

ILLINOIS POLLUTION CONTROL BOARD
May 20, 1999

SIERRA CLUB, MIDEWIN TALLGRASS)
PRAIRIE ALLIANCE, AUDUBON COUNCIL)
OF ILLINOIS, and ILLINOIS AUDUBON)
SOCIETY,)
)
Petitioners,)
)
v.) PCB 99-136
) (Pollution Control Facility
WILL COUNTY BOARD and WASTE) Siting Appeal)
MANAGEMENT OF ILLINOIS, INC.,)
)
Respondents.)

LAND AND LAKES COMPANY,)
)
Petitioner,)
)
v.) PCB 99-139
) (Pollution Control Facility
WILL COUNTY BOARD and WASTE) Siting Appeal)
MANAGEMENT OF ILLINOIS, INC.,)
)
Respondents.)

KATHLEEN KONICKI,)
)
Petitioner,)
)
v.) PCB 99-140
) (Pollution Control Facility
WILL COUNTY BOARD and WASTE) Siting Appeal)
MANAGEMENT OF ILLINOIS, INC.,) (Consolidated)
)
Respondents.)

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

On March 4, 1999, the Will County Board granted respondent Waste Management of Illinois, Inc.'s (WMII's) application for site location approval of the Prairie View landfill. On

April 6, 1999, petitioners Sierra Club, Midewin Tallgrass Prairie Alliance, Audubon Council of Illinois and Illinois Audubon Society (Sierra Club) filed with the Board a petition for review of the Will County Board's decision. On April 8, 1999, petitioner Kathleen Konicki (Konicki), a Will County Board member, filed with the Board a petition for review of the Will County Board's decision (Konicki Pet.).

Today the Board addresses three motions to dismiss. The first is a motion filed by WMII to dismiss the Konicki petition. The second and third are motions filed by the Will County Board to dismiss the petitions of the Sierra Club and Konicki, respectively.

For the reasons set forth below, WMII's motion to dismiss the Konicki petition is granted. The Will County Board's motion to dismiss the Sierra Club petition is denied. The Will County Board's motion to dismiss the Konicki petition is denied as moot.

WMII'S MOTION TO DISMISS KONICKI PETITION

On April 28, 1999, WMII filed a motion to dismiss Konicki's petition for review and a request for stay of discovery (WMII Mot.). On May 6, 1999, Konicki filed a response (Resp.) to WMII's motion to dismiss. On May 7, 1999, Will County Board submitted a filing to adopt and join WMII's motion to dismiss. On May 14, 1999, Konicki filed a response to Will County Board's May 7, 1999 filing. WMII's motion to dismiss Konicki's petition is granted. WMII's request for stay of discovery is denied as moot.

In its motion to dismiss, WMII asserts that Konicki's petition is legally insufficient in three ways: (1) there is no legal authority permitting a dissenting board member to challenge a decision of the board of which the person is a member; (2) Konicki has no standing in either her official or individual capacity to appeal the County's decision; and (3) Konicki did not participate in the public hearings conducted by Will County Board as required by Section 40.1(b) of the Environmental Protection Act (Act) (415 ILCS 5/40.1(b) (1996)). WMII Mot. at 2. In support of its claims, WMII cites case law from various states, but none from Illinois.

Konicki counters that she did not file the appeal as a board member. Resp. at 2. In her petition, Konicki claims to bring the petition on her own behalf and not on behalf of the Will County Board. Konicki Pet. at 1. Further, she argues she has standing to bring the appeal as an individual, and asserts she attended the hearing through duly authorized representatives. Resp. at 2 and 4. Konicki also notes that none of the case law cited by WMII holds that "decision-makers do not and/or can not (sic) have standing as members of the public under 415 ILCS 5/40.1(b)." Resp. at 2.

