

ILLINOIS POLLUTION CONTROL BOARD
October 2, 1997

SIERRA CLUB and JIM BENSMAN,)	
)	
Petitioners,)	
)	
v.)	PCB 98-43
)	(Landfill Siting Review)
CITY OF WOOD RIVER and NORTON)	
ENVIRONMENTAL,)	
)	
Respondents.)	

ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board on an appeal filed pursuant to Section 40.1(b) of the Environmental Protection Act (Act) (415 ILCS 5/40.1(b) (1996)) on September 22, 1997, by the Sierra Club and Jim Bensman (petitioners) from the August 18, 1997 decision of the City of Wood River (City) granting local siting approval to Norton Environmental for the pollution control facility located in Madison County.

The cited section of the Act requires the Board to hear the instant petition if it has been filed by a third party other than the applicant if the party participated in the public hearing conducted by the county board or municipal governing body which granted siting approval, unless it determines that the petition is duplicitous or frivolous, or that the petitioner is so located as to not be affected by the proposed facility. An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. Brandle v. Ropp (June 13, 1985), PCB 85-68. 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 Metal Co. (May 17, 1973), PCB 73-173.

The petition indicates that the Sierra Club and Jim Bensman each participated in the City's public hearing. There is no evidence before the Board to indicate this matter is identical or substantially similar to any matter brought in another forum, nor is there any evidence that the Board cannot grant the relief requested. There is also no evidence before the Board to suggest that the petitioners are so located as to not be affected by the proposed facility. Therefore, the Board finds, pursuant to 35 Ill. Adm. Code 103.124(a), that the complaint is neither duplicitous nor frivolous, that the petitioners participated in the prior public hearing, and that the petitioners are or may be so located as to be affected by the proposed facility. Accordingly, this matter shall proceed to hearing.

INVALIDITY OF REPRESENTATION OF SIERRA CLUB BY JIM BENSMAN

While the matter may properly proceed to hearing as both parties have standing to bring the action, there is an additional issue which must be addressed concerning representation of the Sierra Club by Jim Bensman. The petition relates that the Sierra Club is a not-for-profit public benefit corporation incorporated in the state of California (Pet. at 2). Jim Bensman is described, among other things “as a member of the Executive Committee of the Piasa Palisades Group of the Sierra Club and its Conservation Chair. He is authorized to represent the Sierra Club before the Board.” Pet. at 2. He is not described as being an attorney.

Although the Board’s current procedural rules would allow the Sierra Club to be represented by a non-attorney (see 35 Ill. Adm. Code 101.107(a)(2)), the Board recently held that these rules violated the provisions of the Attorney Act (705 ILCS 205/1 (1996)) and the Corporation Practice of Law Prohibition Act (705 ILCS 220/1 (1996)). See In the Matter of: Petition of Recycle Technologies, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 720.131(c) (July 10, 1997), AS 97-9 (hereinafter RTI). Specifically, the Board found that a non-attorney could not represent a corporation in an adjusted standard proceeding without violating both the Attorney Act and the Corporation Practice of Law Prohibition Act. The Board believes that the rationale employed to find that a non-attorney was prohibited from representing a corporation in an adjusted standard proceeding applies equally to the situation presented in this matter. Accordingly, the Sierra Club must be represented by an attorney.

Rather than dismissing the Sierra Club from the action immediately as some case law would suggest, the Board finds that special circumstances of the type also found in RTI apply here. Consistent with RTI, the Board grants the Sierra Club 30 days in which to retain an attorney and for that attorney to file an amended petition in this case on the Sierra Club’s behalf. If an amended petition and attorney’s appearance are not filed on or before October 31, 1997, the Sierra Club will be dismissed from this action.

The Board stresses that under the Attorney Act and the Board’s rules, individuals such as Jim Bensman may continue to represent themselves in adjudicatory proceedings before the Board without aid of attorney. See 705 ILCS 205/11 (1996); 35 Ill. Adm. Code 101.107(a)(1). Since there is no question as to Mr. Bensman’s standing or ability to represent himself in this action, the statutory decision deadline will continue to be calculated from the date of his filing of the petition on September 22, 1997, unless an acceptable waiver is filed by Norton Environmental. (See “Waiver of the Decision Deadline” below.)

RECORD BEFORE THE CITY OF WOOD RIVER

P.A. 82-682, also known as SB-172, as codified in Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (1996)), provides that the hearing before the Board is to “be based exclusively on the record before the county board or the governing body of the municipality.” The statute does not specify who is to file with the Board such record or who is to certify to the completeness of the correctness of the record.

