

ILLINOIS POLLUTION CONTROL BOARD  
July 21, 2011

CONGRESS DEVELOPMENT COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 11-90
	)	PCB 12-12
ILLINOIS ENVIRONMENTAL	)	(Permit Appeal - Land)
PROTECTION AGENCY,	)	(Consolidated)
	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

Today's order addresses procedural matters in two land permit appeals. The appeals were brought by Congress Development Company (CDC), seeking review of Illinois Environmental Protection Agency (Agency) permit determinations concerning CDC's sanitary landfill, which is located in Hillside, Cook County. In docket PCB 11-90, CDC timely filed a petition on June 3, 2011, to contest the Agency's denial of CDC's application for significant permit modification concerning groundwater monitoring. The Board accepted that petition for hearing in an order of June 16, 2011. *See Congress Development Co. v. IEPA*, PCB 11-90, slip op. at 1 (June 16, 2011). In docket PCB 12-12, CDC timely filed a petition on July 8, 2011, to contest the Agency's denial of CDC's application for significant permit modification concerning corrective action (12-12 Pet.). The latter petition, which has not yet been accepted for hearing, was accompanied by an unopposed motion to consolidate the two permit appeals (Mot. Consol.).

For the reasons below, the Board accepts the petition for review in docket PCB 12-12. The Board also grants CDC's motion to consolidate the PCB 11-90 permit appeal with the PCB 12-12 permit appeal, but the appeals are consolidated only for purposes of hearing, not necessarily decision, and the Agency must file separate administrative records. In this order, the Board first considers whether to accept for hearing the petition filed by CDC in docket PCB 12-12. The Board then rules upon the unopposed motion to consolidate, at which point the Board addresses the Agency's record filing and the Board's decision deadline.

**PETITION IN PCB 12-12**

Under the Environmental Protection Act (415 ILCS 5 (2010)), the Agency is the permitting authority, responsible for administering Illinois' regulatory programs to protect the environment. If the Agency denies a permit or grants one with conditions, the permit applicant may appeal the Agency's determination to the Board. *See* 415 ILCS 5/4, 5, 40(a)(1) (2010); 35 Ill. Adm. Code 105.Subpart B. In docket PCB 12-12, the Agency issued a determination on June 3, 2011, denying CDC's application for significant permit modification, which was submitted in the form of a corrective action remedy selection report. 12-12 Pet. at 3. In appealing the Agency's denial, CDC alleges that the Agency "erred in denying the Permit because (1) it failed

to give a sufficiently specific or detailed reason for its denial, (2) even if its reasons were sufficiently specific and detailed, the regulations upon which it relied do not provide a basis for denying the Permit application, and (3) to the extent IEPA may have based its decision on Congress's inability to obtain access to adjacent properties for groundwater sampling, IEPA misconstrued the potentially relevant statute." *Id.* at 1. CDC's petition meets the content requirements of 35 Ill. Adm. Code 105.210. The Board accepts the petition for hearing.

### **CONSOLIDATION**

With its PCB 12-12 petition, CDC filed a motion to consolidate the PCB 12-12 permit appeal with the previously-filed PCB 11-90 permit appeal.<sup>1</sup> In the motion, CDC notes that both permit appeals involve the same parties and maintains that each appeal concerns groundwater monitoring and assessment at the landfill. Mot. Consol. at 2. According to CDC:

The administrative record for the two appeals will include many of the same documents. The two appeals also may involve overlapping factual and legal issues, such as whether the well water survey performed by Congress was sufficient and whether Congress can compel neighboring property owners to provide access to their properties for groundwater investigation. \*\*\* Because of the overlap between the two proceedings, it will be more convenient, efficient and expeditious for Congress, IEPA and the Board to have the permit appeals heard and decided together. Consolidation of the two proceedings will not cause material prejudice to any party. *Id.*

CDC proposes that if the cases are consolidated, CDC agrees to waive the 120-day statutory decision deadline in the PCB 11-90 appeal "by up to 35 days so that the two permit appeals may be heard and decided together."<sup>2</sup> Mot. Consol. at 2. In addition, CDC agrees to an extension of the Agency's deadline for filing the administrative record in PCB 11-90 so that the Agency may file "a single administrative record for both appeals 30 days from the date of filing of the [PCB 12-12 petition]."<sup>3</sup> *Id.* Finally, CDC represents that Agency counsel "has indicated that the Agency is not opposed to the relief sought in this Motion." *Id.*

The Board observes that its procedural rules allow for consolidating proceedings. Section 101.406 of those rules provides:

---

<sup>1</sup> The Board reminds that a motion to consolidate should be filed in each of the cases sought to be consolidated, rather than in just one of them.

<sup>2</sup> At the time that CDC filed the motion to consolidate, the statutory deadline for the Board to reach a final decision in the PCB 11-90 appeal was October 3, 2011. *See Congress Development*, PCB 11-90, slip op. at 2. CDC subsequently waived the statutory decision deadline in PCB 11-90 to November 7, 2011.

<sup>3</sup> A hearing officer order required the Agency to file the administrative record in the PCB 11-90 appeal by July 21, 2011. *See PCB 11-90 Hearing Officer Order* at 1 (June 30, 2011).

