

ILLINOIS POLLUTION CONTROL BOARD
July 22, 1993

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| PEKIN METRO LANDFILL, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | PCB 93-10 |
| |) | (Permit Appeal) |
| ILLINOIS ENVIRONMENTAL |) | |
| PROTECTION AGENCY, |) | |
| |) | |
| Respondent. |) | |

ORDER OF THE BOARD (by J. Anderson):

This matter is before the Board on the January 14, 1993 filing of a petition for permit appeal by Pekin Metro Landfill (Pekin). On June 1, 1993, the Illinois Environmental Protection Agency (Agency) filed a motion for summary judgment. On June 10, 1993, Pekin Metro Landfill (Pekin) filed a motion for summary judgment, a response in opposition to the Agency's motion for summary judgment, and a motion requesting leave to file both pleadings instantner. On June 23, 1993, the Agency filed a response to Pekin's motion for summary judgment and a motion for leave to file the response instantner.

The issue in this case is whether the Agency has the authority, pursuant to 35 Ill. Adm. Code 814.104(c), to "call-in" Pekin's application for significant permit modification prior to September 18, 1994, on the basis of its concern over groundwater issues. In its motion for summary judgment, the Agency requests that the Board find that the Agency has such authority. In the alternative, the Agency asks the Board to dismiss Pekin's petition as being not ripe for review at this time. Pekin, on the other hand, requests the Board to find that the Agency is without such authority or, in the alternative, that the Agency failed to allow Pekin a reasonable time within which to respond to the "call in".

Both Pekin and the Agency, in their respective motions to file instantner, assert that there is no objection to either motion. Accordingly, the Board grants Pekin's request for leave to file its response and motion for summary judgment instantner. The Board also grants the Agency's request for leave to file its response to Pekin's motion for summary judgment instantner. For the reasons expressed below, the Board grants the Agency's motion for summary judgment, and denies Pekin's cross-motion for summary judgement.

FACTS

Pekin operates a sanitary landfill located in Tazewell County, Illinois. On August 7, 1970, the Agency granted Pekin an

operating permit. That permit was revised on February 10, 1989. On March 18, 1991, Pekin filed form "LPC-PA15" with the Agency, as required by 35 Ill. Adm. Code 814.103. (Agency Rec. at 1-5.) In that form, Pekin indicated that it planned to initiate closure of its landfill in August 1997, and that, as a result, it was subject to 35 Ill. Adm. Code 814.Subpart D.¹ (Id. at 2.) Pekin also noted that it planned to file the application for significant permit modification.² (Id.)

On February 21, 1992, the Agency notified Pekin that it would have to submit its application for a significant permit modification by June 15, 1992. (Id. at 6.) On June 16, 1992, Pekin requested the Agency to extend the filing date of its application until November 1, 1992. (Id. 8.) In support of its request, Pekin stated:

[w]e are in the midst of a groundwater investigation and remediation program. Although the final results of this investigation will have no bearing on our closure date, they will dictate or duplicate some of the testing required in the significant modification, such as additional monitoring wells. As soon as we have an approved plan for the remediation we will be happy to begin the work required for the significant modifications.

(Id.)

On June 30, 1992, the Agency granted Pekin's request for extension until November 1, 1992. (Id. at 9.)

On October 28, 1992, Pekin requested a second extension until: "...six months from the date on which [Pekin] submits its remediation plan for the groundwater contamination.... [Pekin] shall file its remediation plan with the Agency by January 31, 1993." (Id. at 10.) In support of its request, Pekin stated:

[the][groundwater remediation] issues have occupied considerable time on the part of our client.... For that reason, and for the additional reason that the resolution of the groundwater matters discussed in the report will have to occur before [Pekin] can submit its application for significant modification, we hereby

¹35 Ill. Adm. Code 814.Subpart D is applicable to facilities planning to initiate closure by September 18, 1997.

²35 Ill. Adm. Code 814.104(c) sets a September 18, 1994 deadline for the submission of such applications for those sites planning to remain open past September 18, 1992.

request additional time to prepare the application for significant modification.

