

ILLINOIS POLLUTION CONTROL BOARD
November 19, 2009

ROCHELLE WASTE DISPOSAL, L.L.C.,)
)
Petitioner,)
)
v.) PCB 07-113
) (Third-Party Pollution Control Facility
THE CITY OF ROCHELLE, an Illinois) Siting Appeal)
municipal corporation, and THE ROCHELLE)
CITY COUNCIL,)
)
Respondents.)

ORDER OF THE BOARD (by A.S. Moore):

On September 4, 2009, the Appellate Court, Second District, issued its order reviewing the Board's decision regarding an application by the City of Rochelle (City) for approval of the site of a pollution control facility. Specifically, the Appellate Court dismissed a portion of its review, vacated the Board's order, remanded for additional proceedings consistent with the Court's order, and affirmed the Board's order as modified. *City of Rochelle v. PCB, et al.*, Nos. 2-08-0427, 2-08-0433 (cons.) (2nd Dist. 2009) (Rule 23 order).

Below, the Board first reviews the procedural background of this case. The order then summarizes the Appellate Court's order and its direction on remand. The Board then makes its ruling pursuant to the Appellate Court's direction.

PROCEDURAL BACKGROUND

On October 16, 2006, the City filed an application with the Rochelle City Council (City Council) for approval of the site of a proposed expansion of the Rochelle Municipal Landfill in Rochelle, Ogle County. *See generally* 415 ILCS 5/39.2(a) (2008). Rochelle Waste Disposal, L.L.C. (RWD) operates the existing landfill and, under the terms of a host agreement with the City, would operate an expanded facility.

On April 11, 2007, the City Council granted approval of the proposed expansion subject to 37 special conditions. On April 20, 2007, RWD filed a motion requesting that the City Council reconsider its decision to impose Special Conditions 8, 13, 22, 23, 26, 28, 33, and 34. On May 8, 2007, the City Council granted the motion to reconsider. On reconsideration, the City Council affirmed Special Conditions 8, 13, 22, 23, 26, 28, 33 as imposed and modified Special Condition 34.

On May 16, 2007, RWD appealed to the Board the City Council's determination to impose eight special conditions. *See* 415 ILCS 5/40.1(b) (2008). RWD argued that the conditions are not reasonable, supported by the record, or necessary to accomplish the purposes of Section 39.2 of the Environmental Protection Act (Act) (415 ILCS 5/39.2 (2008)). On

January 24, 2008, the Board issued an opinion and order affirming six of those conditions and modifying two of them.

The Board received separate motions for reconsideration of its opinion and order from the City, the City Council, and RWD. The City requested that the Board reconsider affirming Special Conditions 13 and 23, although the City Council sought reconsideration only of the determination to affirm Special Condition 23. RWD joined and adopted the motions filed by the City and the City Council and also lodged additional arguments regarding Special Conditions 13 and 23.

Special Condition 13 addressed exhumation and transfer of waste from the original landfill to a new section of the landfill and specifically required that

[t]he Operator shall complete the exhumation and redisposal of waste from Unit 1 as soon as practicable, but in no event later than six (6) years from the date an IEPA [Illinois Environmental Protection Agency] 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.

The City's application for approval of the site of the landfill expansion proposed a berm at least eight feet high around the perimeter of the facility. City of Rochelle v. PCB, et al., Nos. 2-08-0427, 2-08-0433 (cons.), slip op. at 4 (2nd Dist. 2009). Special Condition 23 specifically required that

[p]erimeter 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 Easternmost 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 at least 14 feet in height, placed between the waste footprint and Creston Road, and located between E 4,500 and E 7,500.

On April 3, 2008, the Board issued an order granting the motions to reconsider and, on reconsideration, affirming its January 24, 2008, opinion and order in its entirety. Both the City and the City Council then appealed the Board's decision with respect to the Board's determinations regarding Special Conditions 13 and 23.

