

ILLINOIS POLLUTION CONTROL BOARD  
February 16, 1995

WILMER BROCKMAN, JR. and FIRST )  
MIDWEST BANK/ILLINOIS, AS )  
TRUSTEE UNDER TRUST NO. 757, )  
 )  
Petitioners, )  
 )  
v. ) PCB 94-207  
 ) (Permit Appeal Land)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

FRED PRILLAMAN AND PATRICK D. SHAW, OF MOHAN, ALEWELT, PRILLAMAN  
& ADAMI, APPEARED ON BEHALF OF THE PETITIONERS;

JOHN KIM APPEARED ON BEHALF OF RESPONDENT;

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

On August 2, 1994, Wilmer Brockman, Jr., and First Midwest Bank of Joliet as Trustee under Trust No. 757 (Brockman or petitioners) filed a petition for review and reversal of the denial by the Illinois Environmental Protection Agency (Agency) of Brockman's permit application for a supplemental permit containing a closure, post-closure care plan, and cost estimates including a request for temporary suspension of waste acceptance at Brockman's site in LaSalle County, Illinois. Hearing was held on October 12, 1994, in Ottawa, LaSalle County, Illinois, with members of the public in attendance.

On October 27, 1994, the petitioners' brief was filed. Respondent's brief was filed on November 14, 1994, accompanied by a motion to file the brief instantter which the Board hereby grants. Brockman filed petitioners' reply brief on November 18, 1994.

The Board's responsibility in this matter arises from Section 40 of the Environmental Protection Act (Act). [415 ILCS 5/40 (1992).] The Board is charged, by the Act, with a broad range of adjudicatory duties. Among these is adjudication of contested decisions made pursuant to the permit process. More generally, the Board's functions are based on the series of checks and balances integral to Illinois' environmental system: the Board has responsibility for rulemaking and principal adjudicatory functions, while the Agency is responsible for carrying out the principal administrative duties, inspections, and permitting.

Based on review of the record, the Board affirms the Agency's denial of a permit to temporarily suspend waste acceptance for Brockman's site in LaSalle County, Illinois.

#### BACKGROUND

The subject property is located west of the Village of Naplate, LaSalle County, Illinois. The site is referred to as the Brockman II Landfill by petitioners (Pet. at 1)<sup>1</sup> or as Brockman II, Pioneer Processing, or the Carus Disposal Area by the respondent. (Res. Br. at 2.) For the purposes of this permit denial review, the Board will refer to the subject property as the "Brockman site" or "site".

The Brockman site consists of approximately 177 acres owned by First Midwest Bank of Joliet, Trust No. 757. (Pet. at 2.) Brockman was originally granted development permit number 1975-23-DE by the Agency on March 14, 1975, to develop a solid waste disposal site on the 177 acres. (St. R. Vol. I at 133.) Several modifications to this development permit were allowed by the Agency. The most litigated of these modifications was granted on December 22, 1980, to Pioneer Development Company by supplemental permit number 1980-1944 DE. (St. R. Vol. III at 527.) In the ensuing litigation contesting that modification, the permit was declared void by the Illinois Supreme Court in Pioneer Processing, Inc. et al. v. IEPA 102 Ill.2d 119, 464 N.E.2d 238 (1984). A reapplication was withdrawn on March 22, 1988, and that withdrawal was confirmed by the Board by its order of April 27, 1989, in PCB 88-158. (St. R. Vol. I at 211-231.) The Brockman site only accepted special waste from the Carus Chemical Company pursuant to operating permit number 75-2-OP issued July 9, 1976 (St. R. Vol. I at 152-153) and supplemental permit number 76-686 issued November 29, 1976 (St. R. Vol. II at 154), and other supplemental permits. Waste was accepted only from 1975 to 1982 from Carus. (St. R. at 46-47 and 127.)

