

ILLINOIS POLLUTION CONTROL BOARD
February 3, 1994

WILMER BROCKMAN, JR. AND)
FIRST MIDWEST BANK OF JOLIET)
AS TRUSTEE UNDER TRUST NO. 757,)
)
Petitioners,)
)
v.) PCB 93-162
) (Permit Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

FRED PRILLAMAN, OF MOHAN, ALEWELT, PRILLAMAN & ADAMI, APPEARED ON BEHALF OF THE PETITIONERS;

RICHARD WARRINGTON AND JOHN BURDS APPEARED ON BEHALF OF RESPONDENT;

JOAN BERNABEI APPEARED ON BEHALF OF BENYA, IRNIS, BENYA AND BERNABEI;

GEORGE MUELLER APPEARED ON BEHALF OF RESIDENTS AGAINST A POLLUTED ENVIRONMENT;

ROBERT ESCHENBACH APPEARED AS ASSISTANT STATE'S ATTORNEY FOR LASALLE COUNTY.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

On September 1, 1993, Wilmer Brockman, Jr., and First Midwest Bank of Joliet as Trustee under Trust No. 757 (Brockman or petitioners) filed a petition for review and reversal of the denial by the Illinois Environmental Protection Agency (Agency) of Brockman's permit application to temporarily suspend waste acceptance at Brockman's site in LaSalle County, Illinois. On December 2, 1993, the Board denied the Agency's motion for summary judgement, which the Agency filed on November 24, 1993. Hearing was held on December 6, 1993, in Ottawa, LaSalle County, Illinois, with members of the public in attendance.

On December 22, 1993, a motion for leave to file amicus brief was filed by Residents Against a Polluted Environment (R.A.P.E.). The motion was granted by the Board on January 6, 1994. On December 23, 1993, the petitioners' brief was filed. Respondent's Brief was filed on January 4, 1994, accompanied by a motion to strike petitioners' brief. Brockman filed petitioners' reply brief and opposition to motion to strike petitioners' brief on January 5, 1994. The motion to strike petitioners' brief is hereby denied. On January 12, 1994, petitioners filed petitioners' reply to amicus brief.

The Board's responsibility in this matter arises from Section 40 of the Environmental Protection Act (Act). [415 ILCS 5/40 (1992).] The Board is charged, by the Act, with a broad range of adjudicatory duties. Among these is adjudication of contested decisions made pursuant to the permit process. More generally, the Board's functions are based on the series of checks and balances integral to Illinois' environmental system: the Board has responsibility for rulemaking and principal adjudicatory functions, while the Agency is responsible for carrying out the principal administrative duties, inspections, and permitting.

Based on review of the record, the Board upholds the Agency's denial of a permit to temporarily suspend waste acceptance for the Brockman site.

REGULATORY FRAMEWORK

Petition for review of permit denial is 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 Board has long held that in permit appeals the burden of proof rests with the petitioners. The petitioners bear the burden of proving that the application, as submitted to the Agency, would not violate the Act or the Board's regulations. This standard of review was enunciated in Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (Second District 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, petitioners must establish to the Board that the permit would not violate the Act or the Board's rules if the requested permit was to be issued by the Agency. In addition, the Agency's written response to the permit application frames the issues on appeal from that decision. (Pulitzer Community Newspapers, Inc. v. Illinois Environmental Protection Agency, PCB 90-142, at 6 (December 20, 1990); Centralia Environmental Services, Inc. v. Illinois Environmental Protection Agency, PCB 89-170, at 6 (May 10, 1990); City of Metropolis v. Illinois Environmental Protection Agency, PCB 90-8 (February 22, 1990).

There are essentially two issues in this case. The first issue is the sufficiency of the June 15, 1993, application (R. at

15-24)¹ to temporarily suspend waste acceptance at the Brockman site. The language of 35 Ill. Adm. Code 807.205(f) provides the Agency with the authority to deem applications incomplete that lack the information, documents, and authorizations required by Board rules and Agency procedures. The second issue raised by the Agency is that "Agency records for the Brockman #2 facility indicate that this facility is closed pursuant to Ill. Adm. Code 807.318(c)". (Rec. Vol. III at 670-671.)

