ILLINOIS POLLUTION CONTROL BOARD
May 4, 2006

KIBLER DEVELOPMENT CORPORATION and MARION RIDGE LANDFILL, INC.,	)	
Petitioners,	)	
v.	)	PCB 05-35 (Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ORDER OF THE BOARD (by N.J. Melas):

Consistent with well-settled precedent, this order denies leave to the City of Marion, the City of Herrin, and the Williamson County Airport Authority (Marion, Herrin, and the Airport Authority) to intervene as party respondents in this permit appeal. The Board finds that they have not persuaded the Board that they have any statutory right to intervene here, or that they will be materially prejudiced absent intervention. *See* 35 Ill. Adm. Code 101.402(d)(2) and (3). For the reasons set forth below, the Board denies the motion to intervene.

The relevant pleadings are the April 6, 2006 motion to intervene, the responses in opposition filed by the Illinois Environmental Protection Agency (Agency) April 10, 2006 and the petitioners on April 17, 2006. On April 20, 2006, the Marion, Herrin, and the Airport Authority filed a reply to the response accompanied by a motion for leave, which the Board grants.

THE PERMIT AND APPEAL

In this action, filed August 25, 2004, Kibler Development Corporation and Marion Ridge Landfill, Inc. (the petitioners) seek review of certain conditions of a 1994 permit issued to them by the Agency for development of a new solid waste landfill in Williamson County. Petitioners filed the appeal under Section 40(a)(1) of the Environmental Protection Act (Act). 415 ILCS 5/40(a)(1) (2004). The challenged conditions are: (1) a paragraph that describes a federal restriction on landfill location near an airport, and states the need for the petitioners to obtain an exemption from the federal restriction before construction begins; (2) a condition prohibiting construction of a liner within 500 feet of any inhabited structure and requiring a survey of the waste boundaries and adjacent properties before construction; and (3) a condition requiring submission of a map within 90 days that indicates facility boundaries, on-site buildings, and monitoring points.

The petitioners appeal on the grounds, among others, that: (1) the Agency inclusion of the contested additions are arbitrary and capricious, (2) the Agency has no authority or

jurisdiction over matters included in the airport paragraph, and (3) the disputed language is not necessary for compliance with or Board regulations or the Act (415 ILCS 5/1 *et seq.* (2004)). In an April 4, 2006 telephone status conference, the petitioners reported that this action may be near settlement. Petitioners have forwarded new permit language concerning the airport issue to the Federal Aviation Administration (FAA) for approval, after which the language will be submitted to the Agency. Pursuant to waiver, this case is now due for decision by November 16, 2006. No hearing is yet scheduled.

APPLICABLE STATUTE AND RULE

Appeals of nonhazardous waste landfill permits are governed by Section 40(a)(1) of the Act, which provides:

> If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may . . . petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 5/40(a)(1) (2004).

The Board's intervention procedure and standards are set out in Section 101.402 of the Board's rules. Section 101.402(a) allows persons to file motions to intervene which must set out the grounds for intervention. Section 101.402 goes on to provide, in pertinent part:

> (b) In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.
>
> (c) Subject to subsection (b) of this Section, the Board will permit any person to intervene in any adjudicatory proceeding if:
>
> (1) The person has an unconditional statutory right to intervene in the proceeding; or
>
> (2) It may be necessary for the Board to impose a condition on the person.
>
> (d) Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:
>
> (1) The person has a conditional statutory right to intervene in the proceeding; or
>
> (2) The person may be materially prejudiced absent intervention; or
>
> (3) The person is so situated that the person may be adversely affected by a final Board order.

(e) An intervenor will have all the rights of an original party to the adjudicatory proceeding, except that the Board may limit the rights of the intervenor as justice may require. 35 Ill. Adm. Code 101.402 [examples omitted].

MOTION TO INTERVENE BY CITY OF MARION, CITY OF HERRIN, AND WILLIAMSON AIRPORT AUTHORITY

On April 6, 2006, the Board received a motion to intervene filed by the Marion, Herrin, and the Airport Authority (the movants) to intervene as party participants as provided in 35 Ill. Adm. Code 101.402(d)(2) and (3). The movants assert that construction of the proposed landfill "would endanger public safety, and severely disrupt economic development in the area." Mot. at 3. They argue that:

> [T]he current parties have discussed a settlement that would involve some change to the permit language. Under the circumstances, it is important that the Movants be permitted to intervene as parties in this proceeding so that they have a seat at the negotiating table with formal party status, rather than being permitted to simply file an amicus brief after the fact on a done deal. Mot. at 8.

