ILLINOIS POLLUTION CONTROL BOARD
May 18, 1995

PENNY SNYDER, GEORGE J. MORAN, ROBERT D. LARSON, GEORGE ARNOLD, JIM BENSEN, MADISON COUNTY CONSERVATION ALLIANCE and PIASA PALISADES GROUP OF THE SIERRA CLUB,	)	
Complainants,	)	
v.	)	PCB 95-1 (Enforcement - Land)
WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
Respondent.	)	

ORDER OF THE BOARD (by E. Dunham):

On January 4, 1995, Penny Snyder, George J. Moran, Robert D. Larson, George Arnold, Jim Bensen, Madison County Conservation Alliance and Piasa Palisades Group of the Sierra Club (Citizens), filed a citizen's enforcement complaint against Waste Management of Illinois, Inc. (WMII) for the operation of its landfill, known as the Chain-of-Rocks landfill, located on Chouteau Island in the Mississippi River in Madison County Illinois. The Citizens amended their complaint on January 31, 1995. This matter is before the Board today pursuant to Section 31(a)(2) of the Act and the Board's procedural rule at 35 Ill. Adm. 103.124(a). The Board's procedural rules require a determination to be made as to whether a citizen's complaint is frivolous or duplicitous. Additionally, the Board will rule on motions to dismiss the complaint and amended complaint filed by WMII.

Specifically the Citizens allege that WMII's landfill expansion, which received permitting by the Illinois Environmental Protection Agency (Agency) in Supplemental Permit No. 1994-089-SP, violates Section 39.2 of the Environmental Protection Act (Act) because WMII never received local siting approval from Madison County. (Amend. Comp. at 2-3.)[1] (415 ILCS 5/39.2 (1993).) According to the complaint, the proposed expansion would go beyond the current waste mound, and such expansion requires local siting pursuant to Section 39.2 of the Act. (Amend. Comp. at 2-5.) Additionally, in the amended complaint, the citizens allege "...that Waste Management will cause or threaten to cause pollution of the ground waters of the area and pollution to the Mississippi River if its plan of expansion of the Chain of Rocks Landfill goes into effect."

---

[1]The Citizens' amended complaint will be referenced as "Amend. Comp. at ".

(Amend. Comp. at 6.) In support of this allegation the Citizens cite to an Agency Press Release dated November 15, 1994, from the director, Mary A. Gade, that states the Agency's concerns about the location of the landfill, and to Exhibit #6 of the amended complaint concerning the probability of water exceeding the 25-year protective levees at the site. (Amend. Comp. at 6.) The Citizens, however, do not specify any provisions of the Act or Board regulations that are being violated as the result of the alleged water pollution. The Citizens further state that, while Landfill, Inc. v. The Pollution Control Board, 25 Ill.Dec. 602, 74 Ill.2d 541, 387 N.E.2d 258, does not allow the Board to review the actions of the Agency, Landfill does allow for citizens to file a complaint against anyone "...violating the Environmental Protection Act even though the alleged polluter has received a permit from the Agency." (Amend. Comp. at 1.)[2]

On January 18, 1995 and again on February 10, 1995 WMII filed motions to dismiss the Citizens' complaint and amended complaint. In both motions, WMII claims that the complaint and amended complaint are frivolous and duplicitous. WMII argues that this matter should be dismissed because, taking the facts alleged as true, it is not operating in violation of Section 39.2 of the Act and that the Citizens' mere assertion that the location of the landfill is unlawful, without further evidentiary showing of which sections of the Act or Board regulations are being violated, makes this amended complaint frivolous. (Mot. at 2.)[3] In addition, WMII argues that the Board's Inquiry Hearing (Docketed as R94-34) concerning landfill facilities located in the 100-year floodplain causes this action to be duplicitous. (Mot. at 2-3.) For these reasons, WMII requests the Board to dismiss the complaint with prejudice.

