

ILLINOIS POLLUTION CONTROL BOARD
October 23, 1986

RICHARD W. TERMAAT,)
)
 Complainant,)
)
 vs.) PCB 85-129
)
 MILTON ANDERSON, CITY OF)
 BELVIDERE, COUNTY OF BOONE,)
 AND THE BELVIDERE MUNICIPAL)
 LANDFILL NO. 2,)
)
 Respondents.)

KEVIN T. Mc CLAIN (IMMEL, ZELLE, OGREN AND Mc CLAIN), APPEARED ON BEHALF OF THE PETITIONER;

ROGER T. RUSSELL, CITY ATTORNEY, APPEARED ON BEHALF OF THE CITY OF BELVIDERE, RESPONDENT; AND

GERALD F. GRUBB, ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF THE COUNTY OF BOONE, RESPONDENT.

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

This matter comes before the Board on the August 26, 1985 complaint brought by Richard W. Termaat (Termaat). Hearing was held on November 4, 1985.

The one count complaint revolves around the "unit of local government" exemption from the performance bonds requirement in Section 21.1(a) of the Environmental Protection Act (Act), as more specifically enunciated in Board regulations 35 Ill. Adm. Code 807.601(a) and 807.602(b).

The regulatory provisions read as follows:

- 807.601 a) The financial assurance requirement does not apply to the State of Illinois, its agencies and institutions, or to any unit of local government; provided, however, that any other persons who conduct such a waste disposal operation on a site which may be owned or operated by such a government entity must provide financial assurance for closure and post-closure care of the site.

807.602 b) For sites which are required to obtain financial assurance as of March 1, 1985, as provided in Section 807.601, financial assurance must be tendered to the Agency before March 1, 1985 in an amount equal to the cost estimate, which may be based on closure and post-closure care plans or on the formula of Section 807.624.

Mr. Termaat, the complainant, alleges a violation of the Act and the underlying Board regulations because the Boone County(County)/City of Belvidere (City) owners of the Belvidere Municipal Landfill No. 2 (Landfill) do not "conduct any waste disposal operation". Rather, Mr. Anderson, an independent contractor, is the operator who actually conducts the operation and thus, Termaat alleges, financial assurance for closure and post-closure care is required. The City/County and Mr. Anderson contend, in essence, that Mr. Anderson performs limited contractual services under the direct and ongoing control of the operator City/County and thus is not required to post financial assurance.

Attached to the complaint are two letters: The first is a May 8, 1985 letter from the Illinois Environmental Protection Agency (Agency) to the City Attorney noting perceived ambiguity in the rule that might require the contractor to provide financial assurance. However, another letter from the Agency dated July 15, 1985 to the County State's Attorney states the Agency's conclusion that no "financial assurance documentation under Section 21.1 of the Act" need be provided.

Mr. Termaat asserted that Mr. Anderson is an operator as defined under 37 Ill. Adm. Code 807.104. Section 807.104 states:

"Operator" means a person who conducts a waste treatment, waste storage or wate (sic) disposal operation.

The Board, in its opinion supporting the adoption of the Final Rules [(R84-22(C), p. 23, November 21, 1985)] states:

Paragraph (a) [807.601(a)] includes the local government exemption taken from Section 21.1(a) of the Act. The Board construes this exemption to apply only when the governmental unit is actually conducting waste disposal operations: that is, when the governmental unit is the "operator". If the governmental unit is the "owner" of the site, but another person "conducts" waste disposal on the site, the other person must provide financial assurance for closure. A proviso has been added to state this expressly (R. 53, 64, 686, 782, 943).

JCAR [the Legislature's Joint Committee on Administrative Rules] considered this matter and did not object to the Board's interpretation of the statute.

The Landfill Operations

The Landfill, more commonly called the County Farm Landfill, is jointly owned by the City/County. In 1981, Mr. Anderson was the successful bidder, as an independent contractor, to perform certain functions at the landfill for a monthly payment. The contract was extended yearly and included a five day cancellation clause upon performance failure following notice by the City/County. The last extension, from July 28, 1985 through November 30, 1986, contained an added provision that the City/County would pay for any extra financial assurance if so required by the Agency. (Pet. Exh. 1-3).

The "Landfill-Site Operation" notice to bidders described the scope of work as:

In general the Contractor will be required to furnish all equipment, labor, supplies and other items of expense necessary to perform all earthwork, compact and refuse, dispose of all landscape wastes, place intermediate and final cover, police the area and other items in accordance with these specifications. (Ibid)

The contract then states:

"The Contractor shall perform all work under the direction of the Owner and its authorized representative."

