

ILLINOIS POLLUTION CONTROL BOARD
April 8, 1993

ST. LOUIS AUTO SHREDDING,)
)
Petitioner,)
)
v.) PCB 93-45
) (Permit Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ST. LOUIS AUTO SHREDDING,)
)
Petitioner,)
)
v.) PCB 93-46
) (Permit Appeal)
ILLINOIS ENVIRONMENTAL) (Consolidated)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by R.C. Flemal):

This matter comes before the Board on the Illinois Environmental Protection Agency's (Agency) March 22, 1993 motion to dismiss a portion of this permit appeal. On March 4, 1993, St. Louis Auto Shredding filed two petitions for permit review. As part of the petition in PCB 93-45, petitioner asks the Board to review the February 1, 1993 Agency denial of its Section 401 certification in connection with petitioner's wetlands application, in addition to the January 28, 1993 denial of its permit application. No response from petitioner to the Agency's motion has been received by the Board.

The Agency states that on February 1, 1993, it denied petitioner's application for water quality certification pursuant to Section 401 of the Clean Water Act (CWA) (33 U.S.C. §1341 (1992)) for the construction of a landfill in a wetlands. The application for the Section 401 certification was part of the permit process in the petitioner's application to the Army Corps of Engineers for a Section 404 permit to place fill material into waters of the United States. Prior to the issuance of a Section 404 permit, the CWA requires that the applicant must obtain a water quality certification from the state to ensure that the proposed activity will comply with state water quality standards. The Agency's authority to so certify derives from Section 4 of the Environmental Protection Act (415 ILCS 5/1 et seq.

(1992)(Act))¹, which designates the Agency as the water pollution agency for the state for all purposes of the Federal Water Pollution Control Act (33 U.S.C. §1251, et seq.(1992)), as amended. The Agency makes its determinations in this arena pursuant to 35 Ill. Adm. Code 395.401. (Agency motion at ¶ 2-4.)

The Agency argues that the Board does not have the authority to review the Agency's denial of the water quality certification since the Act does not confer such authority upon the Board. The Agency cites National Marine Service v. Illinois Environmental Protection Agency (1983), 120 Ill. App.3d 198, 458 N.E. 2d 551. In that case, the Fourth District found that the Board does not have jurisdiction to review Agency certification decisions under Section 401 of the CWA, as that authority is not conferred upon the Board by statute (458 N.E.2d 556). However, the Board notes there is a distinction: where here petitioner was denied a permit and has appealed, National Marine Service was neither issued nor denied a permit under the Act (See, 458 N.E.2d 557).

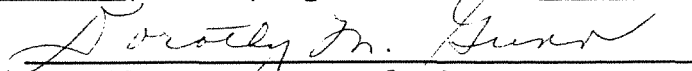
The Board agrees that it lacks statutory authority to review the Agency's denial of the Section 401 water quality certification, and therefore will not review the certification determination in this appeal. However, the Board does have statutory authority to review the entire permit denial pursuant to Section 40(a)(1) of the Act. (See, Jurcak v. Illinois Environmental Protection Agency (1987), 161 Ill. App. 3d 48, 513 N.E. 2d 1007; where the court found the Board lacked authority to review the Agency's decision to amend an Illinois Water Quality Management Plan, but that the Board did have jurisdiction to review a permit condition at issue and related to the Plan.)

Therefore, the Board grants the Agency's motion and strikes the portion of the permit appeal PCB 93-45 that requests review of the Agency's Section 401 certification. However, the Board retains its authority to perform its review of the permit denial as requested.

IT IS SO ORDERED.

Board Member B. Forcade abstained.

I Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 8th day of April, 1993, by a vote of 5-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

¹ The Act was formerly codified at Ill.Rev.Stat. 1991, ch 111½, par. 1001 et seq.