ILLINOIS POLLUTION CONTROL BOARD
October 24, 1991

D & B REFUSE SERVICE, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 89-106
	)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

FRED C. PRILLAMAN, MOHAN, ALEWELT & PRILLAMAN, APPEARED ON BEHALF OF PETITIONER.

MARK V. GURNIK, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board pursuant to a petition for review filed June 29, 1989 by petitioner D & B refuse Service Inc. (D & B) pursuant to Section 40 of the Environmental Protection Act (Act). (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1040.) D & B seeks review of the Agency's denial of D & B's closure/post-closure care plan (CPC plan) for its Loveall landfill near Sullivan, Illinois. A hearing was held in Sullivan, Moultrie County, Illinois on June 27, 1991 at which no members of the public attended.

FACTS

D & B owns and operates the Loveall landfill near Sullivan, Illinois. The site consists of 33.5 acres, 30 acres of which have been filled and of which 29 acres have been, or will shortly receive, final cover. The Agency granted D & B a development permit for solid waste disposal in 1974 and an operating permit in 1976. (R. Ex.6, 12.) In response to the Agency's December 14, 1988 compliance inquiry letter (R. Ex. 64, 66), D & B submitted its application for approval of its CPC plan (R. Ex. 67). On May 31, 1989, the Agency denied the permit application listing six reasons for denial. (R. Ex. 73.)

On June 29, 1989, D & B filed its petition for review with the Board seeking reversal of the Agency's denial. On June 27, 1991 a hearing was held at which D & B and the Agency appeared. However, D & B failed to present testimony or evidence in support of its position that the Agency incorrectly denied approval of its CPC plan, nor did D & B make any arguments in support its petition

for review. The hearing officer set a briefing schedule; however, D & B failed to file a post-hearing brief, choosing instead to rely solely upon its petition for review and the Agency record. On September 13, 1991, the Agency filed its post-hearing brief.

DISCUSSION

D & B's petition for review challenges the Agency's characterization of the CPC plan as a permit application. D & B asserts that the Board's regulations (35 Ill. Adm. Code 807.206(c), 807.501(b), 807.503 and 807.523(a)) provide that closure/post-closure care plans are conditions to existing permits and not separate permit applications.

The Agency relies upon John Sexton Contractors Co. v. IEPA, PCB 88-139 at 4-5 (February 23, 1989), Sexton Filling and grading Contractors Corp. v. IEPA, PCB 88-116 at 6 (June 22, 1980) and John Sexton Contractors Co. v. PCB, 558 N.E.2d 1222 (1st Dist. 1990) in support of its position that it correctly treated the CPC plan as a permit application. In John Sexton, the Board stated that "the initial submission of a closure plan ... constitute[s] a permit application." (PCB 88-139 at 5.) The appellate court reviewed the Board's interpretation of its closure/post-closure regulations and upheld the Board's determination as not being plainly erroneous. (John Sexton Contractors Co. v. PCB, 558 N.E.2d at 1228-29.)

The Agency's denial letter states that "[t]his will acknowledge receipt of your Application for Permit to modify a solid waste management site" and that "[y]our permit application to modify is denied." (R. Ex. 43.) The Board notes that D & B fails to argue any prejudice resulting from the Agency's treatment of the CPC plan as a permit application or why such treatment should result in reversal of the Agency's decision. It is unclear whether D & B's argument is procedural in nature (ie., a contention that the Agency failed to adhere to its deadline for issuing its denial letter) or substantive (ie., the Agency applied an incorrect standard in reviewing D & B's CPC plan). In any event, we disagree with D & B's contention. D & B correctly states that the Board's regulations provide that CPC care plans will be included in permits as conditions. For example, Section 807.206(c) provides that "[a]ll permits issued after March 1, 1985 shall include the following conditions ... [a] closure plan [a] post-closure care plan if required ... ." However, these regulations were not in effect at the time D & B's development and operating permits were issued in 1974 and 1976, respectively. (See, John Sexton Contractors Co. v. IEPA, PCB 88-139 at 4-5 (February 23, 1989), citing, 9 Ill. Reg. 6723 (May 10, 1985) and 9 Ill. Reg. 18943 (December 6. 1985).) Hence, the Agency properly treated D & B's CPC care plan as a modification to an existing permit. Moreover, in reviewing the Agency's decision, the Board applies the "permit appeal standard of review" of whether the Agency correctly

determined that the applicant failed to demonstrate compliance with the Act and applicable regulations. (Robertson-Ceco Corp. v. IPCB, No. 3-91-0165, slip op. at 5 (3d Dist. September 17, 1991).)

The Board also disagrees with D & B's contention that the only information required to be submitted in a CPC plan are those eight items set forth in 35 Ill. Adm. Code 807.503(c). Section 807.503(c) specifically provides that a "closure plan shall include as a minimum" eight specific items. The wording of this provision establishes that it is not an exclusive listing. Moreover, D & B's contention ignores the existence of the general closure performance standard provision of 35 Ill. Adm. Code 807.502 and the post-closure plan minimum requirements of 35 Ill. Adm. Code 807.523.