On May 1, 1995 the Citizens filed an answer to WMII's motion to dismiss. The Citizens argue that the motion to dismiss should not be considered by the Board because the Act does not contemplate WMII's motion to dismiss and the use of the Civil Practice Act. Further, the Citizens argue that they have the right to file an enforcement action, citing to Mystik Tape v. Illinois Pollution Control Board, 16 Ill.App.3d 778, 304 N.E.2d

---

[2]In addition to the specified allegations above the Citizens' also allege that the Agency's order violated Sections 3.32(B) and 3.88 of the Act. (415 ILCS 5/3.32 and 5/3.88 (1992).) It is unclear as to whether the Citizens' are claiming that WMII is violating those sections, however, both sections are definitions and do not create any requirement that can be violated and, secondly, the Agency is not a party to this action. For these reasons the Board will not entertain such allegations.

[3]WMII February 10, 1995 motion to dismiss will be referenced as "Mot. at ".

574, and that pursuant to M.I.G. Investments, Inc v. IEPA, 119 Ill.Dec. 533, 523 N.E.2d 1, there is a landfill expansion occurring which requires WMII to receive local siting in order to be lawfully issued the supplemental permit by the Agency. Finally, the Citizens argue that there is water and groundwater pollution in violation of State law.

On May 2, 1995, pursuant to 35 Ill. Adm. Code 101.243(a), WMII filed a motion to strike the Citizens' answer to its motion to dismiss for untimeliness. WMII argues that, pursuant to the Board's general procedural rules at 35 Ill. Adm. Code 101.241(b) and the Board's enforcement procedural rule set forth at 35 Ill. Adm. Code 103.140(c), there is a seven (7) day response time to motions. WMII additionally argues that failure to respond to the motions within the seven (7) days can be deemed as waiving objection to the motion.

Pursuant to the Act's general grant of authority for the Board to adopt regulations in Section 5 and the specific authority to adopt procedural rules set forth in Section 26 of the Act, the Board has adopted procedural regulations which are to be followed by all persons practicing before the Board. The Board, if it so chooses, can waive a procedural requirement on its own motion or a motion of a party practicing before the Board. These are the only situations where a Board procedural rule would not apply.

The Board's procedural rule at 35 Ill. Adm Code 103.140(a) allows for a respondent in an enforcement action to file a motion to dismiss within fourteen (14) days of the receipt of the complaint. The complainant has seven (7) days to respond to a respondent's motion to dismiss pursuant to Section 103.140(c); there is no right for a reply from the respondent. Pursuant to 35 Ill. Adm. Code 103.140(c), the Citizens were to have responded by February 24, 1995. The Citizens' answer (response) was filed May 1, 1995, approximately eighty (80) days after the filing of the motion to dismiss. WMII filed a response to the answer on May 2, 1995, however, it did not request leave of the Board to do so. Neither the Citizens' answer nor WMII's response are properly before the Board. Notwithstanding, the Board will allow and consider both filings. For the reasons stated below, the Board finds the allegation of violation of Section 39.2 frivolous, grants WMII's motion to dismiss and dismisses the other counts of the complaint for being insufficiently plead.

REGULATORY BACKGROUND

As stated previously, pursuant to Section 31(a)(2) of the Act and the Board's procedural rules the Board must make a determination as to whether a citizen's enforcement complaint is frivolous or duplicitous. (415 ILCS 5/31(b) (1992).) Section

103.124(a) of the Board's procedural rules, which implements Section 31(b) of the Act, provides:

> ... If a complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the Board agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the *filing of motions regarding the insufficiency of the* pleadings. (35 Ill. Adm. Code 103.124.)

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. (Brandle v. Ropp, PCB 85-68, 64 PCB 263 (1985).) An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. (Citizens for a Better Environment v. Reynolds Metals Co., PCB 73-173, 8 PCB 46 (1973).)

DISCUSSION

The Board will consider WMII's motion to dismiss, finding that it is timely filed. Pursuant to 35 Ill. Adm. Code 103.140(a) a respondent may file within fourteen (14) days of receipt of a complaint a motion to dismiss. In this case WMII met the requirement by filing its motion to dismiss on February 10, 1995 and therefore is properly before the Board.