The motion recites that the proposed landfill was granted site location suitability approval under Section 39.2 of the Act (415 ILCS 5/39.2 (2004)) by Williamson County. The landfill will occupy 353 acres immediate adjacent to Marion's corporate boundaries, and less than two miles from the Williamson County Regional Airport. In support of the motion to intervene, the movants assert that it is appropriate "to allow officials who represent the public interest to intervene in appeal proceedings before the Board," relying primarily on Land and Lakes Co. v. PCB, 245 Ill. App. 3d 361, 616 N.E. 2d 349, 354-55 (3d Dist. 1993) (Land and Lakes) (allowing Will County State's Attorney to intervene in permit appeal). Movants assert:

> Here, Williamson County was the siting authority, and it therefore would be inappropriate for the State's Attorney to intervene. Under the circumstances, there is no public body better situated to protect the public interest than the adjacent municipalities and airport whose citizens and users, respectively, will be most directly affected by the proposed landfill. Mot. at 2.

RESPONSES IN OPPOSITION BY THE AGENCY AND PETITIONERS

The Agency filed is response in opposition to the motion (Ag. Resp.) on April 10, 2006. Petitioners filed their response in opposition (Pet. Resp.) on April 17, 2006.

Agency Arguments

The Agency argues that Section 40(a)(1) of the Act does not grant the Board authority to hear third-party appeals in cases of this type, citing *e.g.*, City of Waukegan *et al*. v. IEPA and North Shore Sanitary District, PCB 02-173 (May 2, 2002) (citing Landfill Inc. v. PCB, 74 Ill. 2d 541, 387 N.E.2d 258 (1978) (Landfill, Inc.). The Agency further points out a recent Board decision involving the effect of the Board's recent amendment of its procedural rule concerning

intervention, 35 Ill. Adm. Code 101.402. In Sutter Sanitation, Inc. *et al*. v. IEPA, PCB 04-187 (Sept. 16, 2004) (denying intervention in a landfill permit appeal case) the Board held that in adopting Section 101.402 the Board had no intention of disturbing existing case law involving interpretation of the Act.

The Agency acknowledges that the Third District did allow the Will County State's Attorney to intervene in a landfill permit appeal in Land and Lakes, 616 N.E. 2d at 354-55. But, the Agency notes that the court based its decision on Pioneer Processing Inc. v. IEPA, 102 Ill. 2d 119, 464 N.E.2d 238 (1984) (Pioneer Processing), allowing the Attorney General, as representative of the interests of the People of the State of Illinois, to seek review of a Board decision in a landfill permit appeal case. The Agency suggests that neither the moving cities nor airport authority have the same sort of "unique constitutional role as a representative of the citizenry" as do the Attorney General or States Attorneys. *See* Ag. Resp. at 3, and cases cited therein.

Finally, the Agency objects to any implication that movants' intervention is necessary to guarantee a vigorous defense of the terms, conditions, and language of the permit:

> In response the Illinois EPA, who carefully crafted and issued the permit pursuant to [its] authority under the Act, contends that it will defend its own decisions in the pending appeal with competence and zeal. Ag. Resp. at 3.

Petitioners' Arguments

Petitioners discuss three of the cases relied on by the Agency (Landfill, Inc., Pioneer Processing, and Land and Lakes) and make similar arguments. Pet. Resp. at 1-2. Petitioners submit that there is no valid analogy between movants' status as municipalities and a municipal corporation with the status of a county's States Attorney, noting that that the former are creations of statute, while the latter is a creation of the Illinois Constitution "with a duty and obligation to protect the State's environment." Pet. Resp. at 2-3. Petitioners assert that, by contrast, movants "have only local and parochial interests." Pet. Resp. at 3. Without providing any authority, the petitioners suggest:

> [T]his Board should sanction [movants'] counsel for bringing this frivolous motion. represented by experienced counsel, there is no excuse for the [movants] to have brought this motion other than as a means to harass and annoy Petitioners, and to cause them the expense and inconvenience of submitting this response. To the extent this Board is unable to sanction [movants] in any other way, it should deny them even the Right to participate in the extremely limited role of *amicus curiae*. *Id.*

REPLY TO RESPONSE BY CITY OF MARION, CITY OF HERRIN, AND WILLIAMSON AIRPORT AUTHORITY

In their April 20, 2006 reply to petitioners' response (Rep.), Marion, Herrin, and the Airport Authority argue that the Board should liberally construe the Act in their favor. They

argue that this is an important proceeding, involving protection of the Williamson County Airport from aviation hazards posed by birds drawn to landfills. Rep. At 2.

