

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C.,)
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)
 Petitioner,)
)
)
THE CITY OF ROCHELLE, an ILLINOIS) PCB 07-113
MUNICIPAL CORPORATION and THE)
ROCHELLE CITY COUNCIL,)
)
)
 Respondents.)

**PETITIONER'S AMENDED MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Petitioner Rochelle Waste Disposal, L.L.C., files this Amended Motion for Partial Summary Judgment ("Amended Motion"), in order to clarify the relief sought and the grounds therefor in the Motion for Partial Summary Judgment ("Original Motion") provisionally filed herein, and in support of this Amended Motion, states as follows:

I. INTRODUCTION

1. In its Petition for Review, Petitioner challenged eight (8) special conditions imposed by the Rochelle City Council in its grant of siting approval, and requested that the Illinois Pollution Control Board refuse to affirm those conditions and strike them from any grant of siting approval. Alternatively, Petitioner requested the Board to grant "such other and further relief as this Honorable Board deems appropriate in the circumstances".

2. In its initial brief, Petitioner set forth its arguments for striking the challenged conditions. Petitioner believes that those arguments are well taken, and that the challenged conditions, as imposed, are not supported by the record, Petitioner also believes that no factual dispute exists with respect to record as it relates to Conditions 13, 22, 23, 33 and 34 ("Subject Conditions"). More particularly, the undisputed evidence supports the

modification of Conditions 13, 23, 33 and 34 in the manner set forth herein, and the deletion of Condition 22.

The purpose of this Amended Motion is to facilitate the disposition of this appeal by providing the Board with the legal and factual bases for revising the Subject Conditions to comport with the undisputed evidence in this matter. Petitioner represents to the Board that the granting of this Amended Motion would entirely dispose of this appeal.

3. Upon review, Petitioner believes its Original Motion and Memorandum do not clearly set forth that the purpose of the Original Motion is to obtain Summary Judgment which modifies the Subject Conditions to be consistent with and comport with the undisputed record, and do not succinctly set forth the analyses and arguments made in support the modification of the Subject Conditions to comport with the undisputed record. Accordingly, Petitioner withdraws its Original Motion and Memorandum, and submits this Amended Motion in lieu thereof.

II. STANDARDS

4. The applicable standard for granting a Motion for Summary Judgment is well-established. The Illinois Supreme Court in *Chatham Foot Specialists, P.C. v. Healthcare Services Corporation*, 216 Ill.2d 366 at 376,837 N.E.2d 48 at 49 (2000), stated:

"A Motion for Summary Judgment is properly granted when the pleadings, depositions, admissions, and Affidavits on file establish that no genuine issue of material fact exists and, therefore, the moving party is entitled to judgment as a matter of law."

Under the standard enunciated by the Illinois Supreme Court and as is similarly set forth at Section 101.516 of the Pollution Control Board Rules, this case is clearly appropriate for summary judgment.

5. In an appeal seeking review of conditions imposed upon an applicant seeking siting approval, the Petitioner bears the burden of proving that the Application as submitted, without the conditions, would not violate the Act or the Board's regulations. *Browning-Ferris Industries of Ill., Inc. v. PCB*, 179 Ill.App.3d 598, 607, 534 N.E.2d 616 (2nd Dist. 1989); *Jersey Sanitation Corp. v. IEPA*, PCB-00-082 at 6 (June 21, 2001). A condition that is not necessary to accomplish the purposes of the Act or Board regulations is arbitrary and unnecessary and must be deleted. *Jersey Sanitation*, at 4-5. When considering whether a condition is necessary to accomplish the purpose of a Section 39.2(a) siting criterion, the Board must determine whether the local government's decision to impose the condition is against the manifest weight of the evidence. *Waste Mgmt. of Ill. v. Will Co. Bd.*, PCB 99-141 at 3 (Sept. 9, 1999), *affirmed*, *Will Co. Bd. v. Ill. PCB*, 319 Ill. App.3d 545 (3rd Dist. 2001).

