

ILLINOIS POLLUTION CONTROL BOARD
February 17, 1994

INDUSTRIAL SALVAGE INC. and)
JOHN PRIOR,)
)
Petitioner,)
)
v.) PCB 93-60
) (Permit Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

INDUSTRIAL SALVAGE INC. and)
JOHN PRIOR,)
)
Petitioner,)
)
v.) PCB 93-61
) (Permit Appeal)
ILLINOIS ENVIRONMENTAL) (Consolidated)
PROTECTION AGENCY,)
)
Respondent.)

WILLIAM BECKER OF HEYL, ROYSTER, VOELKER & ALLEN APPEARED ON BEHALF OF PETITIONER;

TODD F. RETTIG AND JACK BURDS APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

On March 19, 1993 Industrial Salvage Inc. and John Prior filed two petitions for review pursuant to Section 40 of the Act which were consolidated by the Board for purposes of hearing¹. Docket PCB 93-60 is an appeal from an Illinois Environmental Protection Agency (Agency) denial of petitioner's re-application for prior conduct certification. Docket PCB 93-61 is an appeal of an Agency denial of an application for supplemental operating permit to operate Area IV of the Centralia Environmental Landfill in Marion County Illinois and to revise the current cost estimate for that facility.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1992).) The Board is charged therein to adjudicate disputes arising out of permit decisions made by the Agency. (Act at Title X and Section 40.) More generally, the Board's responsibility in this

¹ March 25, 1993

matter is based on the system of checks and balances integral to Illinois environmental governance: the Board is charged with the rulemaking and principal adjudicatory functions, and the Agency is responsible for carrying out the principal administrative duties, including the issuance of permits.

In a review of a permit denial it is the burden of the petitioner to prove that the application, as submitted to the Agency, demonstrated that no violation of the Act or Board regulations would occur if the permit was granted. (e.g., Joliet Sand & Gravel v. Pollution Control Board (3rd District 1987), 163 Ill. App. 3d 830, 516 N.E.2d 955,958.) Similarly, in review of a prior conduct certification determination, it is the petitioner's burden to prove that the application as submitted to the Agency demonstrated that the petitioner is entitled to the certification. Completion of the application showing that none of the reasons for denial exist is sufficient demonstration absent information to the contrary. (35 Ill. Adm. Code 745.141(c)).

Based upon review of the record, the Board affirms the Agency's denial of prior conduct certification and denial of the application for operating permit.

PROCEDURAL HISTORY

On September 9, 1992 John Prior first applied to the Agency for prior conduct certification as required by 35 Ill. Adm. Code 745. The Agency denied John Prior's first application on October 22, 1992 after considering previous adjudicated violations of the Act and Board regulations found against John Prior. This October 22, 1992 denial is not before this Board on review as John Prior did not appeal this earlier denial. On December 18, 1992 John Prior re-applied for prior conduct certification. The Agency denied the re-application on February 10, 1993, and John Prior brought this appeal of the February 10, 1993 Agency denial.

It is worth noting that neither the December 19, 1992 re-application for certification nor the February 10, 1993 denial letter are listed in the contents tables or have been found in the Agency record in this matter. At hearing, the Agency argues that petitioner's appeal of the October 22, 1992 certification denial is not timely. (Tr. at 11-14.) However, petitioner did not appeal the October 22, 1992 denial, but rather appealed the February 10, 1993 denial of which filing is timely. A copy of the February 10, 1993 Agency denial letter which references the December 19, 1992 re-application was submitted by the petitioner with its petition for review.

It is the Agency's responsibility to file the complete record that is before it, specifically including the application and denial. (See, 35 Ill. Adm. Code 105.102 (a)(4).) The filing

of a partial record places the Board in a difficult situation, causing the Board to be faced with making its decision based upon the incomplete record and pleadings as they stand. However, no motion to compel the filing of the missing documents has been filed by petitioner. As stated above, petitioner has the burden to prove that its application as submitted to the Agency demonstrates that the petitioner is entitled to the certification.