D & B also challenges four of the Agency's denial reasons. As noted above, D & B failed to present evidence at hearing in support of these contentions or to argue these contentions at hearing. Additionally, D & B failed to file a post-hearing brief with the Board. D & B relies solely upon its petition for review and the Agency record in support of reversal of the Agency's permit decision. The Agency alleges that D & B has failed to carry its burden of proof and, therefore, the Agency's decision must be affirmed.

The Agency is required to issue a requested permit "upon proof by the applicant that the facility will not cause a violation of the Act or regulations." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039(a).) In reviewing a CPC plan, the Agency "must assess whether the proposed CPC care plan will minimize the need for further maintenance and will minimize or eliminate release of wastes from the landfill to the extent necessary to prevent threats to human health or the environment." (John Sexton Contractors Co. v. PCB, 558 N.E.2d at 1229; see also, 35 Ill. Adm. Code 807.502.) No hearing is held before the Agency reaches its permit decision. The first opportunity for a hearing is at the Board level.[1] (Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1039, 1040.) The Agency record contains the permit application submitted by the applicant and any other information relied upon by the Agency in reaching its decision. Because the Board reviews the Agency's decision based upon the application as submitted to the Agency, as a general rule the applicant may not introduce new evidence at the Board hearing. (cite Joliet Sand & Gravel) The sole issue before the Board is whether the permit application as submitted to the Agency demonstrates compliance with the Act and regulations. (Id.) To prevail before the Board, D & B has the burden of establishing that

---

[1] While the Board reviews the Agency's permit decision, it does not apply any standard of deference to the Agency's determination because no hearing is held until review is sought before the Board. (IEPA v. PCB, 486 N.E.2d 293, 294 (3d Dist. 1985), aff'd, 503 N.E.2d 343 (1986).)

the Agency incorrectly determined that the proposed CPC plan would result in violations of the Act or regulations. (Id.; Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1040(a).)

Because the Board's review in a permit appeal is limited to whether the Agency correctly determined that the application package as submitted by the applicant demonstrates compliance, we do not agree with the Agency's contention that the failure to present evidence at hearing and file a post-hearing brief constitutes a failure to meet the applicant's burden of proof.[2] However, "[the Board] is not simply a depository in which the [applicant] may dump the burden of argument and research." (Williams v. Danley Lumber Co., 472 N.E.2d 586, 587 (2d Dist. 1984).) The appellate court has stated that "[a]n appellant may not make a point merely by stating it without presenting arguments in support of it" such that the court may deem waived any issue which has not been adequately presented to the court. (In re Application of Anderson, 516 N.E.2d 860, 863 (2d Dist. 1987).) The court has also refused to consider arguments where appellant's brief fails to reference those portions of the record supporting reversal. (Mielke v. Condell Memorial Hospital, 463 N.E.2d 216 (2d Dist. 1984).) Although the Board rejects the Agency's contention that D & B has failed to meet its burden, an applicant who does not participate at hearing and fails to file a post-hearing brief risks waiver of arguments in its appeal to the Board.

It is well established that the Agency's denial statement frames the issues on review before the Board. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039(a); Centralia Environmental Services v. IEPA, PCB 89-170 at 8 (October 25, 1990).) "In a permit appeal review before the Board, the burden of proof is on the applicant to demonstrate that the reasons for denial detailed by the Agency in its 39(a) denial statement are inadequate to support a finding that permit issuance will cause a violation of the Act or regulations." (Centralia Environmental Services v. IEPA, PCB 89-170 at 8 (October 25, 1990), citing, Technical Services Co., Inc. v. IEPA, PCB 81-105 at 2 (November 5, 1981).) Here, D & B has failed to challenge all of the Agency's denial reasons. D & B fails to seek review of denial reason no. 1 which provides that "[t]he applicant shall provide either a closure/post-closure care plan with cost estimates reflecting closure of covered, but not certified areas or provide the Agency with certifications of all closed areas (approximately 32.4 acres) along with cost estimates for the active area (approximately 1 acre). Sections 807.503 and 807.598." (R. Ex. 73.) D & B also does not challenge denial reason no. 6 providing that "[t]he applicant shall submit cost estimates reflecting the additional information that is requested. Sections 807.621 and 807.622." (Id.)

---

[2] Particularly where, as here, the applicant has presented a minimal argument in its petition for review.

D & B challenges the following denial reason: "The applicant shall include the installation of gas vents in the closure cost estimates, Section 807.621(e)(7), or discuss why they are not needed." (R. Ex. 73.) In its permit application, D & B stated that "[g]as vents have never been required at this site and are not anticipated in the future." (R. Ex. 67 at 3.) D & B alleges that, pursuant to section 807.621(e)(7), the installation of gas vents need not be included in the cost estimate because such installation was not required in the development or operating permits.