Regarding those portions of the amended complaint alleging that WMII's proposed expansion causes or threatens to cause water pollution, the Citizens failed to make references to the provision of the Act and/or Board regulations which the respondent is allegedly violating. The Board's procedural rule at 35 Ill. Adm. Code 103.122(c)(1) states that the formal complaint shall contain "[a] reference to the provision of the Act and regulations which the respondents are alleged to be violating." Therefore, as to that claim, the Board dismisses the amended complaint and therefore need not make a frivolous and duplicitous determination as to the alleged water pollution.[4]

The Board, however, will make a determination as to whether the amended complaint is frivolous or duplicitous concerning the

---

[4]The Board's dismissal of the allegations that WMII is causing or threatening to cause groundwater or water pollution today does not prohibit a future filing that meets the requirements of 35 Ill. Adm. Code Part 103.

Citizens' allegation of a violation of Section 39.2 of the Act. Regarding whether the complaint is duplicitous as stated above, the Board has determined that a citizen's enforcement action is duplicitous if the matter is identical or substantially similar to one brought in another forum. WMII argues that the matter is duplicitous because the Board has initiated an inquiry hearing docketed as R94-34 to address the issue of location of a landfill in a floodplain.[5] The Board disagrees with WMII's conclusion. The Citizens' amended complaint is not duplicative of another enforcement action pending before the Board. The pendency of an inquiry hearing before the Board wherein a facility's operations are not directly at issue, does not create a shield against enforcement for that facility. Finally, there is no evidence that the matter is identical or substantially similar to one brought in another forum. Therefore, the Board finds that the remaining alleged violation of Section 39.2 of the Act is not duplicitous.

Nonetheless, while the complaint is not duplicitous, WMII argues that the portion of the complaint which alleges a violation for failure to obtain siting approval pursuant to Section 39.2 of the Act should be dismissed on the basis that siting is not required and therefore the complaint is frivolous. We agree with WMII and therefore find that the complaint fails to state facts upon which relief can be granted.

Illinois' siting law, sometimes known as SB-172, provides for local approval for the siting of all pollution control facilities, and expansions thereof, in the State of Illinois. Codified at Sections 3.32, 39(c), 39.2 and 40.1 of the Act, the siting law provides that before a permit to develop or construct a "new pollution control facility" can be issued by the Agency, a County board or municipal government must first approve the siting request for each new pollution control facility. (415 ILCS 5/39(c) (1993).)[6] Specifically, Section 39(c) states "... no permit for the development or construction of a new regional

---

[5]The Agency formally requested the Board on December 4, 1994, to hold an inquiry hearing concerning the Board's regulations on landfills and transfer stations located in floodplains. The Board granted the request by order of December 14, 1994 and will a public hearing in June of 1995. In this case, the inquiry hearing will address the issue of any public health or environmental impact resulting from hazardous or nonhazardous landfills being located in Illinois' 100-year floodplains.

[6]The legislature in P.A. 88-681, which became effective December 22, 1994, removed the word "regional" in reference to pollution control facilities.

pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of said facility has been approved by the County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area, in which the facility is to be located in accordance with Section 39.2 of this Act." Additionally, Section 39(c) sets forth an exemption to the requirement of demonstrating to the Agency that the applicant has received local siting. The language of Section 39(c) states:

> In the case of a regional pollution control facility for which a development permit was issued before November 12, 1981, if an operating permit has not been issued by the Agency prior to August 31, 1989 for any portion of the facility, then the Agency may not issue or renew any development permit nor issue an original operating permit for any portion of such facility unless the applicant has submitted proof to the Agency that the location of the facility has been approved by the appropriate county board or municipal governing body pursuant to Section 39.2 of this Act.

Therefore in order to receive a development or construction permit, the applicant must demonstrate to the Agency that it either has received local siting or falls within the exemption. The Agency then determines if the applicant has met the requirement or meets the exemption, and issues the permit. Thus local siting is not necessarily required for all pollution control facilities.

