

ILLINOIS POLLUTION CONTROL BOARD
December 15, 1983

BROWNING-FERRIS INDUSTRIES, INC.)
OF IOWA,)
)
Petitioner,) PCB 83-85
) and
v.) PCB 83-88
) through
ILLINOIS ENVIRONMENTAL) PCB 83-96
PROTECTION AGENCY,)
)
Respondent.)

MR. STEWART R. WINSTEIN AND MS. DOROTHEA O'DEAN, WINSTEIN,
KAVENSKY, WALLACE AND DOUGHTY, APPEARED FOR PETITIONER;

MR. DONALD L. GIMBEL, ATTORNEY AT LAW, APPEARED FOR RESPONDENT.

OPINION AND ORDER OF THE BOARD (by D. Anderson):

This matter comes before the Board upon several petitions for review of permit denials filed by Browning-Ferris Industries, Inc., of Iowa (BFI). The appeals are of denials by the Illinois Environmental Protection Agency (Agency) of applications for supplemental wastestream permits for disposal of special waste at a sanitary landfill owned by BFI at 13606 Knoxville Road in Rock Island County. The appeals were consolidated by the Board by Orders entered July 26 and August 18, 1983. The following summarizes the cases:

PCB
83-85 Vacuum filter cake from the City of Moline, South Slope Plant, No. 830639, application filed March 30, 1983, denied June 13, 1983, appeal filed July 12, 1983.

83-88 Salt cakes from Nichols Homeshield, No. 830942, application filed June 2, 1983, denied June 16, 1983, appeal filed July 18, 1983.

83-89 Honing, shot-sand and spent welding from SARRI-ENM-T, No. 830665, application filed April 4, 1983, denied June 16, 1983, appeal filed July 18, 1983.

83-90 Oily filter material from Aluminum Company of America, No. 830889, application filed May 18, 1983, denied June 16, 1983, appeal filed July 18, 1983.

83-91 Parts tumbling process sludge from Extrusion Sciences Corp., No. 830690, application filed

PCB

- April 11, 1983, denied June 16, 1983, appeal filed July 18, 1983.
- 83-92 Flyash from John Deere Harvester Works, No. 822959, application to transfer filed March 21, 1983, denied June 20, 1983, appeal filed July 19, 1983.
- 83-93 Wastewater treatment sludge from Village of Milan, No. 822958, application to transfer filed March 21, 1983, denied June 20, 1983, appeal filed July 19, 1983.
- 83-94 Foundry waste, blast sand and dust from Rock Island Arsenal, No. 830667, application filed April 3, 1983, denied June 20, 1983, appeal filed July 19, 1983.
- 83-95 Vacuum filter cake from City of Moline, North Slope Plant, No. 830640, application filed March 30, 1983, denied June 20, 1983, appeal filed July 19, 1983.
- 83-96 Baghouse waste from Rock Island Arsenal, No. 830666, application filed April 4, 1983, denied June 20, 1983, appeal filed July 19, 1983.

The Agency filed the records on August 4 and 5, 1983, together with a motion for leave to file instanter, which is granted. A public hearing was held on September 19, 1983 at Rock Island.

A landfill development permit was issued to Mr. James Kiesow (Kiesow) and Mr. Melvin Mohr (Mohr) in August, 1981. An operating permit was issued to them on February 9, 1983. That same month they signed a letter of intent to sell the landfill to BFI, and requested transfer of the permits. Two supplemental wastestream permits were issued on February 25 and March 8. On the latter date the landfill was sold to BFI, and a transfer of the supplemental permits was requested. The operating and development permits were transferred, and eight new supplemental wastestream applications were filed. In May, 1983 the Agency concluded that issuance of the two wastestream permits to Kiesow and Mohr had been wrong since they were the first special wastes approved for the facility, making it a "new regional pollution control facility", requiring local government site location suitability approval (local government approval) (Sections 3 and 39.2 of the Environmental Protection Act (Act)). The Agency then denied the requests to transfer the two permits, and denied all new applications. The following is a more complete chronology:

March 5, 1981 Landfill development application received from Kiesow (Ex. 1).

June 3, 1981 Development permit denied (Ex. 8).