The contract specifications define "contractor" as "That person, firm or corporation with whom the Owner contracts to operate and maintain the City-County Landfill Site," (Ibid).

The Contract then outlines detailed specifications, including the items to be furnished by the Owner, and the responsibilities of the Contractor.

At hearing, testimony was presented by Mr. Anderson and Mr. LeRoy Schroeder, the Chairman of the Boone County Board.

Mr. Anderson testified that he has been an excavating contractor for 38 years. He described his duties and responsibilities, pursuant to the Contract, as follows: For a set monthly fee he supplies the equipment, supplies, labor, and liability and personal injury insurance; applies needed cover;

controls litter and vectors; and maintains an unpaved road from the weigh-in scale to the fill area. He generally provides daily and intermediate cover with little or no direct supervision. He testified that the City Director of Public Works, who is on-site "every day or twice a week" (R. 55), determines any further lifts, final cover, height for final cover, where to fill, and when and what kind of grass to apply.

The City/County opens the site each day, maintains the access road to the scale house, employs a person to perform weigh-ins and collect fees (unless otherwise billed directly from the City/County), provides cover and seeding materials, maintains the paved access road from the entrance to the scale house, sets rates, and pays all bills. Mr. Anderson pointed out that he has no lease, that he receives no income from the operation independent of his monthly fee, and that he has no interrelationships with the scale master's operations or any other activity concerning the site.

Mr. Schroeder, the County Board Chairman, testified that the City/County operates the site through a City/County coordinating committee (Committee) on which he serves as an ex officio member, and which is made up of Aldermen and County Board Members. The Committee meets monthly and set rates, collects fees, prepares contracts, pays bills, and reviews conditions at the site. Mr. Schoeder explained that the added provision in Mr. Anderson's last contract extension concerning City/County assumption of the cost of any financial assurance was due to uncertainty, prior to receipt of the Agency's second letter, about the applicability of the financial assurance requirement: the Committee wanted to avoid an "open-ended fee structure" (R. 66), as well as to indemnify Mr. Anderson.

Mr. Schroeder stated that the Director of Public Works appears before the Committee at each meeting to report, concerning operations, as to cover costs, need for more land area, fencing, and employment for day to day operations. He stated that the provisions in the contract (see Ex. 2, p. 4) concerning contractor responsibility were intended to assure the City/County as operators that the contractor would comply with EPA regulations.

Mr. Schroeder stated that it was the City/County position that they were fully responsible for the landfill. He pointed out that the City/County supplies funds for any landfill operations losses.

BOARD CONCLUSIONS

The Board finds that the City/County, not Mr. Anderson, is the operator of this site and conducts the waste disposal operations within the meaning of the Act and Board regulations.

As such, no "performance bond or other security" is required, pursuant to the exemption in Section 21.1(a) of the Act.

The City/County, as permit-holder, has clearly assumed responsibility to assure proper closure and post-closure care of the site. The City/County uses the tipping fees and, if necessary, utilizes other public funds to pay for all site operations. Mr. Anderson is under the ongoing supervision of the City Director of Public Works; his discretion is limited in the performance of his contractual duties and is non-existent in other aspects of site operations. He is paid a set amount under a short term contract that is renewable at the sole discretion of the City/County. While terms like "operate" and "maintain" are used in the contract, they are used in the context of Mr. Anderson's responsibilities, responsibilities which do not rise to the level of an operator conducting a waste disposal operation as anticipated in the Act and Board regulation. Therefore, the Board finds that the respondents have not violated the provisions of the Act or Board regulations as alleged.

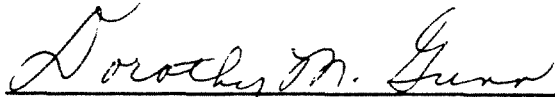
This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Board finds that Respondents Milton Anderson, City of Belvidere, County of Boone, and the Belvidere Municipal Landfill No. 2 have not violated the financial assurance requirements of Section 21.1(a) of the Environmental Protection Act or 35 Ill. Adm. Code 807.602(b) as alleged. The Board further finds that the "unit of local government" exemption contained in Section 21.1(a) and 35 Ill. Adm. Code 807.601(a) relieves Respondents of these requirements. The docket is hereby closed.

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 23rd day of October, 1986 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board