#### PRELIMINARY MATTERS

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<sup>1</sup> The Agency record prepared for this proceeding will be cited as "R. Vol. \_\_\_ at \_\_\_"; the Agency record prepared for the proceeding in PCB 93-162 which was incorporated by stipulation will be cited as "St. R. Vol. \_\_\_ at \_\_\_"; the petition for review of permit denial will be cited as "Pet. at \_\_\_"; petitioners' brief will be cited as "Pet. Br. at \_\_\_"; petitioners' reply brief will be cited as "Pet. R. Br. at \_\_\_"; respondent's brief will be cited as "Res. Br. at \_\_\_"; the hearing transcript will be cited as "Tr. at \_\_\_". The Board's previous case Brockman v. IEPA will be cited as "P93-162 at \_\_\_". Petitioners's motion for order, order and memorandum of law in support of motion for order will be cited as "Memo at \_\_\_".

Before going to the merits of the case, the Board will address two outstanding motions in this matter. First, on October 12, 1994, the petitioners filed a motion to supplement the record. A response by the Agency to the motion was received by the Board on October 18 and a motion to file a reply was filed on October 17 by the petitioners. At hearing, petitioners indicated that the petitioners would propose that the motion be taken with the case. (Tr. at 6.)

The Board notes that the procedural rules allow a reply to be filed to a motion only as permitted by the Board or hearing officer "to prevent material prejudice". (35 Ill. Adm. Code 101.241(c).) The Board finds that a reply is not necessary to prevent material prejudice and the motion to file the reply is denied. The Board will also deny the motion to supplement the record. An examination of the record indicates that the LPC-PA15 form at issue is included in the record (See St. R. Vol. I at 174-175). The two pages offered as Joint Exhibit 18 appear to be a compilation of the data already included in the LPC-PA15 form. Therefore, the Board will deny the motion to supplement as the information being offered is already included in the record. (See, Brockman v. IEPA, PCB 93-162 (January 6, 1994).)

The second motion was filed by petitioners on December 23, 1994, and is titled "Motion for Order, Order and Memorandum of Law in Support of Motion for Order". On December 30, 1994, the Board received a response filed by the Agency. For the reasons discussed below, the motion for order is denied.

Petitioners assert that the Board has failed to take final action within the statutorily-prescribed decision time frame. The basis for this assertion is that petitioners have waived the decision deadline only until December 16, 1994. Petitioners acknowledge that a waiver was filed on August 9, 1994, waiving the decision deadline date until February 16, 1995. However, petitioners argue that the August 9, 1994, waiver was "withdrawn by the Board and by the petitioners". (Memo at 2.)

The Agency argues that the August 9, 1994, waiver is in full force and effect and cites to the Board's opinion in Land and Lakes Company, et al. v. Village of Romeoville, PCB 91-7 (April 25, 1991) to support its position. The Agency maintains that the Board's September 1, 1994, order in this proceeding did not constitute a "withdrawal" of the August 9, 1994, waiver. Further, the Agency argues that even if the Board were to determine that the Board failed to issue its final decision by the applicable deadline, the proper relief would not be to deem the permit issued. Rather, the relief would be to find that the application for permit as filed with the Agency was complete and to remand the case to the Agency for technical review.

The Agency has correctly cited the Board's previous decisions regarding the waiver of a decision deadline. Although appended to a motion, the August 9, 1994 waiver is unconditional by its terms. A waiver may not be contingent or conditional and a waiver may not be withdrawn. (See 35 Ill. Adm. Code 101.105<sup>2</sup> also see, Natural Gas Pipeline Company of America v. IEPA, PCB 87-150 (September 8, 1988) and Commonwealth Edison Company v. IEPA, PCB 91-70 (May 6, 1991).) Therefore, the motion for order is denied.