The central issue raised by WMII's motion is whether a dissenting member of a county board may appeal a county board decision as an individual. Consideration of the standing requirements articulated in Section of the 40.1(b) of the Act is essential to the Board's analysis of this issue. Section 40.1(b) of the Act states, in relevant part:

If the county board or the governing body of the municipality as determined by paragraph (c) of Section 39 of this Act, grants approval under Section 39.2 of this Act, a third party other than the applicant who participated in the public hearing conducted by the county board or governing body of the municipality may petition the Board within 35 days for a hearing to contest the approval of the county board or the governing body of the municipality. (emphasis added) 415 ILCS 5/40.1(b)(1996).

Konicki argues that she is a proper party under Section 40.1(b) because she is someone “other than the applicant,” she attended the public hearings through duly authorized persons, and she is not only a taxpayer and resident of Will County, but also an actual user of the recreational and educational public lands and improvements that surround the proposed facility. Resp. at 4 and 6. The relevant question, however, is whether she is “a third party other than the applicant who participated in the public hearing conducted by the county board or governing body of the municipality.” See 415 ILCS 5/40.1(b).

The Board has previously found the plain language of Section 40.1(b) “limits the universe of potential petitioners to those persons who physically attended the public hearing or were present by a duly authorized representative.” Valessares and Heil v. County Board of Kane County, Illinois, and Waste Management of Illinois, Inc. (July 16, 1987), PCB 87-36, slip op. at 4. WMII argues that Konicki did not attend the public hearings either personally or through a representative, and therefore she does not have standing under Section 40.1(b). WMII Mot. at 7. Konicki asserts that although she did not personally attend the public hearings, she attended the hearings through duly authorized representatives, namely: (1) the three Will County Board members who conducted the public hearings “and did so as duly appointed representatives of all County Board members, including petitioner;” and (2) Special Assistant State’s Attorney Chuck Helsten who represented the Will County Board at the hearings. Resp. at 4, 5. She does not argue that the representatives represented her as an individual. Rather, she fully admits to participating at the hearings “as a member of the Board.” Konicki Pet. at 2.

The Board finds that Konicki did not satisfy the participation requirement of Section 40.1(b). At most, her representatives at the hearing only represented her as a county board member, not as an individual. Therefore, the Board finds Konicki never participated at the hearings as a third party, as required by Section 40.1(b). The Board grants WMII’s motion to dismiss the Konicki’s petition.¹ Further, WMII’s motion for stay of discovery is denied as moot. All future captions must reflect today’s dismissal of docket PCB 99-140.

WILL COUNTY BOARD’S MOTIONS TO DISMISS SIERRA CLUB PETITION AND
KONICKI PETITION

¹ Will County Board’s May 7, 1999 filing to adopt and join WMII’s motion to dismiss cited Illinois case law. None of the cases addressed Section 40.1(b) of the Act. Because the Board interprets the plain meaning of the language of Section 40.1(b), it is unnecessary to address the case law cited by the Will County Board.

On May 7, 1999, the Will County Board filed the following two motions to dismiss: (1) a motion to dismiss the petition filed by Sierra Club *et al.*, (Mot. to Dism. Sierra Club); and (2) a motion to dismiss the petition filed by petitioner Konicki. On May 13, 1999, Sierra Club filed a response to the motion to dismiss (Sierra Club Resp.) and a motion to amend the caption. On May 14, 1999, Konicki filed a response to the motion to dismiss and a motion to amend her petition. On May 19, 1999, the Will County Board filed a response to the Sierra Club's motion to amend the caption. Also on May 19, 1999, the Will County Board filed a response to Konicki's motion to amend the petition.

For the reasons set forth below, Will County Board's motion to dismiss Sierra Club is denied. Sierra Club's motion to amend is granted. Because the Board has dismissed Konicki's petition for failure to satisfy Section 40.1(b), Will County Board's motion to dismiss Konicki and Konicki's motion to amend are denied as moot.

