ILLINOIS POLLUTION CONTROL BOARD
March 19, 1987

HILLVIEW FARMS FERTILIZER, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 86-18
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Intervenors.	)	

MR. JAMES R. MORRIN AND MR. LEONARD KURFIRST, WILDMAN, HAROLD, ALLEN & DIXON APPEARED ON BEHALF OF PETITIONERS;

MS HEIDI HANSON & MR. STEVE EWART APPEARED ON BEHALF OF RESPONDENT; AND,

MR. MATTHEW DUNN, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF INTERVENORS.

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

This matter comes before the Board upon a January 31, 1986 permit appeal filed on behalf of Hillview Farms Fertilizers, Inc. (Hillview) seeking reversal of the Illinois Environmental Protection Agency's (Agency) denial of Hillview's application to renew and modify its existing permit for the land injection of industrial non-hazardous sludge.

Hillview owns and operates a facility which accepts and stores non-hazardous industrial process sludge from certain specified generators. Hillview applies this sludge to approximately 600 acres* of farmland located in Richmond, McHenry County, Illinois. This sludge is applied 10 to 20 inches below

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* This figure of 600 acres was supplied by Hillview in its petition for review. However, a dispute exists over the exact amount of acres Hillview injects, and this figure is used for descriptive purposes only and does not constitute a finding by the Board on this point.

the surface of the ground by means of injection units. (Pet. p. 2).

Procedural History

On September 25, 1985, Hillview filed with the Agency an application consisting of a renewal and modification of its existing permit which was due to expire on February 1, 1986. The application requested to operate as in the past, but with an increase in capacity from 17 to 22 million gallons per year. In connection with this volume increase, Hillview also requested permission to extend one of its existing feed lot tanks to add approximately 2.1 million gallons to its existing storage capacity. (Pet. pp. 3-4).

On December 3, 1985, the Agency requested additional information and Hillview responded on December 6, 1985. On December 11, 1985, a public hearing was held at which numerous members of the public testified as well as witnesses from Hillview. (Agency Record, Vol. 1). Hillview submitted additional information in response to concerns expressed at the public hearing. The record closed on December 20, 1985. (Pet. pp. 4-5).

On January 17, 1987, the Agency denied Hillview's application listing eight reasons for the denial. This appeal followed (Id. p. 5). Hearings on Hillview's permit appeal were held on August 28, 29; September 8, 9; and October 27, 28 and 31, 1986. Briefs were filed by Hillview, the Attorney General on behalf of the People of Illinois and the Agency on December 19, 1986, January 26, 1987 and January 27, 1987, respectively. Hillview filed a reply brief on February 11, 1987.

Motion to Dismiss

The first matter to be addressed by the Board in this permit appeal is the Attorney General's Motion to Dismiss this appeal which was denied with leave to renew the motion at hearing by Board Order dated March 14, 1986. The motion was renewed at hearing and the parties presented additional argument on this motion at hearing. (R. pp. 32-53). Prior to ruling on this motion, the Board believes that it would be useful to outline the procedural scenario of the instant appeal as it relates to the dismissal issue.

On January 17, 1986, the Agency denied Hillview's application to renew and modify its existing operating permit. (first application). On January 22, 1986, Hillview reapplied to the Agency for renewal of its existing operating permit but did not include in its reapplication a request to modify the existing permit. (second application). In other words, Hillview attempted to renew as well as modify its existing permit in the

first application, and after denial of the first application, Hillview reapplied only for the renewal of its existing permit. Then, on January 31, 1986, Hillview filed an appeal with the Board concerning the first application.

The Attorney General and the Agency argue that the procedural scenario of this permit appeal is identical to the scenario in Caterpillar Tractor Co. v. Illinois Environmental Protection Agency, 54 PCB 259, October 19, 1983, and, since the permit appeal in Caterpillar was dismissed this permit appeal must also be dismissed. The procedural scenario in Caterpillar and the instant appeal was: the Agency permit decision, the reapplication and then, the filing of the appeal. The Attorney General and the Agency cite Caterpillar for the proposition that when the same permit is the subject of a pending permit application and a permit appeal, the appeal must be dismissed as there is no final action by the Agency for the Board to review under Section 40 of the Environmental Protection Act. Caterpillar, at 260. They go on to argue that application of this proposition to the instant case requires the Board to dismiss this appeal.

Hillview does not dispute that the procedural scenario in Caterpillar is identical to the instant appeal, rather, Hillview argues that the facts of its appeal differ to such an extent that it is distinguishable from Caterpillar. Hillview argues that the second application is different from the first application in that the second application does not request a modification of the existing operating permit; the second application only seeks renewal. Hillview goes on to argue that it has a right to appeal the modification issue to the Board and if the Board were to grant the motion to dismiss it would deprive Hillview of its right under Section 40(a) of the Act to appeal the Agency's decision.