III. ARGUMENT

6. **CONDITION 13**. Condition 13, as imposed, requires the Operator (Petitioner) to exhume the waste in Unit 1 “in no event later than 6 years from the date an IEPA permit is issued for the expansion, except as otherwise provided by the City Council for good cause shown.” The six-year period was not established by any evidence in the record. However, there was ample support for a ten-year period. Accordingly, Petitioner seeks a partial summary judgment finding that the undisputed evidence in the record supports the imposition of the following modified Condition 13:

“13. The Operator shall complete the exhumation and relocation of the waste from Unit 1 as soon as practicable, but in no event later than ten (10) years from the date an IEPA permit is issued for the expansion, except as otherwise provided by the City Council for good cause shown. The waste exhumation and redisposal shall be restricted to the months of November, December, January, February and March unless it is demonstrated to the City Council that the process can occur in other months without off-site odor migration or other impacts associated with the process.”

Discussion. In Section 2.6 of the City's Application for Siting Approval (pages 2.6-24 through 28), Shaw Environmental discussed the proposed exhumation at length. The Application sets forth plans and procedures for the exhumation, including the equipment to be used, the method of excavation and cover, the proposed hours and times of the year when exhumation would occur, the nature and quantity of cover used, procedures to be used in the event hazardous waste is encountered, the air monitoring program that would be required to avoid dangers from explosive gases and VOCs, stormwater management requirements during exhumation, and additional safety procedures to be implemented and safety equipment to be utilized during exhumation.

Taking into account what is presently known about Unit 1, and the additional requirements that the Application would impose, Shaw Environmental concluded that "[i]t is anticipated that relocation of Unit 1 will be performed over a 5-10 year period." (Application, Section 2.6, page 2.6-24).

The only witness who testified concerning the timing of the exhumation was Devin Moose of Shaw Environmental. Mr. Moose's testimony on this point, in answer to questions from the City Council's attorney, is clear and direct. He describes the sequencing of the exhumation and concludes that "we think that that's going to take on the order of about 10 years to achieve that." (Jan. 25 Tr. at 321-23).

The Shaw analysis of the detailed requirements of exhumation, and the anticipated time reasonably necessary to complete that task, is the only competent and reliable evidence in the record addressing those issues. To the extent that public comment may have requested the City Council to impose a firm deadline shorter than Shaw's anticipated time period, such comments were not based on relevant and reliable information. Accordingly, Condition 13, insofar as it requires completion of the exhumation within six years, is not supported by the

record. However, Petitioner submits that a similar condition requiring exhumation within ten years, as set forth above, would clearly not only be supported by the record, but was established by the undisputed evidence. Accordingly, the Board should grant summary judgment with respect to Condition 13, as so modified.

7. **CONDITION 22.** Condition 22 imposes a requirement of operational screening berms of between six feet and eight feet in height. This is in addition to perimeter berms required by Condition 23, discussed below.

In this instance, the record is simply devoid of any evidence supporting this condition. The Application does not require operational screening berms and no witness testified that operational screening berms were necessary. Accordingly, summary judgment should be granted striking this condition in its entirety.

8. **CONDITION 23.** Condition 23 imposed a requirement for perimeter berms at least 14 feet in height. The need for 14-foot perimeter berms was not established by any evidence in the record. However, there was ample evidence to support a requirement of undulating berms 8 to 10 feet in height, with plant material on top of the berms which would include trees a minimum of 6 feet in height. Accordingly, Petitioner seeks a partial summary judgment finding that the undisputed evidence in the record supports the imposition of the following modified Condition 23 (deletions shown by strikethrough; insertions by underline):

"23. Perimeter berms shall be built in advance of the cells in order to screen operations to a reasonable extent. It is recommended to require the berms to be built at least 500 feet in advance of the Eastern-most edge of the cell being constructed. By way of example, prior to completion of Cell 3's liner, the Southern berm along Creston Road shall be constructed from E 4,200 to E 6,500, which extends approximately 600 feet East of the cell. The vegetation shall be established (with at least a one-year growing period) prior to waste being placed within 400 feet of a cell with active waste placement. The berm shall be an undulating berm at least 8 to 10 feet in height, with plant material on top of the berm in accordance with the landscape plan in the application, including without limitation plant material in excess of six feet in height, placed between the waste footprint and Creston Road, and located between E 4,500 and E 7,500".

