

UNITED STATES OF AMERICA

STATE OF ILLINOIS )  
APPELLATE COURT ) ss  
SECOND DISTRICT )

At a Session of the Appellate Court begun and held at Elgin on the 1st day of January, in the year of our Lord two thousand and nine within and for the Second District of Illinois:

Present: Honorable KATHRYN E. ZENOFF, Presiding Justice  
Honorable ROBERT D. MCLAREN Honorable JOHN J. BOWMAN  
Honorable SUSAN F. HUTCHINSON Honorable JACK M. O'MALLEY  
Honorable ANN B. JORGENSEN Honorable MICHAEL J. BURKE  
Honorable MARY S. SCHOSTOK Honorable DONALD C. HUDSON  
Robert J. Mangan, Clerk  
Patrick B. Perez, Sheriff

-----  
#2-08-0427 CONSOLIDATED CASE/S: 2-08-0433  
THE CITY OF ROCHELLE, an Illinois APPEAL FROM THE  
municipal corporation, PCB  
Petitioner,  
v.  
ILLINOIS POLLUTION CONTROL BOARD, TRIAL COURT NO.  
ROCHELLE WASTE DISPOSAL, L.L.C., PCB07113  
and THE ROCHELLE CITY COUNCIL,  
Respondents.

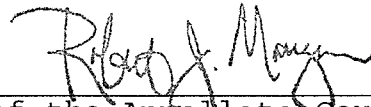
MANDATE

BE IT REMEMBERED, that, to wit: On the 4th day of September, 2009, a Decision of the aforementioned Court was entered and in accordance with the views expressed in the attached Decision the judgment of the trial court is Vacated and Remanded.

CERTIFICATE

I, Robert J. Mangan, Clerk of the Appellate Court, Second District of the State of Illinois, and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of said Appellate Court, in the above entitled cause of record in my said office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 23rd day of October, 2009, A.D.



\_\_\_\_\_  
Clerk of the Appellate Court  
Second District

*This Case Is Not Precedential  
And Is Not To Be Cited*

**FILED**

SEP - 4 2009

Nos. 2--08--0427 & 2--08--0433, cons.

ROBERT J. MANGAN, CLERK  
APPELLATE COURT 2nd DISTRICT

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

THE CITY OF ROCHELLE, an Illinois municipal corporation,	)	On Petition for Review of Orders of
	)	the Illinois Pollution Control Board.
	)	
Petitioner,	)	
	)	
v.	)	No. PCB--07--113
	)	
ILLINOIS POLLUTION CONTROL BOARD,	)	
ROCHELLE WASTE DISPOSAL, L.L.C.,	)	
and THE ROCHELLE CITY COUNCIL,	)	
	)	
Respondents.	)	

---

THE ROCHELLE CITY COUNCIL, an Illinois municipal body,	)	On Petition for Review of Orders of
	)	the Illinois Pollution Control Board.
	)	
Petitioner,	)	
	)	
v.	)	No. PCB--07--113
	)	
ILLINOIS POLLUTION CONTROL BOARD,	)	
ROCHELLE WASTE DISPOSAL, L.L.C.,	)	
and THE CITY of ROCHELLE,	)	
	)	
Respondents.	)	

---

**RULE 23 ORDER**

In these consolidated cases, we review the final administrative decision of respondent, The Pollution Control Board (PCB), regarding an application by the City of Rochelle (City) for local siting approval of a landfill pollution control facility. We dismiss in part and affirm as modified.

Nos. 2--08--0427 & 2--08--0433, cons.

The City owns a landfill at 6513 Mulford Road in Rochelle. The landfill began operation in 1972 and has been operated since 1995 by respondent Rochelle Waste Disposal (RWD). On October 16, 2006, the City filed an application with the Rochelle City Council (Council) to expand the landfill. The planned expansion included the exhumation and transfer of waste from the original landfill to a new section equipped with a composite liner, leachate control system, landfill gas management system, and groundwater monitoring system. This part of the expansion was estimated to take between five and ten years to complete. The application also provided for a vegetated berm, at least eight feet tall, around the perimeter of the facility.

The parties presented testimony from 10 witnesses over six days of public hearings. Patrick Engineers, retained by the Council as a technical consultant, submitted its report and recommendations after the close of evidence. Patrick recommended approval of the application subject to 37 various conditions. The hearing officer submitted his findings of fact and conclusions of law and recommended approval with the imposition of the 37 conditions recommended by Patrick. The Council adopted Resolution R07-10, approving the application subject to 37 special conditions based on, but slightly different from, Patrick's conditions.

RWD filed a motion to reconsider, objecting to eight of the special conditions. The City also filed a response to the motion, arguing that the conditions were unnecessary and specifically requesting the deletion or modification of eight of the conditions. The Council subsequently adopted a resolution modifying two of the conditions contained in Resolution R07-10 and reaffirming all other remaining conditions. RWD then appealed to the Board, contesting eight of the special conditions imposed by the Council. The Board affirmed the Council as to six of the conditions and modified two conditions that are not here at issue. Both the City and the Council then sought review in this court.