(Id.)

On December 11, 1992, the Agency granted Pekin an extension, but until only January 1, 1993, not until 6 months thereafter, as requested. (Id. at 14-15.) The Agency, in that letter, stated:

...[t]he reason the application was called in is that the Agency is concerned about the ability of this facility to demonstrate that it is capable of meeting the standards to remain open. The Pollution Control Board explained this provision and rationale in the adopting opinion (R88-7) dated August 17, 1990.

In your letters for extension you explained that the need for more time was tied to a ground water investigation and remediation program. This is exactly why the Agency has called in the significant modification and now that the option to initiate closure before September 18, 1992 and be subject to the regulations of 35 Ill. Adm. Code 807 has passed, the investigation and remediation will need to be an integral part of the significant modification application.... [The] intent of the call-in rules was to allow this Agency programatic (sic) flexibility in determining call-in dates to insure all facilities receive their significant modifications in timely order.

(Id.)

DISCUSSION

35 Ill. Adm. Code 814.104 provides, in part, as follows:

- (a) All operators of landfills permitted pursuant to Section 21(d) of the...Act...shall file an application for a significant modification to their permits for existing units, unless the units will be closed pursuant to Subpart E within two years of the effective date of this Part [i.e., September 18, 1992].

* * *

- (c) The application shall be filed within 48 months of the effective date of this part [i.e., prior to September 18, 1994], or at such earlier time as the Agency shall specify in writing pursuant to 35 Ill. Adm. Code 807.209 or 813.201(b).

35 Ill. Adm. Code 807.209(a) grants the Agency authority to "revise any permit issued by it to make the permit compatible with any relevant new regulations adopted by the Board." 35 Ill. Adm. Code 813.201(b)(1)(D) grants the Agency the authority to modify a permit when there is a "promulgation of new statutes or regulations affecting the permit."

Pekin asserts that the Agency's scope of authority is delineated on the face of the regulations. Specifically, Pekin argues that 35 Ill. Adm. Code 814.104(c) allows a "call-in" only in accordance with the authority granted to the Agency pursuant to 35 Ill. Adm. Code 807.209(a) or 813.201(b)(1)(D). In other words, Pekin argues that, although 35 Ill. Adm. Code 807.209(a) or 813.201(b)(1)(D) authorize the Agency to issue modified permits, neither section requires a permittee to request a permit modification in the first instance, or authorizes the implementation of a "call-in" procedure. Pekin asserts that the regulations authorize the Agency, at most, to issue a permit modification with a condition requiring the submission of a supplemental permit application to demonstrate compliance with the new Part 814, Subpart D regulations.

The Agency, on the other hand, argues that the "call-in" of Pekin's application is an Agency permit modification resulting from the "promulgation of new statutes or regulations affecting the permit" and an Agency permit revision "to make the permit compatible with any relevant new regulations adopted by the Board". (see 35 Ill. Adm. Code 807.209(a) and 813.201(b)(1)(D).)

35 Ill. Adm. Code 814.104(c) explicitly authorizes the Agency's "call-in" of a significant modification application prior to September 18, 1994, to comport with the Board's new regulations. The Agency is under no duty to provide justification for its "call-in", except to assure that the applicant will be in compliance with applicable regulations. In fact, the Agency's February 21, 1992 "call-in" letter states as follows:

[t]his LP-PA15 notification submitted for the above referenced facility pursuant to 35 IAC subtitle G Section 814.103 indicated that you intend to operate this facility past September 18, 1992.

Sections 807.209 and 813.210(b)(1)(D) allow the Agency to revise any permit to be compatible with new regulations adopted by the Board.

Therefore, pursuant to these regulations and Section 814.104(c) we are requiring that the application for significant modification for this facility be submitted by June 15, 1992.

* * *

(Agency Rec. at 6.)