As to the issue of modification of the existing operating permit, the motion to dismiss is denied. As to the issue of renewal of the existing operating permit, the motion to dismiss is granted as the Board finds the second application to be identical to the renewal request in the first application and, therefore, Caterpillar dictates that this portion of the appeal be dismissed until the Agency has rendered a final decision on this matter.*

As to the modification issue, Hillview is correct in arguing that the facts of this appeal are distinguishable from those in Caterpillar. In Caterpillar, the Agency issued a permit to

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* The Board notes that the Agency denied Hillview's renewal request and Hillview has appealed that decision to the Board. That action is docketed PCB 86-70.

Caterpillar with conditions. Caterpillar requested the Agency to reconsider its decision and also stated that it may file an appeal of the decision. The Agency reopened the application, and Caterpillar filed an appeal. The Agency filed a motion to dismiss the appeal and the Board granted the motion stating that:

> "Since the same permit is the subject of a pending permit application and this appeal, there was not final action by the Agency ... for the Board to review under Section 40 of the Act. This appeal is dismissed" Caterpillar, 54 PCB at 260.

The appeal in Caterpillar focused on the permit conditions on which the Agency had decided to reopen discussion. The issues in the permit appeal were the same as those to be addressed in the reapplication. However, in the instant case, the issues to be addressed in the permit appeal and the reapplication are different in that Hillview wishes to appeal the modification issues which are not part of the reapplication. The Board cannot deprive Hillview of its right to appeal these issues.

The Board notes that the procedural scenario in the instant appeal is identical to the scenario in Caterpillar. However, Caterpillar cannot be read so broadly as the Attorney General and the Agency would suggest. Procedural identity does not trigger dismissal of the appeal under Caterpillar, rather, identity of the factual issues underlying the permit appeal and the permit reapplication triggers dismissal of the appeal under Caterpillar. Thus, the portion of the appeal which deals with the renewal of Hillview's existing operating permit must be dismissed as it presents factual issues which are identical to those which are the subject of a pending permit application. As stated previously, the Agency has rendered a decision on the renewal application which is the subject of an appeal in PCB 86-70. Review of the Agency's decision on the renewal application will be addressed in that proceeding.

The only remaining issue to be addressed by the Board is Hillview's request to expand its waste storage area and its request to accept additional sludge volume (i.e., the modification portion of the permit application). The Agency denied both requests in its January 17 denial letter the reasons for which are as follows:

> 1. The Agency has determined that the proposed waste storage pit expansion is a new regional pollution control facility pursuant to the Environmental Protection Act under Section 3(X). The proposed waste storage pit represents a physical expansion of the facility and

as such is expanding its area currently permitted for storage. Pursuant to Section 39(c) of the Environmental Protection Act "... no permit for the development or construction of a new regional 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..." Therefore, you must obtain the McHenry County Board approval prior to the Agency approving the construction of the new storage pit.

2. The Agency has noted in numerous site visits during the periods when you cannot apply on the farm fields that the storage tanks have become nearly completely full of sludge. As such, the Agency cannot approve additional large quantities of sludge such as Griffith Laboratories (Chicago).

At hearing, Hillview made the following stipulation:

> "Hillview hereby stipulates for purposes of this appeal only, and for no other purpose, that the Agency's refusal in its permit denial letter of January 17, 1986 to approve the receipt by Hillview of additional large quantities of sludge was not arbitrary and capricious and was justified by the record before the Agency at the time of the denial -- I guess the denial letter." (R. at 1494).

This stipulation resolves the issue set forth in paragraph 2 of the denial letter in that it states that the Agency's refusal to approve the receipt of additional large quantities of sludge was justified by the record. However, such a stipulation does not resolve the issue presented in paragraph 1 of the denial letter and cannot, by itself, support affirmance of the Agency's January 17 decision. Therefore, the Board will address the issue presented in paragraph 1 of the denial letter.

The issue presented in the paragraph 1 is whether Hillview's proposed waste storage pit expansion is a new regional pollution control facility, as that term is defined in the Act, thereby requiring local siting approval under Section 39.2 of the Act before the Agency can issue a permit for development of the new storage pit. The Attorney General and the Agency argue that the

proposed expansion would be an "area of expansion beyond the boundary of a currently permitted regional pollution control facility," and, therefore, falls within the definition of a new regional pollution control facility pursuant to Section 3(x)2 of the Act, thereby triggering local review under Section 39.2 of the Act.

Hillview, on the other hand, argues that the Agency had previously determined that the construction of the additional tankage would not cause it to fall within the siting requirements for new regional pollution control facilities and, notwithstanding this determination, that the Second District Appellate Court in M.I.G. Investments, Inc. et al. v. Illinois Environmental Protection Agency, et al. ___ Ill. App. 3d ___, No. 2-84-734, October 15, 1986, rendered the question moot. Hillview argues that in M.I.G. Investments the applicant sought to increase the volume of wastes to be deposited on its lands within the geographical boundaries of its approved site, and the Court held that such an increase did not trigger local siting approval under Section 39.2 of the Act. Hillview argues that it seeks to increase the volume of waste to be stored on its lands within the geographical boundaries of its own site, and therefore the holding in M.I.G. Investments controls.