BACKGROUND

The subject property is located west of the village of Naplate, LaSalle County, Illinois. The site is referred to as the Brockman II Landfill by petitioners (Pet. at 1) or Brockman II, Pioneer Processing, or the Carus Disposal Area by the respondent. (Res. Br. at 2.) For the purposes of this permit denial review, the Board will refer to the subject property as the "Brockman site" or "site".

The Brockman site consists of approximately 177 acres owned by First Midwest Bank of Joliet, Trust No. 757. (Pet. at 1.) Brockman was originally granted development permit number 1975-23-DE by the Agency on March 14, 1975, to develop a solid waste disposal site on the 177 acres. (R. Vol. I at 133.) Several modifications to this development permit were allowed by the Agency. The most litigated of these modifications was granted on December 22, 1980, to Pioneer Development Company by supplemental permit number 1980-1944 DE. (R. Vol. III at 527.) In the ensuing litigation contesting that modification the permit was declared void by the Illinois Supreme Court in Pioneer Processing, Inc. et al. v. IEPA 102 Ill.2d 119, 464 N.E.2d 238 (1984). A reapplication was withdrawn on March 22, 1988, and that withdrawal was confirmed by the Board by its order of April 27, 1989, in PCB 88-158. (R. Vol. I at 211-231.) The Brockman site only accepted special waste from the Carus Chemical Company pursuant to operating permit number 75-2-OP issued July 9, 1976 (R. Vol. I at 152-153) and pursuant to a supplemental permit number 76-686 issued November 29, 1976 (R. Vol. II at 154, Tr. at 28.), and other supplemental permits. Waste was accepted only from 1975 to 1982 from Carus. (Pet. Br. at 2; R. at 46-47 and 127.)

¹The Agency record will be cited as "R Vol. ___ at ___"; the petition for review of permit denial will be cited as "Pet. at ___"; petitioners' reply brief will be cited as "Pet. Br. at ___"; respondent's brief will be cited as "Res. Br. at ___"; the amicus brief will be cited as "Am. Br. at ___"; the hearing transcript will be cited as "Tr. at ___".

DISCUSSIONApplication Deficiencies

Board regulations provide for development permits at 35 Ill. Adm. Code 807.201, for operating permits at 35 Ill. Adm. Code 807.202, and for experimental permits at 35 Ill. Adm. Code 807.203. Modifications to these three classes of permits may be made by supplemental permits issued by the Agency pursuant to 35 Ill. Adm. Code 807.210. Board rules do not refer to permits to temporarily suspend waste acceptance in Subpart B of Part 807. Subpart B is a part of the Board's waste disposal regulations entitled "Solid Waste Permits".

Board rules refer to "temporary suspension of waste acceptance" at only 35 Ill. Adm. Code 807.503(c)(3), 807.504(b)(1), 807.506(c), 812.114(d) and 813.401. The Part 807 subsections are contained in Subpart E, which is entitled "Closure and Post-Closure Care". Part 812 is entitled "Information to be Submitted in a Permit Application". Part 813 is entitled "Procedural Requirements for Permitted Landfills".

Section 807.503(c)(3) states in pertinent part:

- c) The closure plan shall include as a minimum:
 - 3) Steps necessary to prevent damage to the environment during temporary suspension of waste acceptance if the operator wants a permit which would allow temporary suspension of waste acceptance at the site without initiating final closure;

Section 807.504 deals with amendments to closure plans and provides that a revised closure plan must be filed unless the modification is authorized by the permit. Modifications which are included in the permit can include "a temporary suspension of waste acceptance at the site". (Section 807.504(b)(1).)

Section 807.506 is entitled, "Initiation of Closure". Subsection 807.506(c) states:

The owner must notify the Agency within 30 days after a temporary suspension of waste acceptance. The operator must comply with the requirements of any temporary suspension plan in the permit.

