ILLINOIS POLLUTION CONTROL BOARD
April 11, 1991

ESG WATTS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	PCB 90-144 (Permit Appeal)
	)	
Respondent,	)	
	)	
and	)	
	)	
PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Intervenors.	)	

KEVIN T. McCLAIN, of IMMEL, ZELLE, OGREN, McCLAIN, & COSTELLO, APPEARED ON BEHALF OF PETITIONER;

MARK V. GURNIK APPEARED ON BEHALF OF RESPONDENT; and

KELLY A. O'CONNOR, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF INTERVENORS.

OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a permit appeal filed by petitioner ESG Watts, Inc. (Watts) on August 1, 1990. Watts asks this Board to review respondent the Illinois Environmental Protection Agency's (Agency) June 29, 1990 decision denying Watts' application for a RCRA Part B permit for its proposed industrial waste treatment facility in Rock Island, Illinois. A RCRA permit is required by Section 21(f) of the Environmental Protection Act (Act) (Ill.Rev.Stat.1989, ch. 111 1/2, par. 1021(f)) and 35 Ill.Adm.Code 703.121. At hearing on December 10, 1990, the Attorney General moved to intervene on behalf of the People of the State of Illinois. The hearing officer granted that motion, over Watts' objection, on December 31, 1990. All three parties filed briefs. For the reasons stated below, the Board affirms the Agency's denial of the requested permit.

Background

This appeal is the continuation of a long history of dispute

and litigation over Watts' proposed industrial waste treatment complex (complex or facility). Watts seeks to construct and operate this facility at 602 First Street in Rock Island, Illinois. The proposed facility would store and treat hazardous wastes, handling only water-based or aqueous waste. The facility would have eight treatment and receiving tanks and five tanks for storage of product chemicals, treated water, and waste oil for recycling. The complex is designed to treat and discharge 100,000 gallons of wastewater per day, with a daily maximum of 120,000 gallons. (R. at 30-38.)[1]

The City of Rock Island originally denied site approval for the facility. On appeal, this Board found that the City's decision was against the manifest weight of the evidence, and therefore reversed the denial. (Watts Trucking v. City of Rock Island, PCB 83-167 (March 8, 1984).) The appellate court affirmed the Board's decision (Braet v. Pollution Control Board, Nos. 3-84-0193 and 3-84-0221 (unpublished decision, August 23, 1985)), and the Supreme Court of Illinois subsequently denied appellant's petition for leave to appeal. (No. 62414, denied December 4, 1985.) Therefore, the site of the facility was approved and Watts proceeded to apply for construction and operation permits.

On February 10, 1987, Watts submitted its application for a RCRA Part B permit for the construction and operation of the proposed facility. The application indicated that the treated wastewater was to be discharged into the City's storm sewer, eventually being discharged into the Mississippi River under a NPDES permit.[2] (R. at 38-39.) The Agency sent Watts three notices of deficiency (March 9, 1987, August 26, 1987, and February 8, 1988), and Watts responded to those notices. On August 12, 1988, the Agency issued a draft RCRA permit, tentatively deciding to issue the permit. (R. at 323-324.) The Agency held a public hearing on the draft permit on December 13, 1988. (R. at 586-788.)

On November 1, 1988, Watts' consulting engineer informed the Agency that Watts had changed the proposed routing of the treated

[1] "R." denotes the Agency's record, filed with the Board on August 21, 1990.

[2] Watts applied for an NPDES permit for the proposed facility on February 11, 1987. That permit was denied by the Agency on March 30, 1990. Watts appealed that decision to this Board, and the Board today decided that appeal in a separate proceeding. (PCB 90-95).

wastewater.[3] The engineer indicated that the original method of disposal (into the City's storm sewer) was impossible because the storm sewer system is directly tied to the City's sanitary sewer system. Therefore, Watts proposed to route the discharge directly to the Mississippi through construction of a private pipeline. (R. at 467.) This method would require an easement from the City to extend the pipeline under a city street. Watts notified the City of the change in plans on November 3, 1988. (R. at 468.) On September 6, 1989, the Agency asked Watts whether it wished to continue pursuing the RCRA Part B permit, and if so, how it was planning to dispose of the treated wastewater. (R. at 513.) After obtaining two extensions of time to answer the Agency's inquiry, on December 29, 1989 Watts replied that it had been "dragging its feet" but that it wished to pursue the Part B permit. Watts stated that it hoped to be issued a permit "that would allow us to truck the water from the facility or use direct discharge, leaving both options open to us." (R. at 517.)