A "regional pollution control facility" is defined in Section 3(x) of the Act as:

> any waste storage site, sanitary landfill, waste disposal site, waste transfer station or waste incinerator that accepts waste from or serves an area that exceeds or extends over the boundaries of any local general purpose unit of government ..."

A "new regional pollution control facility" is defined in the same Section as:

> 1. a regional pollution control facility initially permitted for development or construction after July 1, 1981; or
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> 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.

The focus of the current controversy is whether Hillview's proposed waste storage expansion falls with the definition of new regional pollution facility in Section 3(x)2 of the Act.

M.I.G. Investments is the most recent case interpreting Section 3(x)2 of the Act. In M.I.G. Investments, the applicant submitted an application to the Agency for a supplemental permit to increase the maximum elevation of its landfill. The Agency denied the application and the applicant appealed the decision to the Board. The only issue on appeal was whether the proposed vertical extension of an existing landfill required local siting approval. The Board held that the "area of expansion beyond the boundary" of an existing facility included vertical extensions of existing landfills. Therefore, the applicant had to go through the local siting requirement pursuant to 39.2 of the Act. 65 PCB 261, August 15, 1985. The Court reversed the Board's decision and held that the definition of a new regional pollution control facility set forth in Section 3(x)2 of the Act does not include vertical extension to existing landfills. M.I.G. Investments, slip op. at 12.

For the following reasons, the Board finds that Hillview's proposed waste storage pit expansion does not constitute a new regional pollution control facility, and, therefore, does not require local siting approval prior to the Agency issuing a permit for development of the waste storage pit expansion.

The Court in M.I.G. Investments was dealing with the vertical expansion of an existing landfill. The Court pointed out that increasing the vertical capacity of a landfill does not involve use of any new land and does not alter the geographical relationship of the fill to its neighbors, that Section 3(x)2 of the Act applies only to lateral growth which involves a new area outside the landfill's existing boundaries and that the legislature intended to limit local review primarily to the propriety of the location of the landfill, not its capacity. M.I.G. Investments, slip op. at 9.

While the facts in Hillview are not identical to those in M.I.G. Investments, the rationale the Court applied to determine whether local siting review is triggered is very useful. The Court determined that local review is triggered when a facility seeks to expand laterally into new area outside its existing boundaries in such a way that the geographical relationship of the facility to its neighbors is altered. Such a "new" location was intended to be submitted to local review. Id.

Hillview seeks to expand laterally into a new area within its existing boundaries. Hillview does not seek to expand beyond its existing boundaries. In addition, even though expansion of the storage pits does involve "new" land, such a "new" location as this expansion will necessarily occupy does not alter to any

appreciable degree the geographical relationship of the storage pits to the neighbors of Hillview's existing facility. Furthermore, the type of intra-facility modification which Hillview seeks is not the type of modification the legislature intended to be submitted to local review. The Board notes that such an intra-facility expansion as requested here does not pertain to location, rather, the expansion pertains to capacity and, according to M.I.G. Investments, should not trigger local review. However, in holding that Hillview's intra-facility modification does not trigger local review under Section 39.2 of the Act, the Board does not intend to exempt all intra-facility modifications from local review.

The Board notes that such an intra-facility expansion cannot proceed without the necessary permits being issued by the Agency. The local community can, as was the case in Hillview, participate at the Agency level and voice their concerns about such an expansion. Such concern about the operation of an existing facility is more appropriately the concern at the Agency level than at the local county board level. Any problems with the facility's operation can be handled more effectively at the Agency level through permit terms and conditions. The Court stated in M.I.G. Investments that the legislature intended to give local governments a voice in landfill decisions which affect them. However, the Court concluded that such control is not unlimited and it could find nothing in the Act or legislative intent to persuade it that local control should be extended beyond matters concerning location. Id.

Since the Board has determined that Hillview's proposed waste storage expansion does not constitute a new regional pollution control facility, the Board reverses the Agency's decision requiring submission of local siting approval prior to the Agency approving the construction of the new storage pit and orders the Agency to issue a permit for construction of the new storage pit. However, this decision does not obviate the need to obtain an operating permit from the Agency before Hillview can begin operating the new storage pit.

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

ORDER

The Illinois Environmental Protection Agency's January 17, 1986 denial of a development permit to Hillview Farms Fertilizers, Inc. to construct a waste storage pit expansion is hereby reversed and the Agency is ordered to issue such a permit to Hillview Farms consistent with the views expressed in this Opinion.

Hillview Farm's appeal of the Agency's January 17, 1986 denial of a renewal of an operating permit for Hillview Farm's facility is hereby dismissed.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 19th day of March, 1987 by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board