In this case WMII claims that its landfill meets the requirements of an exemption contained in Section 39(c) of the Act and that its landfill expansion is not a new pollution control facility as defined by Section 3.32 of the Act. (415 ILCS 5/3.32 (1992).) A new pollution control facility is defined by the Act at Section 3.32 as follows:

> (b) A new pollution control facility is:
>
> (1) a 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 pollution control facility; or
>
> (3) a permitted pollution control facility requesting approval to store, dispose of, transfer or incinerate, for the first time, any special or hazardous waste. (415 ILCS 5/3.32 (1992).)

The Appellate Courts have determined that facilities initially permitted prior to 1981 are not required to receive local siting

approval prior to issuance of a permit. (See Village of Hillside v. John Sexton Sand and Gravel Corporation, (1982) 105 Ill.App.3d 533, 61 Ill. Dec. 229, 434 N.E.2d 382 and American Fly Ash Company v. County of Tazwell, (1983), 120 Ill. App.3d 57, 75 Ill.Dec. 627, 457 N.E.2d 1069.) WMII states that the landfill was originally permitted in 1972 by the Agency and that Supplemental Permit No. 1994-089-SP is not expanding the operations of the landfill beyond the boundaries of the originally permitted facility. The Agency's supplemental permit which was attached to the Citizen's amended complaint as Exhibit #7 states on page 3, "[e]xcept as modified in the above documents, the site shall be developed and operated in accordance with the terms and conditions of Permit No. 1972-63-DE/OP and 1991-095-SP dated September 1972 and August 24, 1992 and with other permits issued for this site." WMII motion to dismiss includes a facility map which describes the new portion of landfill which the supplemental permit was issued so that WMII can begin operation in compliance with Section 21(t) of the Act and 35 Ill. Adm. Code 814.109(e). (415 ILCS 5/21(t) (1992).) The Citizens utilized the same map as WMII in its answer to the motion to dismiss to demonstrate where flooding occurred and how the expansion will be effected. The portion of the landfill for which WMII received a supplemental operating permit for does not go beyond the boundaries of the already permitted landfill as described by Permit No. 1972-63-DE/OP. The fact that this has been termed a "lateral expansion" pursuant to 35 Ill. Adm. Code Part 814 does not necessarily make it a new pollution control facility which would require local siting prior to te issuance of a permit pursuant to Section 39(c) of the Act.

The Citizens argue that the planned expansion must be presumed to be beyond the originally permitted boundaries because the "...application for the expansion did not contain a legal description or any description describing where the boundaries of the previously permitted landfill were." The Citizens cite to Waste Management of Illinois, Inc. v. Illinois Environmental Protection Agency, (July 21, 1994), PCB 94-153, and also claim that it is an expansion because it is expanding beyond the waste footprint. The Citizens, however, are misapplying the Board's findings in that case. The Board's determination was that the waste footprint is not the sole factor in determining that there was an expansion which required local siting. In fact, the Board goes on to find that there was no expansion and states that "...had Christian County established a waste 'footprint' in its resolutions, any proposed extension would almost certainly require an additional siting approval." In that case the Board determined that the waste footprint can limit the area of the landfill that is being utilized if such waste footprint is established by the local unit of government. The original permit in this case has not established a waste "footprint" and therefore in determining whether an expansion is occurring, the Board cannot look to a waste "footprint" for guidance. The area

of the landfill for which WMII has received a supplemental permit lies within the boundaries of the originally permitted landfill site. Since the area that received the supplemental permit is not beyond the originally permitted boundaries, there is no expansion.

Accordingly, in the instant case, WMII is not a new pollution control facility because the area of expansion is not beyond the original boundaries that were permitted prior to 1981, and WMII is not requesting approval to store, dispose of, transfer or incinerate, for the first time, any special or hazardous waste. Based on the evidence in the record, the Board finds that the proposed expansion for which WMII received a development permit is for an area of the landfill which was permitted in 1972 by Permit No. 1972-63-DE/OP. Since WMII is operating under a permit which was issued prior to 1981, and the expansion is not considered a new pollution control facility, the Board grants WMII's motion to dismiss with prejudice.

For the reasons stated above, we find that the remaining alleged violation in this matter is frivolous. This matter is dismissed with prejudice as to the allegation of a violation of Section 39.2 of the Act, and the docket is closed.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 18th day of May, 1995, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board