Nos. 2--08--0427 & 2--08--0433, cons.

On review, it is the Board's final decision that we examine, not that of the local siting authority. See Town & Country Utilities, Inc., v. Illinois Pollution Control Board, 225 Ill. 2d 103, 122 (2007). Pursuant to section 5/41(b) of the Environmental Protection Act, final orders of the Board "shall be based solely on the evidence in the record of the particular proceeding involved, and any such final order \*\*\* shall be invalid if it is against the manifest weight of the evidence." 415 ILCS 5/41(b) (West 2006). A factual finding is against the manifest weight of the evidence if, when viewing all of the evidence in the light most favorable to the prevailing party, the opposite conclusion is clearly apparent or the finding is palpably erroneous and wholly unwarranted, is clearly the result of prejudice or passion, or appears to be arbitrary and unsubstantiated by the evidence. United States Steel Corporation v. Illinois Pollution Control Board, Illinois Environmental Protection Agency, 384 Ill. App. 3d 457, 461 (2008).

At issue here are two of the special conditions imposed by the Council and affirmed by the Board. We first address Special Condition 13, which, in part, required RWD to exhume and dispose of waste from the original landfill "as soon as practicable, but in no event later than six (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 City argues that the evidence in the record supports a ten-year time limit for these activities, not a six-year time limit, and requests this court to delete Special Condition 13. However, in April 2008, the Council adopted Ordinance 08--3668, which, among other things, approved an agreement to extend the time period for the exhumation and disposal of waste from Unit 1 to ten years, subject to possible further extension. This intervening action by the Council makes it impossible for this court to grant the relief sought by the City, as the Council's

Nos. 2--08--0427 & 2--08--0433, cons.

action is the equivalent of the relief sought on appeal. Thus, the issue is moot. See In re D.S., 217 Ill. 2d 306, 320 (2005). Because it is moot, we dismiss this portion of the review.

Both the City and the Council next contend that Special Condition 23, which provides for the building of berms 14 feet in height around the perimeter of the site, is against the manifest weight of the evidence. We agree.

The City's application to expand the landfill proposed a vegetated berm, at least eight feet tall, around the perimeter of the facility. The City also presented the testimony of J. Christopher Lannert of the Lannert Group, a company that provides professional services in the area of planning, community consulting, and landscape architecture. Lannert, a registered landscape architect, proposed a berm that would "undulate from a minimum of 8 feet high to a high of 10 feet high along Creston Road." The top of the berm was to be planted with "overstory trees, ornamental trees and evergreen trees". The only other testimony regarding berms was provided by Devin A. Moose, a registered professional engineer with Shaw Environmental, the principal designer of the expansion proposal. Moose referred to Lannert's testimony about an undulating berm "of a minimum of 8-foot height" but never testified about any other height for the berm.

Thomas Hilbert, the engineering manager for Winnebago Reclamation Service, whose duties included construction, permitting, and compliance at the Rochelle landfill, testified about the violation history at Rochelle that was "more extensive" than most landfill facilities. Stephen Rypkema of the Ogle County Solid Waste Management Department submitted a list of 16 various violations that had occurred between 1995 and 2006.

In its opinion and order, the PCB noted that Patrick Engineering and the hearing officer recommended the berm be at least 14 feet in height. The PCB also noted some of Devin Moose's

Nos. 2--08--0427 & 2--08--0433, cons.

general testimony that berms help to screen operations from view and control litter. The PCB then concluded, based on the recommendations, Moose's testimony, "and RWD's operating record", that Special Condition 23 (and another condition related to an operational screening berm) was not against the manifest weight of the evidence.

Our examination of the record finds no support for the PCB's conclusion that 14 foot berms were required. There was no evidence either in favor of or in opposition to such a height. There was also no evidence suggesting that the planned 8 to 10 foot high berm was insufficient. The PCB argues, correctly, that an applicant's prior operating experience and record can be considered before granting approval of a pollution control facility. See 415 ILCS 5/39.2(a) (West 2006). The PCB also argues, correctly, that it can apply its technical expertise in examining the record to determine whether it supports the local authority's conclusion. See Town & Country Utilities, 225 Ill. 2d at 123. However, there simply is no evidence to support the finding that a 14 foot berm would be necessary to prevent further violations such as those committed in the past or that such a height would be required for any other reason. The PCB's technical expertise must be applied to the record and not imposed arbitrarily or at random.

The record supports the requirement that a berm be installed. However, the 14 foot height requirement is against the manifest weight of the evidence. Therefore, we determine the final order of the Board is invalid and vacate said order. This court retains jurisdiction during the pendency of any further action taken by the Board pursuant to this order. See 415 ILCS 5/41 (West 2006)

The order of the Illinois Pollution Control Board is vacated and remanded for further proceedings consistent with this order.

Vacated and remanded.

McLAREN, J., with HUTCHINSON and HUDSON, JJ., concurring.