



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

**ROCHELLE WASTE DISPOSAL, L.L.C.,** )  
 )  
**Petitioner,** )  
 )  
v. )  
 )  
**THE CITY OF ROCHELLE, an ILLINOIS** )  
**MUNICIPAL CORPORATION and the** )  
**ROCHELLE CITY COUNCIL,** )  
 )  
**Respondents.** )

PCB No. 07-113

**PETITIONER ROCHELLE WASTE DISPOSAL'S REPLY BRIEF**

NOW COMES the Petitioner, Rochelle Waste Disposal, L.L.C. ("RWD"), by and through its attorneys, and in reply to the briefs filed by the City of Rochelle and the City Council, and the amicus brief filed by Concerned Citizens of Ogle County, states as follows:

**I. INTRODUCTION**

This appeal concerns Special Conditions imposed by the Rochelle City Council, pursuant to its grant of approval for an Application filed by the City of Rochelle regarding a proposed landfill expansion. On or about April 11, 2007, the City Council passed Resolution R07-10, in which the City Council approved the Application but imposed thirty-seven (37) Special Conditions. This appeal followed.

In its opening brief, the Petitioner, Rochelle Waste Disposal ("RWD") presented well-founded and supported arguments for striking the challenged Special Conditions (numbers 8, 13, 22, 23, 26,28, 33 and 34) based on the lack of record support, and further based on the fact that the challenged conditions are not necessary to meet the requirements of Section 39.2 of the Environmental Protection Act.

In its Response brief, the City acknowledges that the record does not support any of the challenged conditions, and agrees that they should accordingly be stricken. City's Response Brief at 1.

The City Council, in its brief, concurs that Special Condition 22 should be stricken. City Council's Brief at 2. The City Council also acknowledges that as originally drafted, Special Conditions 13, 23, 33, and 34 lack support in the record. *Id.* The City Council accordingly proffers modifications to the conditions for which the City Council cites at least minimal support in the record. *Id.* The City Council's brief concedes that if the Board finds it lacks authority to modify the conditions, then Conditions 13, 22, 23, 33, and 34 should be stricken because, as originally written, they lack support in the record. *Id.* at 15.

**II. ALL PARTIES AGREE SPECIAL CONDITION 22 SHOULD BE STRICKEN**

In its Opening Brief, RWD argued that Condition 22, which requires construction of operational screening berms along the edges of operating cells at the landfill, was improper because: (1) there is no evidence in the record to establish that such berms are reasonable and necessary; (2) the berms would disrupt operations; and (3) the evidence shows that such berms would be ineffective for their intended purpose.

In its Response brief, the City concurs that there is no support in the record for Special Condition 22, and the City reiterates that the evidence established that the proposed berms would be ineffective; the City accordingly agrees that Special Condition 22 should be stricken. City's Brief at 8-9.

The City Council also concurs that Special Condition 22 enjoys no support in the record, and agrees that this condition should be "stricken in its entirety." City Council's brief at 12.

Inasmuch as the Petitioner and both of the Respondents agree that Special Condition 22 enjoys no support in the record and should be stricken, the Board should strike this condition in its entirety.

**III. THE CITY COUNCIL'S PROPOSED MODIFICATIONS  
TO SPECIAL CONDITIONS 13, 23, 33, AND 34**

**A. Special Condition 13 – Exhumation period**

The City, as previously noted, concedes in its brief that Special Condition 13 is not supported by the record and should be stricken. City's Brief at 1.

The City Council concedes in its brief that the only credible evidence on the issue of the timing of the exhumation process was testimony by Devin Moose, who testified that exhumation would take on the order of "about 10 years." City Council's Brief at 10. The Council further noted that public comment in which objectors urged an abbreviated timetable for the exhumation process "was not based on reliable information." *Id.*

For this reason, the City Council now proposes that Condition 13 be amended to require that exhumation be completed as soon as practicable, but, in any event, in no more than ten (10) years from the date an IEPA permit is issued for the expansion, except for good cause shown. City Council's brief at 10, 14.