Discussion. The Application (Section 3.1, sheets 5 and 6; Table 2.1-1) set forth a comprehensive plan for landscaping, including a perimeter berm at least eight feet in height, with plantings on top of the berm which include trees a minimum of six feet in height, and in many instances extending much higher.

The testimony of Chris Lannert, Applicant's land use planner, was that a perimeter berm with a minimum height of eight feet would be sufficient. (Jan. 22 Tr. at 92, 100, and 153). There was no testimony or other evidence that the berm needed to be 14 feet in height. There was ample evidence to support a requirement of an eight to ten foot high berm, with plantings in accordance with the landscape plan.

9. **CONDITIONS 33 AND 34.** Conditions 33 and 34 imposed a requirement that Mulford Road be improved to a design weight limit of 80,000 pounds between Illinois Route 38 and Creston Road (approximately one mile), and that the Operator bear all the cost of the improvements from Route 38 to the new landfill entrance, and a portion of the costs of the improvements from the new landfill entrance to Creston Road, proportionate to the anticipated traffic attributable to the expanded facility, as determined by a traffic study.

This allocation of costs to the Operator was not supported by any evidence in the record. However, there was ample evidence in the record to support a condition that the costs of improving Mulford Road between Route 38 and Creston Road should be allocated between the Operator and the City on an equitable basis to be agreed upon between them and incorporated in the Host Agreement (Jan. 23 Tr. at 21-35). Accordingly, Petitioner seeks a partial summary judgment finding that the undisputed evidence in the record supports the imposition of the following modified Condition 33 and 34 (deletions shown by strikethrough; insertions by underline):

"33. The following roadway improvements shall be made to Mulford Road prior to acceptance of waste within the expanded facility waste footprint:

The reconstruction of Mulford Road between Route 38 and the existing landfill entrance shall be designed to a rural standard with a dust free, all weather surface, provide a design weight limit of 80,000 pounds and shall be at least two lanes wide.

34. The improvements to Mulford Road as described in special condition 33 above shall be completed from the existing landfill entrance to Creston Road no later than the date on which the proposed new entrance for the expansion is built and completed as required in Special Condition 16. The costs of improvements to Mulford Road shall be allocated between the Operator and the City on an equitable basis to be agreed upon between them and incorporated in the Host Agreement.

Discussion. The Application provided that, as part of the expansion of the landfill, Mulford Road would be reconstructed and upgraded to a two-lane road with a weight limit of 80,000 pounds from IL 38 to just south of the access drive. No mention was made of who would bear the cost of these improvements, and no mention was made of any improvements south of the access drive (which was to be relocated from its present location farther south). The Host Agreement between the City and the Operator is silent as to the reconstruction and upgrading of Mulford Road, or the allocation of costs for such improvements.

Applicant's traffic expert, Michael Werthmann, testified with respect to the contemplated improvements to Mulford Road, but specifically testified that he did not know who would be paying the costs of the improvement (Jan. 23 Tr. at 110-111).

What is clear, and essentially undisputed, from the record is that the costs of upgrading Mulford Road will likely benefit both the Operator and the City, and perhaps other adjacent landowners as well, but no agreement had been reached, and no evidence presented, as to how the costs should be allocated. The record therefore amply supports a condition that requires the allocation to be made on an equitable basis, but does not support the specific allocation of essentially all (or nearly all) of the costs to the Operator.

WHEREFORE, Petitioner, Rochelle Waste Disposal, L. L. C., respectfully requests that this Board, pursuant to 35 Ill. Adm. Code 101.516, grant Summary Judgment on Conditions 13, 22, 23, 33, and 34, in accordance with this Amended Motion.

Dated: December 4, 2007.

Respectfully submitted,

ROCHELLE WASTE DISPOSAL, L.L.C.

By: *s/Charles F. Helsten*

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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on December 4, 2007, she served a copy of the foregoing upon:

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via electronic mail before the hour of 5:00 p.m., at the addresses listed above.

/s

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