

ILLINOIS POLLUTION CONTROL BOARD
May 18, 1995

JACK PEASE, d/b/a)	
GLACIER LAKE EXTRACTION)	
)	
Petitioner,)	
)	
v.)	PCB 95-118
)	(Permit Appeal-Mining)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board on a timely-filed petition for review filed by the petitioner, Jack Pease d/b/a Glacier Lake Extraction (Glacier Lake), on March 31, 1995. The petition for review seeks reversal of the Illinois Environmental Protection Agency (Agency) final determination of February 24, 1995 denying Glacier Lake an operating permit to carry out surface mining activities pursuant to 35 Ill. Adm. Code 404. The Board has received three motions in this case, which is currently scheduled for hearing on May 31, 1995: (1) Motion to Supplement the Record filed by Glacier Lake; (2) Motion to Strike filed by the Agency; and (3) Motion to Dismiss filed by the Agency.

Motion to Supplement the Record

The first motion is a motion to supplement the record filed by Glacier Lake on April 25, 1995 wherein Glacier Lake argues that certain information should be made part of the record.¹ The Agency filed a response on May 2, 1995 objecting to any additional information being added to the record which, the Agency argues, should only consist of the permit application, the correspondence between the applicant and the Agency and the denial letter, all of which the Agency has provided the Board. (Response at 2, citing, 35 Ill. Adm. Code 105.102(a)(4).)

With the exception of one category of information, which we will leave to the hearing officer to address on or before the scheduled hearing in this case as explained below, we grant the

¹The motion asks the Board to supplement the record with: (1) correspondence from 33 elected officials and citizens to the Agency (Group Exhibit A); (2) 31 letters from the Agency to the elected and citizens (Group Exhibit B); (3) information requested by Glacier pursuant to the Freedom of Information Act which was denied by the Agency on "investigatory records" grounds (see Exhibits D and E); (4) September 28, 1994 "Complaint Receipt & Report Form" (see Exhibit F); and (5) October 28, 1994 Analytical results of samples taken at Glacier Lake Gravel Pit on September 28, 1994 compiled by the Agency (see Exhibit G).

petitioner's motion to supplement the record. While the Board's procedural rule at Section 105.102(a)(4) sets forth the minimum information that the Agency must provide as the "record" in a permit appeal, there is nothing in the rule limiting the record solely to the permit application, the correspondence between the applicant and the Agency, and the denial letter. The rule states that the "entire record" shall be filed with the Board and from our review of the documents, each pre-dates the Agency's final denial letter of February 24, 1995, and the documents therefore, were in the Agency's files, and available to the Agency when making its permit decision. To the extent the Agency did not rely on any such documents when it made its determination, it can make those arguments at hearing.

However, regarding certain documents that Glacier Lake requested from the Agency pursuant to Illinois' Freedom of Information Act which were not provided to Glacier Lake on the basis they were developed as part of an "investigation," and which Glacier Lake now seeks to have the Agency produce for the record in this appeal (see Exhibits D and E), we will not direct the Agency to supplement the record with this information at this time. Rather, we direct the hearing officer, who is in a better position to hear all relevant arguments of the parties at this juncture, resolve this portion of Glacier Lake's motion to supplement the record in the course of the hearing.

Motions to Strike and Dismiss

On April 20, 1995, the Agency filed a motion to strike and on May 1, 1995 filed a similar motion to dismiss all references in the petition and its exhibits relating to one of Glacier Lake's appeal points regarding the Agency having an "improper" and "unstated" reason for the permit denial.² In both motions, the Agency argues that Glacier Lake is restricted to only those issues as presented in the permit denial letter.

We hereby deny the Agency's motions to strike and dismiss. In responses filed April 25, 1995 and May 3, 1995, petitioner argues that it should be allowed to prove at hearing that Glacier Lake is entitled to the operating permit and that the Agency's permit denial reasons were "untrue" and "spurious". It appears that a portion of Glacier Lake's case-in-chief consists of demonstrating that the Agency may have denied the permit for a reason not otherwise stated in the denial letter. Glacier Lake

²Glacier Lake claims that in addition to arguing that the permit denial was unsupported by the record, it is Glacier Lake's intent to prove that the Agency was under public pressure to hold a hearing at the Agency level, to which Glacier Lake was opposed. According to Glacier Lake, by denying the permit, the Agency would require Glacier Lake to resubmit the application to the Agency, thus allowing time for a public hearing in this matter.

is entitled to make such an argument at hearing. While the caselaw limits the Agency, at hearing, to the denial reasons set forth by its final denial letter, to hold the permit applicant to this same standard would potentially foreclose legitimate arguments regarding the propriety of those stated denial reasons.³ We remind the petitioner that it remains Glacier Lake's burden of proof to demonstrate that the reasons for denial detailed by the Agency in its denial letter are inadequate to support a finding that permit issuance will cause a violation of the Act or regulations. (Technical Services Co., Inc. v. IEPA, (November 5, 1981), PCB 81-105 at 2.)

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 18th day of May, 1995, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

³Relying on *Centralia Environmental Services, Inc. v. IEPA* (May 10, 1990), PCB 89-170 and *City of Metropolis v. IEPA*, (February 22, 1990), PCB 90-8), the Agency argues that Glacier Lake is foreclosed from making any arguments which are allegedly outside the scope of the permit denial. In each of these case, however, it was the Agency who had tried to present grounds for permit denial in the hearing other than those set forth in the permit denial letter.