ILLINOIS POLLUTION CONTROL BOARD
July 21, 1994

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
Petitioner,	)	
v.	)	PCB 94-153 (Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

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

This case is before the Board on a denial of a supplemental permit modification requested by Waste Management of Illinois, Inc. (WMII). On May 16, 1994, pursuant to Section 40(a) of the Environmental Protection Act (Act) WMII filed a petition for review of the Illinois Environmental Protection Agency's (Agency) Notification of Incompleteness (Notification) regarding WMII's supplemental permit application for its Five Oaks Recycling & Disposal Facility (Facility) in Taylorville, Illinois. (415 ILCS 5/40(a) (1992).) The Agency's Notification was issued on April 25, 1994, as a result of the Agency belief that the requested supplemental permit was actually an expansion of the Facility and thus needed local siting approval pursuant to Section 39.2 of the Act which was not submitted along with the application by WMII. (415 ILCS 5/39.2 (1992).) WMII's permit appeal petition requests that the Board determine local siting approval is not required and order the Agency to retract the Notification.

WMII filed a motion to continue hearing, a waiver of decision deadline, a motion for summary judgment, a brief in support of the motion for summary judgment, and a joint stipulation of facts on June 30, 1994.[1] On July 6, 1994, the Agency filed a response requesting the Board to deny WMII's motion for summary judgment.

On July 11, 1994, WMII filed a motion for leave to file a reply instanter. WMII contends that the Agency has improperly raised an irrelevant issue in its response, and that therefore WMII would be materially prejudiced if it is not allowed to reply to that issue. WMII's motion for leave to file a reply instanter is granted so that it can respond to the Agency's argument. The issue before the Board on the motion for summary judgment is

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[1]The Joint Stipulation of facts will be cited as "Stip. at ______."

whether local siting approval is required in order for the Agency to issue a supplemental permit for the proposed design modifications in accordance with the Act.

Regulatory Framework

In a proceeding for review of permit denial 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 statute provides that the burden of proof shall be on the petitioner. The petitioner bears the burden of proving that operating pursuant to a permit, issued as applied for from the Agency, would not violate the Act or the Board's regulations. This standard of review was discussed in Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (2nd Dist. 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, a petitioner must establish to the Board that issuance of the permit would not violate the Act or the Board's rules if the requested permit was to be issued by the Agency. In this case, WMII has the burden of demonstrating that approval of the supplemental permit modification without the siting approval pursuant to Section 39.2 of the Act would not violate the Act.

Summary judgment is appropriate when there are no genuine issues of fact to be considered by the trier of fact and the movant is entitled to judgment under the law. (Williamson Adhesives, Inc. v. EPA, No. PCB 91-112 (Aug. 22, 1991), Caruthers v. B.C. Christopher & Co., 57 Ill. 2d 376, 380, 313 N.E.2d 457, 459 (1974).) The Agency's Notification in effect denied WMII a permit on the basis that local siting approval is required. Therefore, a grant of the WMII motion for summary judgment would be appropriate if there are no genuine issues of fact remaining and the Board can decide that, based on the law, local siting approval is not required for the Agency to lawfully issue the supplemental permit with the proposed design modifications.

Stipulated Facts

The parties filed a stipulation of facts on June 23, 1994 which presents the following. WMII purchased the landfill in 1992. The Facility received its original local siting approval from Christian County in 1986 and received approval again in 1989 when the original owner filed for an expansion. (Stip. at 1.) The siting approvals of 1986 and 1989 did not establish final design contours and waste limits and were not part of Christian County's siting hearing records. (Stip. at 1 and 2.) The Agency approved the landfill design and issued the current operating permit in 1990. (Stip. at 2.) As part of the Agency's approval, Special Condition #1 sets forth the same maximum elevation as the local siting approval, 685 feet above Mean Sea Level (MSL), and area, 212.965 acres. (Stip. at 2.) WMII refers to the location descriptions found in the siting approvals and reiterated in Special Condition #1 as the "siting line", while the Agency refers to them as the "facility boundary line". In addition, Special Condition #2 of the operation permit issued by the Agency states:

> Any extension of the site beyond the boundaries given in the legal description above (Condition No. 1) and the contours shown on Sheets 8,9 and 10 of 19, entitled "Closed Site," dated August, 1989, of Application No. 1990-196 will require siting approval of the Christian County Board under the provisions of the Environmental Protection Act, Section 39.2. (Stip. at 2.)

Although the language above does not specifically so state, the Agency refers to the area defined in Special Condition #2 as the "waste boundary line".