#### REGULATORY FRAMEWORK

A Petition for review of a permit denial is authorized by Section 40(a)(1) of the Act [415 ILCS 5/40 (a)(1)] and 35 Ill. Adm. Code Section 105.102(a). The Board has long held that in permit appeals the burden of proof rests with the petitioners. The petitioners bear the burden of proving that the application, as submitted to the Agency, would not violate the Act or the Board's regulations. This standard of review was enunciated in Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (Second District 1989) and reiterated in John Sexton Contractors Company v. Illinois (Sexton), PCB 88-139, February 23, 1989. In Sexton the Board held:

...that the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violations of the Environmental Protection Act would have occurred if the requested permit had been issued.

Therefore, petitioners must establish to the Board that the permit would not violate the Act or the Board's rules if the requested permit were to be issued by the Agency. In addition,

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<sup>2</sup> Section 101.105 of the Board's rules provides:

A waiver of a deadline for final Board action, as specified in Sections 3B, 40, 40.1 and 41 of the Act, shall be filed as a separate document. The waiver shall be clearly titled as such, identify the proceeding by name and docket number, and be signed by the party or by his authorized representative or attorney. The waiver shall be an open waiver or a waiver until a calendar date certain. However, the Board reserves the right to accept waivers in other forms where it finds it necessary to prevent undue delay or material prejudice. A contingent waiver is not acceptable.

the Agency's written response to the permit application frames the issues on appeal from that decision. (Pulitzer Community Newspapers, Inc. v. Illinois Environmental Protection Agency, PCB 90-142, at 6 (December 20, 1990); Centralia Environmental Services, Inc. v. Illinois Environmental Protection Agency, PCB 89-170, at 6 (May 10, 1990); City of Metropolis v. Illinois Environmental Protection Agency, PCB 90-8 (February 22, 1990).

The Agency's denial of the permit application was based on the insufficiency of the May 31, 1994, application for a supplemental permit containing a closure, post-closure care plan, and cost estimates, including a request for temporary suspension of waste acceptance at the Brockman site. (R. Vol. II at 365-418.) The language of 35 Ill. Adm. Code 807.205(f) provides the Agency with the authority to deem applications incomplete if they lack the information, documents, and authorizations required by Board rules and Agency procedures. The Agency determined that the application was insufficient because the "Agency records for the Brockman #2 facility indicate that this facility is closed pursuant to Ill. Adm. Code 807.318(c)". (R. Vol. I at 15.)

#### DISCUSSION

Brockman asserts that to maintain its status as an "existing landfill", Brockman was required to apply for a temporary suspension of waste acceptance permit pursuant to Section 39(c) of the Act. (Pet. Br. 10-11.) Section 39(c) provides:

After the effective date of this amendatory Act of 1993, if a solid waste disposal facility, any portion for which an operating permit has been issued by the Agency, has not accepted waste disposal for 5 or more consecutive calendar years, before that facility may accept any new or additional waste for disposal, the owner and operator must obtain a new operating permit under this Act for that facility unless the owner and operator have applied to the Agency for a permit authorizing the temporary suspension of waste acceptance. The Agency may not issue a new operation permit under this Act for the facility unless the applicant has submitted proof to the Agency that the location of the facility has been approved or re-approved by the appropriate county board or municipal governing body under Section 39.2 of this Act after the facility ceased accepting waste.

Brockman applied to the Agency for a permit to temporarily suspend waste acceptance as a supplemental permit for the Brockman site in 1993. The Agency denied the permit and upon appeal to the Board the denial was affirmed. (Brockman v. IEPA, PCB 93-162 (January 6, 1994); Wilmer Brockman, Jr. and First Midwest Bank of Joliet v. IEPA and IPCB, No. 3-94-0175 (3rd Dist.)) The Board determined that a temporary suspension of waste acceptance permit could be evaluated only in the context of

a closure plan. Brockman reapplied for a temporary suspension of waste acceptance permit and included a closure plan. That application is the subject of the instant appeal.