Section 812.114 specifies minimum requirements for a closure plan which must be included in the permit application. According to Section 812.114(d), the closure plan must include:

- d) Steps necessary to prevent damage to the environment during temporary suspension of waste acceptance if the operator wants a permit which would allow temporary suspension of waste acceptance at the site without initiating final closure;

Section 813.401(b) states:

The operator shall notify the Agency within 30 days after any temporary suspension of waste acceptance. The operator must comply with the requirements included in a permitted closure plan in accordance with 35 Ill. Adm. Code 812.114(d) that are applicable during any such period.

In each use of "temporary suspension of waste acceptance", the regulations reference the written closure plan which is to be a condition of the site permit. Plain reading of the Board regulations governing solid waste permits shows that a permit to temporarily suspend waste acceptance can only be properly issued by the Agency in relation to a closure plan for the site. A permit to temporarily suspend waste acceptance is not a stand-alone permit.

Site Closure Issue

The briefs by both parties and the record show that Brockman and the Agency have an ongoing argument about the status of the Brockman site permits. The Agency maintains that the entire Brockman site is closed. (Res. Br. at 5.) Brockman argues that development permit number 1975-23-DE has never been revoked or rescinded. (Pet. at 2.) Brockman maintains that "one unit was closed in 1982, and that the entire site has been inactive in accepting waste since that time, but active in other administrative, legal, and internal avenues". (Pet. Rep. Br. at 4.)

Brockman argues (Pet. Rep. Br. at 2) that the Agency's sole reason for permit denial is that the Brockman site is allegedly closed. Brockman further argues that failure to specify a reason for denial under Section 39 of the Act constitutes waiver of any issues not so specified (Environmental Protection Agency v. Pollution Control Board, 86 Ill. 2d 390, 406(1981)). The Agency maintains that the Brockman site is closed. The Agency also argues that the Brockman application does not contain a closure plan which is necessary to evaluate an application for a permit to temporarily suspend waste acceptance. (Res. Br. at 5-7.)

In the instant case, the Board finds that the application lacked sufficient information to allow the Agency to technically review the permit. Therefore, the application failed to comply

with the provisions of Section 807.205(f). As discussed previously, the permit at issue is a narrow, specific permit that is only a contingency in a closure plan and the record does not include such a closure plan for this site. Because the Board has found that the petition lacked sufficient information to allow Agency review, there is no reason to examine further the arguments by the parties concerning the viability of Brockman's permits or to discuss the issues regarding the contested closure of the site.

CONCLUSION

The permit application (R. Vol. I at 15-24) at issue in this appeal contains no more than a simple request to suspend accepting waste. The application does not contain the necessary preventative measures to delay initiation of closure, nor a written closure plan to specify what needs to be done to properly close the facility. The application clearly lacks the information and documents necessary to process the application and was properly denied. The Board finds that there is no evidence in the record of a closure plan for the site which could be used to evaluate the appropriateness of the instant permit request. The Board's regulations clearly show that the appropriateness of a permit to temporarily suspend waste acceptance can only be evaluated in the context of a closure plan for a site. The Agency's decision to deny the permit according to Section 807.205(f) is supported in the instant case by the nature of the permit requested and the record before the Board. Therefore, the Board affirms the Agency denial of a permit to temporarily suspend waste acceptance by the petitioners.

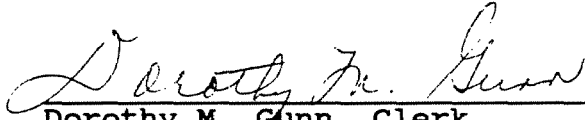
ORDER

The denial by the Illinois Environmental Protection Agency of a permit for the temporary suspension of waste acceptance requested by Wilmer Brockman is affirmed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/40.1) provides for the appeal of final Board orders within 35 days of service of this decision. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 3rd day of February, 1994, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board