WMII began to finalize design details for the permitted, but undeveloped areas of the facility in 1992. (Stip. at 3.) The proposed final design causes the contours (the three-dimensional shape of the closed landfill waste mound) to be lower in some areas and higher in others than in the original permitted design which was approved by the Agency in 1990. (Stip. at 3.) These new design contours will increase the "two dimensional design" of the waste footprint[2] representing an increase in certain areas from the originally permitted 1990 design. (Stip. at 3.) However, the new design contours being proposed by WMII are within the siting line or boundaries and maximum elevation established by the Christian County Board. (Stip. at 3.) Furthermore, the new design modification proposed by WMII does not increase the Facility's capacity and, in fact, the actual

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[2]The waste footprint is the actual surface area the landfill waste mound covers at the site.

capacity will decrease. (Stip. at 3.) WMII is proposing the design modifications in order to reduce leachate generation and improve the collection of leachate. (Stip. at 3.) The proposed design changes would alter the contours of the landfill from having a flat top to a steeper top slope in order to minimize water infiltration through the cover thereby reducing the leachate volumes. (Stip. at 3.) The Agency has not made a determination as to the technical merits of WMII's proposed design modifications due to the Agency's belief that local siting approval is necessary. Therefore the Agency deemed WMII's application incomplete. (Stip. at 3.)

The Parties' Arguments

Pursuant to Section 39.2 of the Act, the Agency cannot grant a permit for an expansion of a currently existing landfill without the approval of the local governmental unit within which the landfill facility is located if the expansion would create a "new regional pollution control facility" as defined in Section 3.32(b) of the Act. (415 ILCS 5/39.2, 5/3.32 (1992). The Act defines new regional pollution control facility as "the area of expansion beyond the boundary of a currently permitted regional pollution control facility." (415 ILCS 5/3.32 (1992).) We are asked in this case to evaluate whether the change in landfill contour and design proposed by WMII at the Facility falls within the definition of "new regional pollution control facility".

In a seminal case regarding what constitutes a new regional pollution control facility, the Illinois Supreme Court has held that a vertical extension constitutes an expansion. In that case, M.I.G. Investments, Inc. v. Environmental Protection Agency, 122 Ill. 2d 392, 523 N.E. 2d 1 (1988), the Court stated:

> To expand the boundaries of a landfill, whether vertically or laterally, in effect, increases its capacity to accept and dispose of waste. An increase in the amount of waste contained in a facility will surely have an impact on the criteria set out in 39.2(a), which local governmental authorities are to consider in assessing the propriety of establishing a new pollution control facility." (Id. at 40.)

A similar, appellate decision is Bi-State Disposal, Inc. v. Illinois Environmental Protection Agency, 203 Ill.App.3d 1023, 561 N.E.2d 423 (5th Dist. 1990). In Bi-State, a 1978 permit issued to a prior owner allowed waste disposal in a mine cut bisecting the property. In 1982, Bi-State requested and received a permit eliminating the mine cut from use. In 1989, Bi-State sought to reopen the mine cut for use. The court held that the proposed modification was a new regional pollution control facility requiring local siting approval prior to the Agency issuing a permit. The Court believed that to reopen the mine cut

would increase the capacity of the landfill, impacting on criteria local governmental authorities consider in assessing the propriety of establishing a new regional pollution control facility.

The parties disagree as to how these decisions apply to the facts of this case. As previously stated, there are two boundaries identified in permit # 1990-196-SP: the facility boundary defined in Special Condition No. 1, and the waste boundary defined in Special Condition No. 2. The facility boundary was considered by the Christian County in its siting approval process. The waste boundary was later set by the Agency during the permitting process. The design change proposed by WMII will decrease the Facility's volumetric capacity to accept waste, but will in some areas extend outside the waste boundary identified in by Special Condition No. 2. The Agency takes the position that the waste boundary, and not the facility boundary, is the boundary at issue; WMII takes the contrary position.

WMII argues that the decisions are distinguishable since the modification of the contours of the Facility is a technical design change only which will not result in increased landfill capacity or life, and therefore, is not an expansion as defined by the Act. Additionally, WMII argues that the proposed modifications to the landfill will not extend beyond the permitted "siting line" and maximum elevation designated in the siting approval. More broadly, WMII argues that to construe the Act to require local siting review for this type of design modification would lead to the absurd result of the local unit of government being asked to evaluate its proposed modifications against nine statutory criteria that are essentially irrelevant.

The Agency, on the other hand, cites to M.I.G. as authority for finding that the local review is required. Specifically, the Agency cites to the following language in M.I.G.:

> From the language of section 3(x)(2)[now section 3.32(b)(2)], it is clear that the legislature intended to invest local governments with the right to assess not merely the location of proposed landfills, but also the impact of alterations in the scope and nature of previously permitted landfill facilities. (Id. at 4.)