The purpose of the "call-in" provision of 35 Ill. Adm. Code 814.104(c) was to assure an orderly transition for existing landfills from operation under 35 Ill. Adm. Code 807 to operation under the applicable requirements of 35 Ill. Adm. Code 811. Support for this proposition can be found in the Board's August 17, 1990 opinion in R88-7.

The Board, in its opinion, stated, in part, as follows:

[a]ll existing landfill facilities are required to notify the Agency (in accordance with Section 814.104), within six months of the effective date, principally with regard to the facility's estimated date of closure of existing units and state whether the facility is subject to the requirements of either Subpart B, C, D or E.

Pursuant to Part 814, if an existing facility is unable to meet the requirements of Subparts B or C and D, then it is subject to Subpart D and such a facility will have to initiate closure within 2 years of the effective date of the Part subject to the existing operation and closure standards of Part 807. All other existing facilities subject to Subparts B, C or D are required to submit information, as required by 35 Ill. Adm. Code 812, to the Agency demonstrating compliance with the appropriate Subpart. Such information (for unpermitted facilities), or an application for significant modification of a permit in accordance with 35 Ill. Adm. Code 813 (in the case of permitted facilities), is to be filed with the Agency within 48 months of the effective date of the Part or an earlier date specified by the Agency. One example of when an earlier date may be specified by the Agency is a situation in which the existing unit or facility, subject to Subpart D, has plans to close within 4 years (48 months) of the effective date of the Part.

In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills (August 17, 1990), R88-7 at 21, 114 PCB 503.

In addition, the Board's Scientific and Technical Section (STS), in response to the Agency's comments regarding 35 Ill. Adm. Code 814.104 and its concerns that it did not wish to be faced with the scenario of reviewing significant modification applications for sites that have already commenced closure, stated, in part, as follows:

The "gap" as stated by the Agency would exist if the Agency fails to use the notification of facility status information that they receive (see Section 814.103) to ask facilities (see Section 814.104(c) planning to close within 2-4 years to submit a significant modification application earlier than the 48 month period specified.

In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills - STS's Response to Comments on Proposed Parts 807 through 815 (March 1, 1990), R88-7, Appendix A-2 at 250.

Pekin incorrectly asserts that the Agency was without authority to issue a "call-in" as a result of its concerns over groundwater issues. The Agency never gave such a reason for its call-in, and it was not obligated to do so. Rather, the Agency iterated its concerns when it decided to deny Pekin's request for an extension of the Agency's "call-in" deadline.

As for Pekin's alternative argument that the Agency, as a matter of law, must allow the permittee a reasonable time within which to respond to a "call-in" (i.e., one year advance notice of the "call-in"), the Board notes that Pekin is unable to find support for such proposition within the Act or the Board's regulations. 35 Ill. Adm. Code 814.104(c) does not state how far in advance of September 18, 1994 the Agency can "call-in" an application, nor does it define the minimum period between the Agency's "call-in" notice and the due date for the application. The Board also notes that this aspect of the regulations was not appealed after the regulations were promulgated, nor has Pekin filed a regulatory proposal to amend the regulations to include such time frames. Even if this were not the case, the Board notes that Pekin has had almost 10½ months to submit its application for modification (i.e., from February 21, 1992 to January 1, 1993.)

For the foregoing reasons, the Board grants the Agency's motion for summary judgment and denies Pekin's cross-motion for summary judgment. As a result of our ruling, the Board need not address the Agency's alternative argument that this matter is not ripe.

ORDER

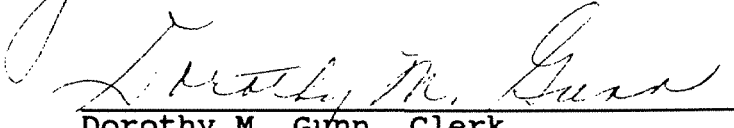
The Board hereby grants the Illinois Environmental Protection Agency's motion for summary judgment and denies Pekin Metro Landfill's motion for summary judgment.

Section 41 of the Environmental Protection Act, 415 ILCS 5/41 (1992) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish

filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

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 22nd day of July, 1993, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board