On December 31, 1992 John Prior also filed an application for an operating permit for Area IV of the Centralia Environmental Landfill. On February 11, 1993 the Agency denied the application for operating permit and John Prior appealed.

Hearing was held on this consolidated matter on August 25 and 26, 1993 before Hearing Officer V. Robert Matoesian, in Centralia, Illinois. Post-hearing briefs were filed on November 17, 1993 by the petitioner and on December 31, 1993 by the respondent. No reply brief was filed by petitioner.

FACILITY DESCRIPTION AND BACKGROUND

These petitions for review pertain to Area IV of the Centralia Environmental Landfill site #121422003. The site is located near Centralia Illinois and is subject to existing permits. Area IV of the landfill is an integral part of the entire landfill. The design of this particular landfill is such that each area of the landfill is dependent upon the development of other areas for its performance. That is, unlike other landfills which may include operating areas which when completed and filled are separate and distinct, Area IV will be part of one large mound upon its fill to capacity. (Tr. at 176.)

During the 1980's, the Agency issued development permit #1984-3-DE and supplemental development permit 1987-194-SP for this landfill. Also, the Board has previously adjudicated an appeal of a denial of supplemental development and operating permits for this site. (Centralia Environmental Services v. IEPA (October 25, 1990), PCB 89-170, 115 PCB 389.) In that matter, the Board affirmed the Agency's denial of the supplemental permits, but found that some of the denial reasons given by the Agency were insufficient bases for permit denial. (Id. at 20, 408.)

The September 9, 1992 application for prior conduct certification lists John Prior as the president of Industrial Salvage, Inc. (Rec. Vol. IV at 93².) The September 9, 1992 and

² The record was filed in seven separate volumes and will be cited as "Rec. Vol. ___ at ___."

December 31, 1992 operating permit applications indicate that John Prior is an owner of Industrial Salvage, Inc. (Rec. Vol. V at 82; Rec. Vol. IV at 54.) Mr. Prior does not contest that he is the present owner or operator of the site.

REGULATORY FRAMEWORK

The Board adopted the prior conduct certification rules on September 4, 1987. (In re Prior Conduct Certification for Waste Disposal Site Personnel: 35 Ill. Adm. Code 745 (Sept. 4, 1987), R81-18. The rules were adopted pursuant to Section 22.5 of the Act which allows for denial of certification based on whether an operator, employee or officer of the operator, among other things, has a history of violations of laws governing waste disposal.

The regulations in pertinent part provide that the Agency shall deny prior conduct certification to any person who has:

- 1) Been repeatedly found, after opportunity for an adversarial proceeding before any judicial or administrative body, to be in violation of any federal, state or local laws, regulations or ordinances governing the operation of waste disposal sites in any state;

* * *

- 4) Practiced any fraud or deceit in obtaining or attempting to obtain prior conduct certification; or

* * *

(35 Ill. Adm. Code 745.141(a).

The rules also afford consideration by the Agency of mitigating factors such that the certification may issue:

- 1) The severity of the misconduct;
- 2) How recently the misconduct took place;
- 3) The degree of control exerted over waste disposal operations at a site by the applicant at the time misconduct described in subsection (a)(3) was committed. (35 Ill. Adm. Code 745.141(b).)

Part 745 also includes relevant definitions:

"Chief Operator" means the one natural person in responsible charge of a waste disposal

site on a 24-hour basis. "Chief Operator" also means any person who may from time to time and in the regular course of business be designated by a waste disposal site's chief operator to assume the functions of chief operator during periods of vacation, accident, illness or the like.

"Owner" means the person who owns a waste disposal site or part of a waste disposal site, or who owns the land on which the site is located.

A person is in "responsible charge" if the person:

Is normally present at a waste disposal site;

Directs the day-to-day, overall operation at the site; and

Either is the owner or operator, or is employed by or under contract with the owner or operator to assure that the day-to-day operations at the site are carried out in compliance with 35 Ill. Adm. Code 724, 725, 730, 807 and other Board rules governing operations at waste disposal sites. (35 Ill. Adm. Code 745.102.)