June 23, 1981 Application refiled (Ex. 9).

July 1, 1981 Cut-off date for "new regional pollution control facilities".

August 28, 1981 Development permit issued to Kiesow and Mohr (Ex. 12).

November, 1981 Kiesow and Mohr offer to sell landfill to BFI (R. 68).

November 18, 1981 Effective date of §39.2 of the Act, requiring local government approval of "new regional pollution control facilities"

April 28, 1982 Letter of intent to sell landfill to BFI signed (Ex. 39)

July, 1982 Negotiations on sale of landfill broken off (R. 26)

December 23, 1982 Applications for special wastestream permits Nos. 822958 and 822959 (Ex. 14A and 14B).

January, 1983 Negotiations on sale of landfill resume (R. 26)

February 9, 1983 Operating permit issued to Kiesow and Mohr (Ex. 16)

February 18, 1983 Letter of intent to sell landfill to BFI signed (Ex. 40).

February 24, 1983 Request for transfer of operating permit (Ex. 17).

February 25, 1983 Special wastestream permit No. 822958 for vacuum filter sludge from the Village of Milan issued to Kiesow and Mohr (Ex. 18).

March 8, 1983 Special wastestream permit No. 822959 for flyash from the John Deere Harvester Works issued to Kiesow and Mohr (Ex. 19).

March 8, 1983 Landfill sold to BFI (Ex. 42).

March 16, 1983 Request mailed for transfer of special wastestream permits No. 822958 and 822959 (Ex. 20).

March 21, 1983 Request received by Agency.

March 24, 1983 Operating permit transferred to BFI (Ex. 21).

March 30, 1983 Special wastestream applications for vacuum filter cake, Nos. 830639 and 830640 (Ex. 22A and 22B).

April 4, 1983 Special wastestream applications: for honing, shot sand and spent welding, No. 830665; baghouse waste, No. 830666; and, foundry waste, blast sand and dust, No. 830667; (Ex. 23A-C).

April 11, 1983 Special wastestream application for parts tumbling sludge, No. 830690 (Ex. 24).

May 18, 1983 Special wastestream application for oily filter material, No. 830889 (Ex. 27).

May 24, 1983 Internal Agency memorandum concluding that the site is a "new regional pollution control facility" subject to local siting requirements (Ex. 45).

June 2, 1983 Special wastestream application for salt cakes, No. 830942 (Ex. 29).

June 13, 1983 Supplemental wastestream permit No. 830639 denied (Ex. 30)

June 16, 1983 Development permit 1981-52-DE transferred to BFI (Ex. 31)

Supplemental wastestream permits Nos. 830942, 830665, 830889 and 830690 denied (Ex. 32A-D).

June 20, 1983 Transfer of supplemental wastestream permits Nos. 822958 and 822959 for Milan vacuum filter sludge and Deere flyash, issued to Kiesow and Mohr on February 25 and March 8, 1983, denied to BFI (Ex. 33).

June 20, 1983 Other supplemental wastestream permits (Nos. 830640, 830666 and 830667) denied (Ex. 34A-C).

Section 39(c) of the Act provides that the Agency may not grant permits to "new regional pollution control facilities" without local government siting approval under Section 39.2. "New regional pollution control facilities" is defined in Section 3:

- 1) a regional pollution control facility initially permitted for development or construction after July 1, 1981; or,
- 2) the area of expansion beyond the boundary of a currently permitted regional pollution control facility; or
- 3) a permitted regional pollution control facility requesting approval to store, dispose of, transfer or incinerate, for the first time, any special or hazardous waste.

Section 39(c) was added effective November 18, 1981, but was retroactive to July 1, 1981 with respect to facilities initially permitted for development or construction. No retroactive date was specified for requests for approval to dispose of, for the first time, any special waste.