APPELLATE COURT ORDER

In its Rule 23 order, the Appellate Court first addressed Special Condition 13 regarding the exhumation of waste from the original landfill. The Court noted that,

in April 2008, the [City] Council adopted Ordinance 08-3668, which, among other things, approved an agreement to extend the time period for the exhumation and redisposal of waste from Unit 1 to ten years, subject to possible further extension. This intervening action by the [City] Council makes it impossible to grant the relief sought by the City, as the [City] Council's action is the equivalent of the relief sought on appeal. Thus, the issue is moot. City of Rochelle v. PCB, et al., Nos. 2-08-0427, 2-08-0433 (cons.), slip op. at 3-4 (2nd Dist. 2009) (citation omitted).

Having found the issue moot, the Court dismissed the portion of its review addressing Special Condition 13. *Id.* at 4.

The Appellate Court then addressed Special Condition 23, which provided for a berm fourteen feet in height around the perimeter of the proposed landfill site. The Court stated that “[t]he record supports the requirement that a berm be installed.” City of Rochelle v. PCB, et al., Nos. 2-08-0427, 2-08-0433 (cons.), slip op. at 5 (2nd Dist. 2009). As noted above, the City’s application for approval of the site of the landfill expansion proposed a berm at least eight feet high around the perimeter of the facility. *Id.* at 4. The City presented the testimony of Mr. J. Christopher Lannert, a registered landscape architect, who proposed a berm ranging from eight to ten feet in height along Creston Road. *Id.* The Court noted that Mr. Devin A. Moose, a registered professional engineer, also testified regarding berms. Mr. 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.” *Id.*

The Court stated that the record did not include evidence either in support of or opposition to a berm 14 feet high. City of Rochelle v. PCB, et al., Nos. 2-08-0427, 2-08-0433 (cons.), slip op. at 5 (2nd Dist. 2009). The Court further stated that “[t]here was also no evidence suggesting that the planned 8 to 10 foot high berm was insufficient.” *Id.* Although acknowledging that the Board may consider an applicant’s operating experience and record, the Court indicated that “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.” *Id.* The Court concluded that “the 14 foot height requirement is against the manifest weight of the evidence,” vacated the Board’s order, and remanded for further proceedings consistent with its order. *Id.* The Court “retains jurisdiction during the pendency of any further action taken by the Board pursuant to this order.” *Id.*, citing 415 ILCS 5/41 (2006).

ORDER

Pursuant to the Appellate Court’s order, the Board modifies its order of January 24, 2008. See Rochelle Waste Disposal, L.L.C. v. City of Rochelle and Rochelle City Council, PCB 07-

113, slip op. at 55-56 (Jan. 24, 2008). Specifically, the Board modifies Special Condition 23 to require that the perimeter berm be at least eight feet in height. Accordingly, as modified, Special Condition 23 reads as follows:

[p]erimeter 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 Easternmost 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 at least eight feet in height, placed between the waste footprint and Creston Road, and located between E 4,500 and E 7,500.

In all other respects, with the exception of Special Condition 13 as addressed in the Appellate Court's order and above, the Board affirms its order of January 24, 2008. For the convenience of the parties, the Board sets forth its modified order as follows:

- 1) The Board's review of the City Council's record of decision demonstrates that the City Council's decision to impose Special Conditions 8, 22, 26, and 28 is not against the manifest weight of the evidence. The Board affirms the requirements of those special conditions as imposed by the City Council.
- 2) The Board finds that Special Conditions 23, 33, and 34 lack support in that record and modifies those conditions as follows:

Special Condition 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 Easternmost 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 at least eight feet in height, placed between the waste footprint and Creston Road, and located between E 4,500 and E 7,500.

Special Condition 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.

Special Condition 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.

The Board directs the Clerk to provide a copy of this order to the Appellate Court as well to the parties.

IT IS SO ORDERED.

C.K. Zalewski abstained.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 19, 2009, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board