As the City alone can verify and certify what exactly is the entire record before it, in the interest of protecting the rights of all parties to this action, and in order to satisfy the intention of SB-172, the Board believes that the City must be the party to prepare and file the record on appeal. The Board suggests that guidance in so doing can be had by reference to Rules 321 through 324 of the Illinois Supreme Court. 107 Ill. 2d R. 321-324. The record shall contain legible versions of all documents, transcripts, and exhibits deemed to pertain to this proceeding from initial filing through and including final action by the local government body. The record shall contain the originals of all documents, shall be arranged as much as possible in chronological sequence, and shall be sequentially numbered, placing the letter "C" before the number of each page. In addition to the actual documents which comprise the record, the City Clerk shall also prepare a document entitled "Certificate of Record on Appeal" which shall be an index of the record that lists the documents comprising the record and shows the page number upon which they start and end. The original and nine copies of the certificate shall be filed with the Board, and a copy of the certificate shall be served upon the petitioner(s). The original and nine copies of the transcript of the local hearing and the original and three copies of any other documents in the record shall be filed with the Board. The Clerk of the City of Wood River is given 21 days from the date of this order to "prepare, bind and certify the record on appeal" (107 Ill. 2d R. 324). If the record is not legible, sequentially numbered, or fails to include an appropriate index of record, the Clerk of the Pollution Control Board may refuse to accept the document for filing.

WAIVER OF THE DECISION DEADLINE

Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (1996)) provides that if there is no final action by the Board within 120 days, petitioner may deem the site location approved.

The Board has construed identical "in accordance with the terms of" language contained in Section 40(b) of the Act (415 ILCS 5/40(b) (1996)) concerning third-party appeals of the grant of hazardous waste landfill permits as giving the person who had requested the permit: (1) the right to a decision within the applicable statutory time frame (now 120 days), and b) the right to waive (extend) the decision period (Alliance for a Safe Environment, et al. v. Akron Land Corp. et al. (October 30, 1980), PCB 80-184). The Board therefore construes Section 40.1(b) of the Act (415 ILCS 5/40.1(b) (1996)) in like manner with the result that failure of this Board to act in 120 days would allow the site location applicant to deem the site location approved. Pursuant to Section 105.104 of the Board's Procedural Rules (35 Ill. Adm. Code 105.104), it is each party's responsibility to pursue its action, and to insist that a hearing on the petition is timely scheduled in order to allow the Board to review the record and to render its decision within 120 days of the filing of the petition.

TRANSCRIPTION COSTS

The issue of who has the burden of providing transcription in Board site location suitability appeals has been addressed in Town of Ottawa, et al. v. IPCB, et al., 129 Ill. App. 3rd, 472 N.E. 2d 150 (3rd District, 1984). In that case, the Appellate Court ordered the Board to assume transcription costs (Ottawa, 472 N.E.2d at 155). The Illinois Supreme Court

denied leave to appeal on March 14, 1985. In cognizance of this ruling, the Board will provide for stenographic transcription of the Board hearing in this matter.

SCHEDULING AND CONDUCT OF THE HEARING

The hearing must be scheduled and completed in a timely manner, consistent with Board practices and the applicable statutory decision deadline, or the decision deadline as extended by waiver (the siting applicant may file a waiver of the statutory decision deadline pursuant to 35 Ill. Adm. Code 101.105). The Board will assign a hearing officer to conduct hearings consistent with this order, and the Clerk of the Board shall promptly issue appropriate directions to that assigned hearing officer.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that a 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days of the hearing.

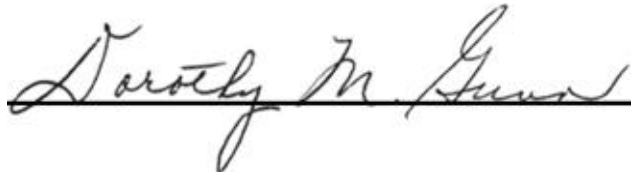
Any briefing schedule shall provide for final filings as expeditiously as possible and, in time-limited cases, no later than 30 days prior to the decision due date, which is the final regularly scheduled Board meeting date on or before the statutory or deferred decision deadline. Absent any future waivers of the decision deadline, the statutory decision deadline is now January 20, 1998 (120 days from September 22, 1997); the Board meeting immediately preceding the decision deadline is scheduled for January 8, 1998.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

Board Members G.T. Girard and J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 2nd day of October 1997, by a vote of 5-2.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board