The development permit was issued on August 28, 1981, during the gap between July 1, 1981, when the local siting approval process became effective for newly permitted sites, and November 18, 1981, when the law was signed. There is no indication of any local approval of the development permit. The Agency apparently issued and transferred the operating permit without raising this issue. The Board has previously addressed the retroactive application of the local siting approval process, determining that the Agency could not issue permits without such approval during the gap (John Prior v. IEPA, PCB 81-165, 44 PCB 189, and ZYX Dixon Corp. v. IEPA, PCB 81-167, 44 PCB 191). The Board will not address the statutory arguments of the parties in detail, finding some of them to be misfocused. The Board finds that the Agency denial of supplemental permit was correct as the record does not indicate that an SB 172 local approval process had at any time occurred. The Board also agrees with the Agency that its issuance of special wastestream permits to Kiesow and Mohr was in error.

BFI's central argument is that the Agency issued the first two supplemental permits to Kiesow and Mohr, that BFI relied on this issuance, in good faith to its detriment, and that the Agency is therefore equitably estopped from denying the transfers of the supplemental permits and issuance of the other permits. The elements of the doctrine of equitable

estoppel were set forth as follows in Willowbrook Development Corporation v. Illinois Pollution Control Board, 92 Ill. App. 3d 1074, 48 Ill. Dec. 354, 416 N.E. 2d 385 (1981):

1. Words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts.
2. Knowledge on the part of the party against whom the estoppel is alleged that representations made were untrue.
3. The party claiming the benefit of an estoppel must have not known the representations to be false either at the time they were made or at the time they were acted upon.
4. The party estopped must either intend or expect that his conduct or representations will be acted upon by the party asserting the estoppel.
5. The party seeking the benefit of the estoppel must have relied or acted upon the representations; and,
6. The party claiming the benefit of the estoppel must be in a position of prejudice if the party against whom the estoppel is alleged is permitted to deny the truth of the representations made.

Application of estoppel in this case would serve to deny the public the right to a hearing before local government before the first special waste is accepted. Estoppel will not be applied where it would defeat the operation of a policy adopted to protect the public [Tri-County Landfill Company v. IPCB, 41 Ill. App. 3d 249, 353 N.E. 2d 316 (1976)].

90-day Rule

BFI mailed the request to transfer on March 16, 1983; the Agency received it on March 21 (R. 60, Ex. 20). Section 39(a) of the Act provides that:

"If there is no final action by the Agency within 90 days after the filing of the application for permit, the applicant may deem the permit issued;..."

The 90 days starts with the "filing of the application", which occurred on March 21. The ninetieth day was Sunday, June 19, 1983. As provided by 35 Ill. Adm. Code 101.105 and Ill. Rev. Stat. 1981, ch. 1, par. 1012, the following Monday, June 20, was within the 90-day period. This was the day on which the Agency took its "final action" on the transfer requests.

BFI argues that the 90 days should be presumed to have started with March 18, two days after the date of mailing of the request to transfer. The Act specifies the date of "filing". The Agency has established through testimony concerning its routine practices that this happened on March 21.

Conclusion

The Board concludes that the Agency was correct in refusing to transfer supplemental wastestream permits Nos. 822958 and 822959, and therefore will affirm the Agency in PCB 83-92 and PCB 83-93. The Agency was also correct in denying supplemental wastestream permits Nos. 830639, 830640, 830665, 830666, 830667, 830690, 830889 and 830942, and the Board will therefore also affirm the Agency in PCB 83-85, PCB 83-95, PCB 83-89, PCB 83-96, PCB 83-94, PCB 83-91, PCB 83-90 and PCB 83-88.

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

ORDER

1. The Illinois Environmental Protection Agency's June 13, 1983 denial of supplemental wastestream permit No. 830639 is affirmed.
2. The Illinois Environmental Protection Agency's June 16, 1983 denial of supplemental wastestream permit Nos. 830665, 830690, 830889 and 830942 is affirmed.
3. The Illinois Environmental Protection Agency's June 20, 1983 denial of Browning-Ferris Industries, Inc. of Iowa's request to transfer supplemental wastestream permits Nos. 822958 and 822959 is affirmed; and
4. The Illinois Environmental Protection Agency's June 20, 1983 denial of supplemental wastestream permit Nos. 830640, 830666 and 830667 is affirmed.

IT IS SO ORDERED.

Board Members J. Dumelle and J.T. Meyer concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 15th day of December, 1983 by a vote of 7-0.

Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board