RWD concludes that the proposed modifications to Condition 13 which are set forth on page 14 of the City Council's brief would alter the condition such that it would thereby enjoy at least minimal support in the record. Because the City has conceded that there is no support in the record for Special Condition 13, and because the City Council has proposed modifications which are supported, at least minimally, by the evidence in the record, the Board should adopt the amendment to Special Condition 13 which is proposed by the City Council at page 14 of its Response brief.

**B. Condition 23 –14 Foot Perimeter Berm**

As previously noted, the City concedes that there is no support for Condition 23 in the record. City's Brief at 1.

For its part, the City Council concedes in its brief that "[n]o witnesses testified and no other evidence was introduced that operational screening berms, or a fourteen-foot perimeter berm, were necessary." City Council's brief at 11.

The City Council does, however, provide minimal record support for a proposed amendment to Condition 23, citing testimony concerning the construction of an undulating perimeter berm of eight (8) to (10) feet in height, with plant material, including trees no less than six feet in height, on top of the berm. *Id.* at 12. Page 14 of the City Council's brief proposes a modification for Special Condition 23 which would reflect the testimony referenced above, and which would therefore have at least minimal support in the record.

Because the City has conceded that there is no support in the record for Special Condition 23, and because the City Council has proposed modifications which are supported, at least minimally, by the evidence in the record, the Board should adopt the amendment to Special Condition 23 which is proposed by the City Council at page 14 of its Response brief.

**C. Conditions 33 and 34 – Road Improvements**

The City's brief concedes there is no support in the record for Conditions 33 and 34 as drafted. City's Brief at 1.

The City Council acknowledges that the sole witness who testified concerning roadway improvements was Mr. Michael Wethmann, who provided testimony concerning the necessity of the Application's proposal to improve Mulford Road, and the reconstruction of Mulford Road as a two-lane road with an 80,000-pound weight limit. City Council's brief at 13. The City Council further acknowledges there was no testimony or evidence to support the conclusion that the entire cost of such road improvements should be borne by RWD. *Id.*

Accordingly, the Council proposes modifications to these conditions which would reflect that the cost of improvements will not be borne by the Operator alone, but instead be allocated between the Operator (RWD) and the City "on an equitable basis to be agreed upon between them and incorporated in the Host Agreement." City Council's brief at 14. RWD believes the proposed modifications to Special Conditions 33 and 34 are consistent with the record in the

case. Because the City has conceded that there is no support in the record for Special Conditions 33 and 34, and because the City Council has proposed modifications which are consistent with the evidence in the record, the Board should adopt the amendments to Special Conditions 33 and 34 which are proposed by the City Council at page 14 of its Response brief.

#### **IV. CCOC'S BRIEF**

The *amicus* brief filed by Concerned Citizens of Ogle County ("CCOC"), an objector group in the proceedings below, consists almost entirely of an exaggerated portrayal of RWD's operating history, and a legally unsound argument that consequently derives from that exaggeration. Notably, CCOC chose to withdraw from this appeal (knowing full well at that time the position RWD had taken in its Motion to Reconsider, as well as the City's position in response thereto), and to limit its participation going forward to submitting only an *amicus* brief. Although it is unnecessary to address the unsubstantiated arguments raised in the *amicus* brief, RWD provides a brief response in an effort to correct at least some of the exaggerations and misrepresentations that appear in CCOC's brief.

As an example, CCOC erroneously claims that RWD's engineering manager, Tom Hilbert, "failed to incorporate all of [the Operator's] violations" in the Application's summary of violations, however Hilbert testified that he compared his summary (Application, Vol. 2, Sec. 20, Table 10-1) with the summary prepared by Mr. Rypkema (Operator's Exhibit 2), and that every violation notice included in Mr. Rypkema's summary was also included in Mr. Hilbert's summary. (Tr. Feb. 8, 2007, p. 137). A review of the two documents confirms the accuracy of Mr. Hilbert's testimony.