On February 9, 1990, the Agency formally asked Watts to provide information on the final disposition of the wastewater generated by the treatment facility. (R. at 519.) Watts supplied written responses on March 9 and March 30, 1990. Watts explained its difficulties in making arrangements for the disposal of the wastewater. Watts had not yet been able to obtain an easement from the City, nor had it been able to arrange for the use of a point along the Mississippi to which the wastewater could be trucked. On March 29, 1990, Watts formally petitioned the City for an easement. That request was denied by the City. (Pet. Br. at 4.) On June 29, 1990, the Agency denied the requested Part B permit. (R. at 1037-1041.) The denial stated:

> The permit is denied because the application has been deemed to be incomplete, on the grounds that the applicant has not demonstrated there is an acceptable means to dispose of the treatment plant wastewater. The disposition of the treated wastewater has significant potential to cause environmental damage if disposed of improperly and is an integral part of being able to provide a service as a hazardous waste treatment facility. The Agency does not feel that issuance of a permit without a feasible discharge point is protective of the environment. Without a feasible discharge point, the facility operations could result in the indefinite storage of wastes at the site if the company was unable to resolve its problem.
>
> (R. at 1041.)

[3] The November 1, 1988 letter states that Watts had indicated during an October 4, 1988 meeting with the Agency that the route of disposal had changed.

The Agency cited 35 Ill.Adm.Code 705.123 in support of its denial on grounds of failure to correct the deficiency. That section reads in part:

> If an applicant fails or refuses to correct deficiencies in the application, the permit may either be denied or issued on the basis of information available to the Agency...

The Agency stated in its denial letter that it had concluded that the missing information "is of such vital importance to the permit decision that issuance of a Part B permit with a compliance schedule or some other mechanism for obtaining information would not be feasible." (R. at 1038.) Watts filed its petition for review of the Agency's decision with the Board on August 1, 1990.

Issue Presented

When reviewing a permit decision made by the Agency, the issue before the Board is whether the permit application, as submitted to the Agency, demonstrates that the issuance of the requested permit will not violate the Act or the Board's regulations. (Joliet Sand & Gravel v. Illinois Pollution Control Board (3d Dist. 1987), 163 Ill.App.3d 830, 516 N.E.2d 955, 958.) In order to reverse a permit denial, the petitioner must demonstrate that its permit application met that standard: that no violation of the Act or Board regulations will occur if the permit is granted. (Waste Management, Inc. v. Illinois Environmental Protection Agency, PCB 84-45,84-61, and 84-68 (Cons.) (November 26, 1984); aff'd sub nom. Illinois Environmental Protection Agency v. Pollution Control Board (3d Dist. 1985), 138 Ill.App.3d 550, 486 N.E.2d 293, 93 Ill.Dec. 192, aff'd 115 Ill.2d 65, 503 N.E.2d 343, 104 Ill.Dec. 786 (1986).) Thus, in this case Watts must demonstrate that the grant of the permit without a specific method of disposal of the treated wastewater will not violate the Act or rules.

Discussion

Watts raises several arguments in support of its position that the RCRA Part B permit should be issued. First, Watts contends that the Agency is estopped from asserting that the permit application is incomplete. Watts maintains that the Agency's February 9, 1990 letter requesting information on the method of disposal did not state that the information was necessary to correct a deficiency, although several earlier deficiency letters had been issued to Watts. Watts also states that the Agency had previously determined that the application was complete, before deciding to issue the 1988 draft permit. Therefore, Watts asserts that the Agency is estopped from contending that the application is incomplete when it had already determined, at an earlier time, that the application was complete. Watts also contends that the

Agency waived its right to determine that the application was incomplete when it failed to raise that point "on a timely basis" prior to the issuance of the denial.

In response, the Agency points out that although the Agency did at one time determine that the application was complete, that early determination was made well before Watts informed the Agency that it was having difficulties securing a discharge point for the treated wastewater. The Attorney General also argues that Watts' claim of estoppel is inappropriate. The Attorney General notes that the application was found incomplete only after Watts changed its application to omit the specific point of discharge. The Attorney General maintains that the Agency did not make any misrepresentations or conceal any material fact, and that Watts could not reasonably rely on the Agency's early determination of completeness after Watts modified the application, since Watts knew of that modification. Therefore, the Attorney General argues that Watts cannot avail itself of the doctrine of estoppel because none of the necessary elements of estoppel are present in this case. (See City of Mendota v. Pollution Control Board (3d Dist. 1987), 16 Ill.App.3d 203, 514 N.E.2d 218, 222.)