Brockman asserts that it is an existing landfill based on a development permit issued in 1975 known as Permit No. 1975-23-DE (R. Vol. I at 20-21) and a supplement to that permit issued in 1978 known as Permit No. 78-2180. (R. Vol. I at 24-25.) Brockman argues that petitioners are seeking this permit to temporarily suspend waste acceptance as a supplemental permit to the development permit. (Pet. Br. at 21.) "The only prerequisite to a permit to temporarily suspend waste acceptance aside from a closure plan is an existing permit to be modified." (Pet. Br. at 21.) Petitioners maintain that "Development Permit No. 1975-23-DE" and "Supplemental Permit No. 78-2180" have not been revoked or rescinded and since No. 1975-23-DE "is a development permit, it does not become invalid by operation of a regulation once the site is completed or closed". (Pet. Br. at 21.)

Brockman concedes that the only operating permits issued were for the "Carus Disposal Area" which was closed in 1982. (Pet. Br. at 4-6.) An experimental permit was issued to Amoco for a disposal area on the 177 acre site, but it was never utilized. Pioneer ultimately withdrew its application for operation on the 177 acre site. (Pet. Br. at 4-6.)

The Board is not persuaded by Brockman's argument. The plain reading of Section 39(c) of the Act requires that an operating permit must be in place before a temporary suspension of waste acceptance may be issued. Although the language of the statute refers to a site "any portion for which an operating permit has been issued", the Act continues on to state that an operator must "obtain a new operating permit" (emphasis added) unless the owner or operator has applied for a temporary suspension of waste acceptance. Thus, the Illinois General Assembly clearly intended that an operating permit would be in effect before a temporary suspension of waste permit would be issued. Further, to read Section 39(c) any differently leads to absurd results. For example, if a facility is not permitted to accept waste, issuance of a permit to suspend waste acceptance is absurd. A development permit does not allow acceptance of waste. Therefore, a permit for suspension of waste acceptance can only be issued if a valid operating permit is in place.

As regards the entire 177 acre Brockman site only one operating permit was issued. That permit was for the Carus Disposal Area which is now closed. (St. R. Vol. I at 169.) Further, one of the express conditions of supplemental Permit Number 78-2180 states that "[t]his supplemental permit is for modification of development only. No wastes shall be accepted or disposed until such time as an operation permit is issued by the

Agency." (R.Vol. I at 24.) Therefore, the petitioners do not currently hold an operating permit for the Brockman site or in any other permit which would arguably allow the acceptance of waste.

The Board need not examine the other arguments put forth by the parties as to whether or not the site was "closed" in 1982. The Act, although "grandfathering" some facilities, clearly does not anticipate allowing a facility which does not have a valid operating permit to "continue" accepting waste without receipt of siting approval pursuant to Section 39.2 of the Act. Therefore, the issuance of a permit to temporarily suspend waste acceptance for a facility without a valid operating permit would violate Section 39(c) of the Act. The Board finds that the Agency properly denied the application on the basis that the site was "closed" as the only operating permit issued was for an area of the site which was closed.

This opinion constitutes the Board findings of facts and conclusion of law.

ORDER

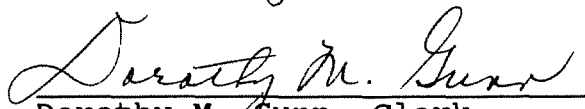
The denial by the Illinois Environmental Protection Agency of a request by Wilmer Brockman Jr. and First Midwest Bank/Illinois as trustee under trust No. 757 for a supplemental permit containing a closure, post-closure care plan, and cost estimates including a request for temporary suspension of waste acceptance at the site in LaSalle County, Illinois is affirmed.

IT IS SO ORDERED.

Chairman Claire A. Manning and Board Member Marili McFawn concur.

Section 41 of the Environmental Protection Act (415 ILCS 5/40.1) provides for the appeal of final Board orders within 35 days of service of this decision. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 16<sup>th</sup> day of February, 1995, by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board