Section 807.207(a) prohibits the Agency from issuing solid waste permits if a violation of the Act or regulations would occur. At Section 745.201(a) it is prohibited for any person to operate a waste disposal site unless the chief operator has prior conduct certification. In addition, at Section 745.201(b) no site owner shall cause or allow the operation of a waste disposal site unless the site operator has prior conduct certification³.

Therefore, the threshold issue is whether petitioner has demonstrated that his application before the Agency entitled him to a prior conduct certification. Without such a showing, the application for the operating permit, in this case a supplemental operating permit, is deficient, and the permit must be denied or

³ Although there are other prohibitions that may apply to John Prior in this instance, the Agency's reasons for denial of the supplemental permit only refer to violations of subsections (a) and (b). We will limit our review of the permit denial to those subsections.

else there would follow a violation of the Act or Board regulations. We now turn to review of the Agency's denial of prior conduct certification and consequent denial of the operating permit on that basis.

PRIOR CONDUCT CERTIFICATION

The Agency's February 10, 1993 denial letter lists specific reasons for denial of prior conduct certification under Section 745.142 as follows:

1. You have been repeatedly found to be in violation of federal, state or local laws, regulations or ordinances governing the operation of waste disposal sites as evidenced by the following:
 - a) On September 4, 1975, in IEPA v. John Prior, PCB 75-184 the Illinois Pollution Control Board ("Board") found you in violation of Section 21(e) of the Illinois Environmental Protection Act and Rules 201 and 202(a) of Chapter 7: Solid Waste, of the Pollution Control Board Rules and Regulations (now codified as 35 Ill. Adm. Code 807.201 and 807.202). Therefore, you were ordered to pay a fine of \$100.00.
 - b) On August 5, 1986, in People of the State of Illinois v. John Prior d/b/a Industrial Salvage, Inc., 85-CH-17 (Marion County)⁴ the court found you in violation of Section 21 of the Illinois Environmental Protection Act and 35 Ill. Adm. Code 807.301 and 807.305(a). Therefore, you were ordered to pay a fine of \$12,000.00.
 - c) On May 28, 1987, in Theresa Castellari, et al. v. John Prior, PCB 86-79 the Board found you in violation of Section 21(d) of the Illinois Environmental Protection Act and 35 Ill. Adm. Code 807.304, 807.305(a), 807.306, 807.311, 807.313, 807.314(c), 807.314(e) and 807.314(f). Therefore, you were ordered to pay a fine of \$10,000.00

⁴ While the other cited Board opinions are readily available, neither party presented a copy of this chancery case. However, its validity and existence were not questioned. (See, Tr. 140-148.)

2. You have practiced fraud or deceit in attempting to obtain prior conduct certification by answering "no" to question Number 1 in Part II of a previous application received by the Agency on September 9, 1992. Question Number 1 in Part II states:
 - 1) Have you ever violated any federal, state, or local laws, regulations or ordinances governing the operation of any waste disposal site.

Consistent with the denial letter cited above, the Agency in this appeal alleges that it properly denied prior conduct certification to John Prior because it found that John Prior has repeatedly been found in violation of the Act and Board regulations.

John Prior argues that he was not given procedural due process by not being afforded the right to notice and hearing or an opportunity to rebut the allegations of the violations before denial of the prior conduct certification. Prior alleges that he was not the operator of the landfill between July 1, 1985 and 1992 and testified that any violations were the responsibility of others. (Tr. 140-145, Pet. Exhs. 13, 14.) Pertaining to the proceedings cited by the Agency in its denial letter, Prior admits that while there may have been adjudication, others were paying the penalties imposed upon Prior. Prior argues that the 1975 finding of violation is de minimis, implying that it should not be considered by the Agency. Prior lastly alleges that the Agency acted arbitrarily and capriciously in denying the certification.