Movants argue that the parties' arguments "reflect a fundamental misunderstanding of the applicable law and are simply wrong." Rep. At. 3. They contend that the court's reasoning in Land and Lakes does not support an interpretation that only the Attorney General or State's Attorneys can be allowed to intervene, suggesting that the same policy arguments allowing those officials to intervene are also in favor of intervention by movants. Movants argue that, while they do not hold law licenses, that Marion and Herrin are both home rule units of government. They note that Article VII, Section 6(a) of the Illinois Constitution of 1970 grants them, among other governmental powers and functions, "power to regulate for the protection of the public health, safety, morals, and welfare." Movants argue that they are accordingly representing the public interest and not, as petitioners contend, "local or parochial interests." Rep. at 4.

Movants request that, if the Board denies intervention, the Board should require the parties to provide 30 days advance notice before any change in permit conditions, to allow them time to comment on any proposed settlement. Rep. at 6.

BOARD DISCUSSION AND RULING

The Board denies the requested leave to intervene, finding that movants have failed to meet the intervention tests of Section 101.402(d). As the parties have correctly demonstrated, movants have no explicit statutory right to intervene. The Supreme Court in Landfill, Inc. made clear in 1978 that the Board has no authority to, by rule, extend appeal rights beyond those granted in the Act under Section 40. Landfill, Inc., 387 N.E.2d 258. There simply are no statutory rights to appeal landfill permits, other than those for hazardous waste disposal sites under Section 40(b).

Intervenors receive the same rights as the original parties to an action, including rights to appeal. Since the decisions in Pioneer Processing and Land and Lakes, the legislature has granted some additional third party permit appeal rights. *See* 415 ILCS 5/40 (e), *as added by* P.A. 92-574, *eff*. June 26, 2002 (granting third parties the right to appeal NPDES permits). Were the Board to grant Marion, Herrin, and the Airport Authority intervenor status in this appeal of a permit to develop a new municipal solid waste landfill brought under Section 40(a)(1) of the Act, the Board would be unlawfully extending appeal rights.

The Board is not persuaded by the movants' arguments that the rationale articulated in Pioneer Processing and Land and Lakes for extension of appeal or intervention rights to constitutional officers such as the Attorney General and the States Attorneys should be applied to their request. The Board does not question the sincerity of the movants' desires to protect the interests of their citizens. Any further extension of landfill development permit appeal rights, however, must come from the legislature, not the Board.

Under the Act, the time for movants to express concerns about the location of the landfill in relation to the airport is during the siting process under Section 39.2. 415 ILCS 5/39.2 (2004). Movants state that Williamson County has granted siting approval for the expansion. The

responsibility of enforcing compliance with applicable environmental law and regulations has now shifted to the Agency permitting process under Section 39 of the Act. 415 ILCS 5/39 (2004).

The Board finds that movants will not be "materially prejudiced absent intervention" within the meaning of Section 101.402(d)(2). 35 Ill. Adm. Code 101.402(d)(2). The Board has no reason to believe that the Agency will proceed here with anything other than its usual "competence and zeal." As petitioners note, federal law prohibits location of a new municipal solid waste landfill within six miles of a commercial service airport without FAA approval. *See* Mot. Ex. 1. If the Agency determines that it cannot lawfully modify the permit, the Board fully expects the Agency will deny any modification request.

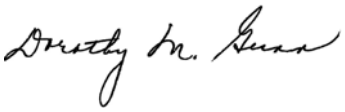
The Board sees no reason to consider any sanctions against movants at this time. Likewise, any considerations of briefing in this action by any *amici curiae* are premature, since it is up to the named parties to determine whether they will settle this action or whether the matter will proceed to hearing.

The Board sees no purpose to requiring 30 days notice to movants of any settlement of this appeal by the parties. If settlement is reached, petitioners will move for voluntary dismissal of the appeal. Since under Sections 39 and 40 of the Act only the applicant has the right to appeal a permit, the Board generally grants an applicant's motion to dismiss its own permit appeal as a matter of course. 415 ILCS 5/39, 40 (2004). The Board does not and will not endorse the terms of any permit language or settlement provision, so that public comment does not assist the Board in its disposition of the case.

Again, for all of the foregoing reasons, the Board denies the motion for leave to intervene.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 4, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board