The Act at Section 40.1(b) requires that "the County Board . . . and the [siting] applicant shall be named as co-respondents." See 415 ILCS 5/40.1. The Will County Board's motion alleges that the Sierra Club failed to properly name the Will County Board as a respondent. Mot. to Dism. Sierra Club at 2. The basis for the allegation is that the caption of the Sierra Club's petition lists "Will County" as a respondent, rather than the "Will County Board." Mot. to Dism. Sierra Club at 2. The issue before the Board is whether Sierra Club's petition must be dismissed because Sierra Club erred in misnaming the respondent in the caption.

The Board finds that the misnaming of the Will County Board in the caption constitutes a misnomer of insufficient consequence to divest the Board of jurisdiction from hearing Sierra Club's petition in this matter. In all other aspects of Sierra Club's filing and petition, the Will County Board was correctly identified. Not only was the petition titled "Petition for Review of a Decision by the Will County Board . . ." (emphasis added), but throughout the body of the petition the Will County Board was identified as a co-respondent. Moreover, the Will County Board was properly served with the petition pursuant to the Act and the Board's regulations.

The Will County Board cites three cases in support of its proposition that this matter should be dismissed.² See Lockett v. Chicago Police Board, 133 Ill. 2d 349, 549 N.E.2d 1266 (1990); McGaughy v. Illinois Human Rights Commission, 165 Ill. 2d 1, 649 N.E.2d 404 (1995); Villa Retirement Apartments, Inc. v. Property Tax Appeal Board, 302 Ill. App. 3d 745, 706 N.E.2d 76 (4th Dist. 1999). However, these cases do not interpret the Act, and in all of these cases a party was completely omitted from the petition for review. That is not the factual situation here.

² Will County Board cites a fourth case, ESG Watts, Inc. v. IPCB, No. 4-98-0229 (4th Dist. 1999). Because the case is unpublished under Rule 23, the Board will not consider it in this decision.

We do, however, find guidance in an appellate case arising under the Act. In Bevis v. Illinois Pollution Control Board, 289 Ill. App. 3d 432, 681 N.E.2d 1096 (5th Dist. 1997), the appellate court addressed the consequences of petitioner's failure to name the applicant in compliance with Section 40.1(b) of the Act. The Bevis court relied on Lockett for the proposition that if an agency failed to follow a mandatory statutory requirement, a reviewing court has discretion to modify the requirement if the party seeking the modification showed a good-faith effort to comply. Bevis, 289 Ill. App. 3d at 437, 681 N.E.2d at 1099, citing Lockett, 133 Ill. 2d at 355, 549 N.E.2d at 1268. The Bevis court noted the good-faith effort test applies in the context of the Environmental Protection Act. Bevis, 289 Ill. App. 3d at 437, 681 N.E.2d at 1099, citing Worthen v. Village of Roxana, 253 Ill. App. 3d 378, 623 N.E.2d 1058 (5th Dist. 1993); Environmental Control Systems, Inc. v. Pollution Control Board, 258 Ill. App. 3d 435, 630 N.E.2d 554 (5th Dist. 1994).

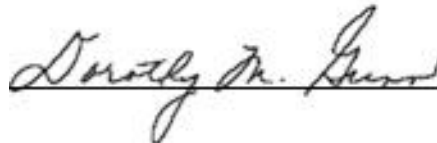
In Bevis, the court found that petitioners intentionally omitted the applicant from the petition and that the petitioners therefore had not made a good-faith effort to comply with Section 40.1(b). Here, by contrast, a party was merely misnamed as a respondent, and petitioners did make a good-faith effort to comply with Section 40.1(b).

Again, the Board finds that Sierra Club adequately named the Will County Board as a respondent in this action. Will County Board's motion to dismiss Sierra Club's petition is denied. Sierra Club's motion to amend is granted. WMII's motion to dismiss the Konicki petition is granted. Will County Board's motion to dismiss the Konicki petition is denied as moot. Konicki's motion to amend is denied as moot. The caption in these cases shall continue to name the Will County Board as a respondent and shall reflect the dismissal of docket PCB 99-140. The docket in PCB 99-140 is hereby closed.

IT IS SO ORDERED.

Board Member G.T. Girard abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 20th day of May 1999 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board