The Board agrees with the Agency and the Attorney General that the doctrine of estoppel is not applicable to this case. Although the Agency did, at one time, determine that the application was complete, the Board believes that the Agency was not bound by that determination after Watts modified its application to reflect the uncertainty of the method of discharge. The method of discharge of treated wastewater is certainly not a minor modification. This is especially true where, as here, the application was changed to show uncertainty, rather than simply reflecting a definite change in the disposal method. After such a change, the Agency is free to find that it does not have enough information to make an informed decision on the permit. Additionally, as the Attorney General points out, the necessary elements of estoppel are not present in this situation. Watts does not even allege that the Agency made any misrepresentations or concealed any material fact. The Board finds that the Agency is not estopped from determining that Watts' application was incomplete.[4]

Second, Watts contends that the Agency's denial of its permit is not well-founded. Watts maintains that the Agency did not

[4] The Board notes that Watts implies that the Agency's February 9, 1990 letter formally requesting information on the method of discharge did not rise to the level of a deficiency letter. Although it might have been better practice for the Agency to issue a formal deficiency letter, as it had previously, the Board finds that the text of the letter should have put Watts on notice that the Agency felt that more information on the discharge method was essential to its determination.

produce any evidence to show that the facility, if the permit was granted, would create environmental harm or "be in violation of any statute or regulation promulgated by the Agency." (Pet. Br. at 12.) Watts argues that the RCRA Part B permit application was submitted for the purpose of constructing a hazardous waste facility, not for the purpose of disposing of hazardous or non-hazardous waste. Watts further alleges that it is "uncontested" that the construction and operation of the facility would conform to federal and state guidelines for RCRA operation and construction. Watts contends that the City of Rock Island's denial of its petition for easement merely delayed the planned method of discharge, and that the problems with the City should have no bearing on the RCRA Part B permit. Finally, Watts maintains that the Agency should not deny a permit because the proposed method of disposal is subject to a local zoning ordinance. In support of this last claim, Watts cites County of Lake v. Pollution Control Board (2d Dist. 1983), 120 Ill.App.3d 88, 457 N.E.2d 1309, 1316, and Carlson v. Village of Worth (1975), 62 Ill.2d 402, 343 N.E.2d 493.

The Agency contends that, contrary to Watts' claims, the Agency must be concerned with Watts' ability to dispose of the wastewater. The Agency states that the wastewater is regulated under the RCRA program until it is discharged, when the NPDES program takes control. 35 Ill.Adm.Code 721.104(a)(2) and corresponding Board note. The Agency notes that the proposed facility will have one 20,000 gallon tank for the storage of treated wastewater, but that the facility is expected to have an average daily flow of 100,000 gallons. Thus, the Agency argues that if the facility were to begin operation without means for wastewater disposal, the facility would almost immediately become an indefinite storage facility and would be in violation of its permit. The Agency notes that there may be alternative methods for wastewater disposal, but points out that Watts never gave it (the Agency) any specific or concrete information on Watts' ability to pursue those alternatives.[5] The Agency also contends that this permit appeal does not involve the propriety or impropriety of struggles between the facility and the local government. Finally,

[5] The Agency also points out that even if Watts can obtain the easement for construction of its pipeline or obtain the use of discharge point to which the wastewater could be trucked, those discharge points would have to have their own RCRA Part B permit. This is because the wastewater would still be regulated under RCRA and the discharge point would be accepting hazardous waste for disposal. 35 Ill.Adm.Code 703.122(b). In its reply brief, Watts challenges the citation to this section, stating that the section refers to owners or operators of publicly owned treatment works (POTW) and thus does not apply to Watts. The Board points out to Watts that only a portion of Section 703.122(b) is limited to POTWs.

the Agency maintains that this case does not involve the application of a local zoning ordinance, because an easement is not a zoning ordinance.

After reviewing the arguments presented by Watts, the Agency, and the Attorney General, the Board concludes that Watts' application did not demonstrate that the grant of the requested permit, without a specific method of discharge for the treated wastewater, would not violate the Act or the rules. The Agency is correct in its belief that the method of discharge of the treated wastewater is an integral part of the operation of the proposed facility. A hazardous waste remains subject to RCRA regulation until that waste is discharged pursuant to an NPDES permit. 35 Ill.Adm.Code 721.104(a)(2). Without knowing what will happen to the wastewater between the time that it is treated and when it is disposed of, the Agency cannot know if the wastewater will be handled properly. Therefore, it is impossible for the Agency to determine whether granting the permit would result in a violation of the Act or Board regulations. The Board notes that, contrary to Watts' claim, the Agency need not produce evidence to show that the facility would cause environmental harm or violate the Act or Board (not Agency) regulations. That burden is on Watts.

Watts' contention that caselaw prevents the Agency from denying a permit because of local zoning ordinances is not applicable here. This case involves a request for an easement, which is not a zoning issue. The issue presented in this case is Watts' failure to identify a discharge point or method of discharge for the treated wastewater, not whether Watts is able to ultimately obtain an easement from the City. Watts' problems with the City of Rock Island are not at issue in this appeal. The only issue before the Board is whether Watts' has demonstrated that the grant of the permit, without an identified disposal method, would violate the Act or the regulations. The Board finds that Watts has not made that showing. Therefore, the Agency's denial of the permit on grounds of incompleteness is affirmed.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

The Agency's June 29, 1990 denial of ESG Watts' RCRA Part B permit application for a hazardous waste treatment facility in Rock Island, Illinois, on grounds that the application was incomplete, is affirmed.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 11th day of April, 1991, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board