The Agency contends that in M.I.G. the Court recognized the legislative intent that the local government be allowed every possible opportunity to assess alterations in the "scope and nature" of permitted facilities. In addition, the Agency cites to other sections of the Court's opinion commenting generally on increases in a landfill facility's operations for the proposition that the Act, and more specifically the word "expansion", should be liberally construed. Finally the Agency concludes that its reading of both M.I.G. and Bi-State is not inconsistent with the

principles and interpretations of the Act. The Agency contends that these cases do not define the word "expansion" only in terms of increased capacity but would also include any alteration in nature and scope of the landfill. Therefore, in this case, that local siting review is required in order for WMII to be issued a supplemental permit.

Board Discussion

The terms in a statute are not to be considered in a vacuum, but must be construed in the context of what they define. (M.I.G. at 4.) We must therefore examine the statutory language as it applies to the specific circumstances of this case. Based on the facts of this case, the Board finds that WMII's proposed redesign does not constitute an "expansion beyond the boundary of a currently permitted pollution control facility" within the meaning of Section 3.32(b) of the Act. WMII's motion for summary judgment is granted. The Agency improperly deemed WMII's application incomplete for failure to contain evidence of a third siting approval by Christian County. The Board will accordingly remand the permit application to the Agency for review on its merits; the Board will express no opinion on the merits of this application.

The stipulated facts are that WMII's proposed reconfiguration of the permitted but undeveloped disposal units 6-II, Unit 7 and Unit 8 falls within the "siting line" boundaries approved by Christian County in its 1986 and 1989 siting resolutions, resolutions which did not specify boundaries for the waste disposal area or "footprint". The proposed reconfiguration also complies with the elevation restrictions imposed by the Christian County for the landfill's final contours.

The proposed reconfiguration would increase the two dimensional area of the landfill by approximately 1000 square feet in a triangular area in a northwesterly direction[3]. The edge of the proposed "expansion area" is approximately 150 feet from the northwest property boundary. However, in contrast to the situations analyzed by the M.I.G. and Bi-State courts, the reconfiguration proposed here will result in a net loss in volumetric capacity to the landfill.[4] The net loss in capacity

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[3]This area is approximated from measurement of the scale drawing of the landfill submitted as Attachment 4, Drawing 3 to the stipulation. The area is located at roughly 9400 N to 10200 N, and 20800 E to 21700 E on the map's grid system.

[4]This is calculated by WMII as a net loss of 14,000 cubic yards. (Petition, Attach. 1, App. 1 "Air Space Volume Calculations", Table 1).

will accordingly shorten the life of the landfill, decreasing the impacts on the criteria of Section 39.2(a) as previously considered by Christian County. (See M.I.G., supra, 523 N.E.2d at 5.)

In further contrast to the situations in M.I.G. and Bi-State, the stipulated purpose of the proposed redesign is to minimize the impacts of the landfill on the environment, by reducing leachate generation and improving leachate collection (Stip. at 3.) This case is inapposite to Bi-State where the issue before the Board concerned a landfill which sought to reuse a previously permitted mine cut that was closed on the advice of Bi-State's environmental consultant. In short, the policy reasons favoring construction of the M.I.G. and Bi-State permit requests as "expansions" within the meaning of the statute do not exist here. The "nature and scope" of the landfill remain the same as that approved by Christian County.

In so finding, the Board wishes to make clear that, had Christian County established boundaries for the waste "footprint" in its siting resolutions, any proposed extension would almost certainly require an additional siting approval. In this case, the Agency is arguing that its permitted "footprint" retroactively becomes a site approval condition. An Agency permit is just that - an Agency authorization from which the permit holder may petition the Agency for a modification. In this case, WMII is requesting a modification of that permit where such modification does not expand beyond the permitted boundary, impact the criteria considered by the siting authority, and is consistent with that approval. Therefore, no additional siting approval is required.

Today's decision turns solely on the facts of this case, including the site-specific conditions, and the language of the Christian County's approvals. This decision does not change the fact that terms of a local government's approval will continue to set the metes and bounds of a landfill's area, and expansions will continue to require local approval pursuant to Section 39.2 of the Act.

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

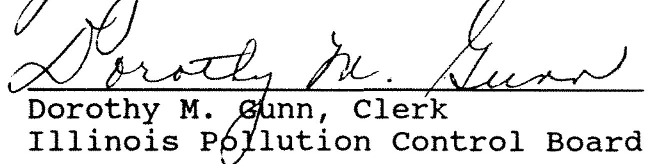
ORDER

WMII's June 30, 1994 motion for summary judgment is granted. WMII's March, 1994 permit application is deemed complete and is remanded to the Agency for technical review on its merits.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1992), provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration).

I, Dorothy M. Gunn, Clerk of Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of July, 1994, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board