CCOC also accuses RWD of, "by oversight or deliberate omission," having "omitted the second sentence of criterion (ix)." CCOC's brief at 4. However, the language which CCOC asserts is a part of criterion (ix), relating to consideration of the operator's past operating history,

is what is often referred to as “criterion (x)” and is not a part of criterion (ix) at all. Thus, RWD, in listing the nine criteria in its brief, did not “deliberately omit” part of criterion (ix).

More importantly, although CCOC asserts that there was “direct, conflicting evidence” concerning each of the challenged condition (CCOC Brief, pp. 3-4), CCOC fails to include any record cites whatsoever to this supposed “evidence”. Instead, CCOC falls repeatedly back on the Petitioner’s “less than ideal” operating record, apparently urging, without citation to any authority, that a record of past violations dispenses with the well-established requirement that a condition to siting approval be supported by evidence in the record.

With respect to specific conditions discussed in its brief, CCOC’s argument regarding Condition 13 is fatally flawed. CCOC argues that because testimony at the hearing established that the exhumation could require five to ten years to complete, that there is record support for mandating that exhumation be completed in six years. Arbitrarily imposing a six-year deadline in Condition 13, however, ignores that portion of the estimate which projected it could take up to ten years to complete the project. In addition, CCOC argues that Condition 13 is reasonable because it provides that the City Council can grant an extension if necessary, however this argument ignores the fact that no standard is provided, and the City Council therefore has unfettered discretion to decide whether to grant the extension. CCOC’s argument that once the exhumation begins, the Petitioner will know exactly how long exhumation will take ignores the fact that the Petitioner cannot know the depth of the waste or the nature of what will be found until the project is complete.

With respect to Conditions 22 and 23, CCOC asserts that the decision to require a 14-foot perimeter berm is justified based on allegedly conflicting testimony and the Petitioner’s operating history. CCOC’s claim of conflicting testimony is, again, totally unsupported by the

record, and as noted above, CCOC's exaggerated allegations concerning the operator's history do not obviate the need for a condition to find support in the record.

As to Conditions 33 and 34, CCOC makes a number of allegations regarding evidence, but once again conveniently fails to include any citations whatsoever to the record to support those allegations. As the City Council noted in its brief, the undisputed testimony of Michael Werthman, the only traffic expert to testify, was that the expansion of the landfill is a continuation of existing operations and most of the traffic is already using that road. (City Council's Brief at 13, citing Tr. January 23, 2007 at 23-24, 29, 30-31, 34-35). There was no evidence to the contrary, and there was no testimony concerning an appropriate allocation of costs.

#### **V. CONCLUSION**

The City of Rochelle, for its part, concedes in its brief that all of the challenged Special Conditions are unsupported by the record and should be stricken. In addition, all parties to the appeal are in agreement that Special Condition 22 enjoys no support in the record, and should therefore be stricken.

The Petitioner, RWD, believes that the modifications proposed by the City Council with respect to Conditions 13, 22, 23, 33 and 34 are supported by the evidence and, if affirmed by the Board *as so modified*, would be proper. In the event the Board sees fit to modify these conditions in the manner proposed by the City Council, or, in the alternative, to strike them, the Petitioner is prepared to withdraw its appeal with respect to Conditions 8, 26 and 28.

WHEREFORE, the Petitioner respectfully requests that this Board strike Special Condition 22, modify Conditions 13, 22, 23, 33, and 34 to conform with the proposals proffered by the City Council in its brief at p. 14, and grant such other relief as it deems appropriate.

**Electronic Filing - Received, Clerk's Office, December 17, 2007**

Dated: December 17, 2007

Respectfully submitted,

ROCHELLE WASTE DISPOSAL

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 17, 2007, she served a copy of the foregoing upon:

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