The Board, upon the motion of any party or upon its own motion, may consolidate two or more proceedings for the purpose of hearing or decision or both. The Board will consolidate the proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party. The Board will not consolidate proceedings where the burdens of proof vary. 35 Ill. Adm. Code 101.406.

The parties are the same in the PCB 11-90 and PCB 12-12 appeals, and the two appeals concern the same landfill. Both cases are permit appeals challenging denials of applications for significant permit modifications. The appeals are at a similar procedural juncture, having only recently been filed, and CDC's burdens of proof do not vary. According to CDC's motion for consolidation, the administrative records would have many of the same documents, and the appeals may have facts and legal issues that overlap. As proposed in the motion, a single administrative record for both appeals would be due for filing on August 8, 2011, and the appeals would share a decision deadline of November 7, 2011.<sup>4</sup> Further, the motion to consolidate is unopposed.

The Board finds that consolidating the two permit appeals for purposes of hearing is in the interest of convenient, expeditious, and complete determinations of the claims. The Board also finds that such consolidation would not cause material prejudice to either party. Under these circumstances, the Board grants CDC's motion to consolidate PCB 11-90 and PCB 12-12, with two exceptions. First, the appeals are consolidated only for purposes of hearing, not necessarily decision. *See, e.g., National City Environmental, LLC v. IEPA*, PCB 03-138, PCB 03-139, PCB 03-140 (consol.), slip op. at 3 (Mar. 20, 2003). Second, despite the apparent relationship between the two appeals, KCBX submitted two different applications to the Agency, one on January 27, 2011, as an expanded assessment monitoring report (PCB 11-90), and the other on December 13, 2010, as a corrective action remedy selection report (PCB 12-12). These applications ultimately resulted in two different Agency determinations, one on April 29, 2011 (PCB 11-90), and the other on June 3, 2011 (PCB 12-12). To avoid potential confusion that could result from a single administrative record of two Agency determinations, the Agency must file separate administrative records pursuant to 35 Ill. Adm. Code 105.212. *See, e.g., National City*, PCB 03-138, PCB 03-139, PCB 03-140 (consol.), slip op. at 2-3.

CDC has the burden of proof in each appeal. 415 ILCS 5/40(a)(1) (2010); *see also* 35 Ill. Adm. Code 105.112(a). Hearings will be based exclusively on the record before the Agency at the time the Agency issued its permit determination. *See* 35 Ill. Adm. Code 105.214(a). Accordingly, though the Board hearing affords a permit applicant the opportunity to challenge the Agency's reasons for denying the permit, information developed after the Agency's determination typically is not admitted at hearing or considered by the Board. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); *Community Landfill Co. & City of Morris v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

---

<sup>4</sup> *See* footnote 2.

Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(2) (2010)), which only CDC may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the applicable decision deadline, CDC “may deem the permit issued.” 415 ILCS 5/40(a)(2) (2010). The current decision deadline in each appeal is November 7, 2011, which is the first business day following the 120th day after the date on which the Board received the PCB 12-12 petition. *See* 35 Ill. Adm. Code 101.300(a), 105.114. The Board meeting immediately before the decision deadline is scheduled for November 3, 2011.

Unless the Board or the hearing officer orders otherwise, the Agency must file both administrative records by August 8, 2011, which is the first business day following the 30th day after the date on which the Board received the PCB 12-12 petition. *See* 35 Ill. Adm. Code 101.300(a), 105.212(a). If the Agency wishes to seek additional time to file either record, it must file a request for extension before the date on which the record is due to be filed. *See* 35 Ill. Adm. Code 105.116. Each record must comply with the content requirements of 35 Ill. Adm. Code 105.212(b). Future filings must reflect the amended caption of this order.

### **CONCLUSION**

The Board accepts CDC’s petition for review in docket PCB 12-12. The Board also grants CDC’s unopposed motion to consolidate the PCB 11-90 permit appeal with the PCB 12-12 permit appeal. However, the Board consolidates the appeals only for purposes of hearing, not necessarily decision, and requires the Agency to file separate administrative records, one for each of the two permit denials. The records must be filed by August 8, 2011, unless the Board or the hearing officer orders otherwise. The Board’s statutory deadline for rendering a final decision in each appeal is presently November 7, 2011, the Board meeting before which is scheduled for November 3, 2011.

### **SUMMARY**

1. The Board accepts CDC’s petition for review in PCB 12-12.
2. The Board grants CDC’s motion to consolidate PCB 11-90 and PCB 12-12, but the appeals are consolidated only for purposes of hearing, not necessarily decision, and the Agency must file separate administrative records pursuant to paragraph 3 below.
3. Unless the Board or the hearing officer orders otherwise, the Agency must file the following by August 8, 2011:
  - a. The administrative record of the Agency’s April 29, 2011 determination; and
  - b. The administrative record of the Agency’s June 3, 2011 determination

4. The current decision deadline in each permit appeal is November 7, 2011.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 21, 2011, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

---

John Therriault, Assistant Clerk  
Illinois Pollution Control Board