35 Ill. Adm. Code 807.621(e)(7) (emphasis added) provides:

> e) The closure cost estimate must, at a minimum, include the following elements, <u>if required in the site permit for closure of the site</u>:
>
> * * *
>
> 7) The cost of installation of gas control equipment.

While "site permit" is not defined in the regulations, the Board reads this language as referring to the operating permit for the site in question. Consequently, an applicant need only include the cost estimate of installing gas control equipment if the operating permit required the installation of such equipment. Here, D & B's "site permit" did not require the installation of such equipment. The Agency asserts that its denial reason asks D & B to explain why it did not include gas vents in its CPC plan, not why it did not include the vents in its cost estimate. However, the regulation relied upon by the Agency in its denial governs the cost estimate, not the CPC plan. If the Agency seeks to deny the plan for failure to include installation of gas vents in the CPC plan, then it must link this denial to a regulation requiring such installation in the plan, such as 35 Ill. Adm. Code 807.502 (Closure Performance Standards) or 807.503 (Closure Plan). Here, the Agency relies upon regulations dictating the contents of the permit application to address alleged deficiencies rather than relying upon regulations which would establish why this site cannot meet closure standards. The Board finds that denial reason no. 2 is an improper basis for denial of approval of the CPC plan because such information is not necessary to establish compliance with the closure/post-closure regulations.

The Agency's third denial reason states that "[b]ecause of the lack of information regarding borings and an adequate number of groundwater monitoring wells, the applicant shall propose a new groundwater monitoring program upon completion of a thorough subsurface investigation. This investigation should provide information on installing wells at the most advantageous locations and at the proper depths based on groundwater flow direction and

additional soil borings. Sections 807.207(b), 807.316(a)(3)(B), 807.316(a)(5) and 807.316(a)(7)." (R. Ex. 73.) D & B contends that the Agency's reliance upon the cited Board regulations are inappropriate for CPC plan denial because these regulations do not pertain to closure/post-closure. The Agency alleges that the denial is properly based upon D & B's failure to "provide the Agency with sufficient information to prove its landfill is not contaminating the groundwater."

The Board agrees with D & B. Section 807.207(b) governs standards for issuance of development, operating and experimental permits and provides that the Agency shall not grant a permit unless the applicant provides proof of compliance with design criteria. Certainly, D & B is not at the "design stage" of its landfill, nor is D & B seeking a development, operating or experimental permit. Section 807.316 and its various subsections set forth the requirements of an application for a development permit. Again, D & B is not seeking issuance of a development permit and, therefore, it need not demonstrate compliance with the cited regulations. The Agency's reliance upon these regulations is an incorrect basis for denial. If the Agency has found that there are site-specific reasons why this landfill cannot meet closure requirements, it must cite to regulations supporting this finding.

The Agency's fourth denial reason provides that D & B "shall also submit a cross-section of the fill areas at the site drawn to scale showing the dimensions of each cell and the invert elevation with respect to the original ground surface and [sic] proposed or present final contours to aid in the installation of monitoring wells. Include surrounding geology around the cell in the cross-sections. Section 807.207(b) and 807.316(a)(15)(J)." (R. Ex. 73.) D & B again alleges that the cited regulations are inapplicable to closure/post-closure. The Agency argues that this denial reason relates to the lack of sufficient information in the application and that, without this information, the Agency cannot be certain that the CPC plan will "satisfy the closure performance standards of 807.502." (Ag. Brief at 13-14.)

For the same reasons stated above, we agree with D & B that the Agency may not rely on the regulations cited in the denial because these regulations pertain to operating and development permits. Furthermore, the Board cannot consider the Agency's reliance in its brief of the general closure performance standard because this regulation was not cited as a basis for denial by the Agency in its denial statement. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039(a).)

The fifth denial reasons provides that "[a] map of the existing contours of the entire facility was not provided. This map is required to document the run-off and run-on patterns for the facility and to demonstrate the landfill is not being filled

above permit height limitations." (R. Ex. 73.) The Agency has failed to cite any provision of the Act or regulation in support of this denial reason. Our review of the closure/post-closure regulations reveals no such requirement. If the Agency is relying upon the general closure performance standards of 35 Ill. Adm. Code 807.502, it has failed to cite to this regulation in its denial. Therefore, the Board finds that denial reason no. 5 is an improper basis for denial.

Although D & B asks that the Board require the Agency to approve the CPC plan, or alternatively, require the Agency to perform a technical review of its application, D & B has not challenged the Agency's remaining two denial reasons (denial reasons nos. 1 and 6). Therefore, D & b has not met its burden of demonstrating that all of the reasons for denial are inadequate to support a finding that permit issuance will cause a violation of the Act or regulations. Consequently, tne Agency's denial of approval of D & B's CPC plan must be affirmed.

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

ORDER

For the foregoing reasons, the Board finds Agency denial reasons nos. 2, 3, 4 and 5 are improper bases for denial of approval of D & B's CPC plan. The remaining denial reasons have not been challenged by D & B and, therefore, the Agency's denial is hereby 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 24th day of October, 1991 by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board