The Board finds that petitioner was afforded due process since he had the opportunity to appeal to this Board both the past enforcement decisions rendered by the Board and the October 22, 1993 Agency denial of prior conduct certification, as well as the instant action. Petitioner was also allowed opportunity to and in fact did reapply for prior conduct certification. In addition, the petitioner was notified that his past violations were being considered by the Agency during the pendency of the related permit application review. (Rec. Vol. V at 17.) Petitioner responded to that letter in writing by denying that the violations occurred. (Rec. Vol. V at 20.)

Petitioner is attempting to again litigate the findings of violations of those matters previously adjudicated and cited by the Agency in its denial letter. Prior had opportunity to properly appeal those findings of violations at the time they were rendered. Petitioner does not contest that the findings of violations specified in the Agency's denial letter were made against him. (Tr. at 146-148.) John Prior's claim of others

being responsible for the adjudicated violations does not rise to a showing that the courts or this Board did not render findings of violation against John Prior. The Board further notes that the issue of ownership and responsible parties was extensively addressed by the Board in Theresa Castellari, et al. v. John Prior (May 28, 1987), PCB 86-79, 78 PCB 132 (See especially pp. 2-12). In that enforcement case, the Board further addressed the extent of Prior's violations:

The extent of Prior's non-compliance with the laws and regulations of the State concerning the Landfills' operations was considerable. The great number of observed violations indicates an almost constant interference with the interests that those regulations are designed to protect. The illegal activities of the Landfills created extensive pollution that at times extended beyond the boundaries of the Landfill. In addition, the failure to apply daily cover to the Landfills created a health risk which was exacerbated by the lack of control over vectors. Prior's general disregard for operational requirements of the Board undermines the Board's role in protecting the environment of the State. (Id. at 31.)

Furthermore, although petitioner argues that one of the past findings of violation is de minimis, that argument does not rise to a showing that mitigating factors exist which the Agency should have considered as allowed by Section 745.141(b). Petitioner's witness' testimony that he has not known the Agency to have previously invoked the prior conduct certification regulations against others (Tr. at 71-84) and petitioners' allegations of bias (Pet. Br. at 13, Pet. Exh. 5⁵) do not prove arbitrary or capricious action by the Agency.

Upon reviewing the record and considering the pleadings, the Board finds that the Agency could reasonably deny prior conduct certification to John Prior based on repeated findings of violations of State law as specified in the denial letter. The Board therefore upholds the Agency's denial of prior conduct certification to John Prior.

PERMIT DENIAL

The February 11, 1993 Agency letter denying the application for operating permit states that the operator's lack of prior conduct certification would result in violation of 35 Ill. Adm. Code 745.201(a) and (b), if the operating permit were issued.

⁵ The testimony from a previous proceeding cited here by petitioner was excluded as hearsay in that proceeding.

(See denial reasons 3 and 4 of the February 11, 1993 denial letter, Rec. Vol. V at 3-4.) Consistent with its denial letter, the Agency alleges in this appeal that because John Prior has no prior conduct certification, the Agency properly denied the application for permit as it would be a violation of the regulations to grant a permit to an owner or operator without that owner or operator obtaining prior conduct certification.

The Board upholds the Agency's denial of an operating permit for Area IV of the Centralia Environmental Landfill based on the fact that the operator has not obtained prior conduct certification. The Agency's reason for denial is correct; issuance of the permit would violate 35 Ill. Adm. Code 745.201(a) and (b).

Lastly, because the Board has found the denial of the operating permit based on the lack of prior conduct certification is sufficient, there is no reason to examine the further arguments made by the parties concerning the viability of the operating permit.

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

ORDER

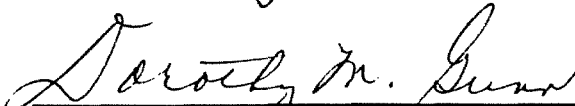
The Illinois Environmental Protection Agency's February 10, 1993 denial of prior conduct certification to John Prior is hereby affirmed.

The Illinois Environmental Protection Agency's February 11, 1993 denial of operating permit to Industrial Salvage, Inc., and John Prior is hereby affirmed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (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 17th day of February, 1994, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board