

ILLINOIS POLLUTION CONTROL BOARD
March 20, 2003

VILLAGE OF SOUTH ELGIN,)
)
 Complainant,)
)
 v.) PCB 03-106
) (Citizens Enforcement - Land)
 WASTE MANAGEMENT OF ILLINOIS,)
 INC.,)
)
 Respondent.)

ORDER OF THE BOARD (by N.J. Melas):

On January 16, 2003, the Village of South Elgin (South Elgin) filed this complaint (Comp.) against Waste Management asking the Board to enforce two special conditions of a landfill siting approval granted to Waste Management by the Kane County Board on September 13, 1988. The special conditions were incorporated by reference into the permit the Illinois Environmental Protection Agency (Agency) issued to Waste Management for expansion of the Woodland site (Woodland III permit). On February 18, 2003, Waste Management of Illinois, Inc. (Waste Management) filed a motion to dismiss this complaint as frivolous (Mot.).

On January 14, 2003, Waste Management filed a petition for review of the Kane County Board's decision to deny Waste Management's request for siting approval of a proposed waste transfer facility (Woodland Transfer Facility). See Waste Management of Illinois, Inc. v. County Board of Kane County, PCB 03-104. In its petition for review, Waste Management claims: (i) the siting process and procedures the Kane County Board used in reaching the decision were fundamentally unfair; and (ii) Kane County's denial of siting approval, and the finding that certain statutory criteria were not met, were against the manifest weight of the evidence. This siting appeal is still pending.

South Elgin responded in opposition to the motion to dismiss this enforcement case on March 4, 2003. As discussed below, the Board denies Waste Management's motion to dismiss, finds South Elgin's complaint is neither duplicative nor frivolous, and accepts this complaint for hearing.

BACKGROUND

The Woodland Landfill site is 213 acres and was established as a pollution control facility in 1976. Initially, the Agency permitted the use of 55 acres for use as a landfill (Woodland I). In 1982, the Agency permitted 48 more acres (Woodland II).

In 1988, Waste Management sought Kane County's siting approval under Section 39.2 to extend the life of the landfill for an additional 15 years by working the area between Woodland I and II (Woodland III application).

At a July 26, 1988 public hearing, Waste Management read into the record representations it made in a letter to South Elgin in which Waste Management promised, among other things, that the Woodland III request would be its last attempt to expand on the Woodland landfill site. At the same hearing, Waste Management also detailed its end-use plan for the facility that would allow for hiking and bicycle riding across the large open space. *See Comp.* at 3.

Subsequently, the Kane County Board adopted Resolution 88-155 approving, with conditions, the Woodland III application. The resolution was incorporated by reference into Waste Management's Woodland III permit issued by the Agency. Condition 2 of the resolution required that the site be developed and operated in accordance with representations made at the July 26, 1988 public hearing. Condition 4 mandated that the Woodland site not be expanded any further.

On June 14, 2002, Waste Management applied for approval to site an 8.9-acre parcel of the Woodland Site for use as a waste transfer facility. The Kane County Board denied Waste Management's application on December 10, 2002. As noted above, Waste Management filed a petition with the Board to contest the siting denial on January 14, 2003.

PRELIMINARY MATTER

The Board finds that South Elgin has the authority to bring this enforcement action before the Board. Sections 31(b) and 33(a) of the Environmental Protection Act (Act) confer the right to enforce site location suitability approval conditions in an enforcement action before the Board. The Second District Appellate Court has held "a violation of a condition properly imposed under this authority is a violation of the Act." County of Lake v. PCB, 120 Ill. App. 3d 89,101, 457 N.E.2d 1309, 1317 (2nd Dist. 1983) (*affirming B.F.I v. Lake County Board*, PCB 82-101, slip op. at 23 (Dec. 2, 1982)).

South Elgin requests the Board enforce two conditions of the 1988 Kane County Board resolution included in the Woodland III Agency permit: (1) that the site shall not be expanded further; and (2) that Waste Management fulfill all of the representations made at a July 26, 1988 public hearing, including that Woodland III was the last expansion it would attempt to make on the site and that the relevant portion of Woodland III would be turned into a passive recreation area post-closure. South Elgin correctly asserts that since the terms of the resolution was incorporated into the permit, a violation of a permit condition is also a violation of the Act. Section 31(b) of the Act allows any person to file a complaint with the Board against any person violating the Act. 415 ILCS 31(b).

DUPLICATIVE/FRIVOLOUS DETERMINATION

Section 103.212(a) of the Board’s procedural rules (35 Ill. Adm. Code 103.212(a)) implements Section 31(d) of the Act. 415 ILCS 5/31(d) (2002). This Section allows any person to file a complaint with the Board against any person violating any permit or condition thereof. Section 31(d) further provides that “[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing.” *Id.*; *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is “identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202. An action is frivolous if it requests “relief that the Board does not have the authority to grant” or “fails to state a cause of action upon which the Board can grant relief.” *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b).

Waste Management filed a motion to dismiss this matter as frivolous on February 18, 2003. Mot. at 2. The Board has not identified any other cases, either substantially similar or identical to Elgin’s complaint, pending in other forums. The Board finds none of the allegations in the complaint are duplicative. The Board determines below whether Elgin’s complaint is frivolous.

MOTION TO DISMISS

For purposes of ruling on a motion to dismiss, all well plead facts contained in the pleading must be taken as true and all inferences from them must be drawn in favor of the nonmovant. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001). A complaint should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings that would entitle complainant to relief. Shelton v. Crown, PCB 96-53 (May 2, 1996).

THE PARTIES’ ARGUMENTS

Waste Management argues that the Board should dismiss South Elgin’s complaint because it does not allege an actual controversy that is ripe for review by the Board. Waste Management states that in order to state a cause of action, an “actual controversy” must exist. In defining “actual,” Waste Management cites to the Illinois Supreme Court’s explanation in National Marine, Inc. v. IEPA, 159 Ill. 2d 381, 390, 639 N.E.2d 571, 575 (1994):

‘Actual’ in this context does not mean that a wrong must have been committed and injury inflicted. Rather, it requires a showing that the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render advisory opinions, or give legal advice as to future events. The case must, therefore, present a concrete dispute admitting of an immediate and definitive determination of the parties’ rights, the resolution of which will aid in the determination of the controversy of some part thereof. *Id.* at 390, 639 N.E.2d at 575.

Waste Management argues there is no actual controversy for two reasons: (1) Waste Management's transfer facility proposal does not constitute an "expansion," and, therefore, it did not violate any condition of the Woodland III siting approval; and (2) even if Waste Management's proposal does constitute an expansion, the Kane County Board's denial of siting for the waste transfer facility renders this complaint premature, or not yet ripe for review by the Board. The parties' arguments are summarized below.

Whether the Waste Transfer Facility Siting Application is a Proposed Expansion

Waste Management contends that South Elgin based its complaint on the mistaken conclusion that Waste Management requested an expansion of the Woodland Site in its application for siting of a waste transfer facility. Mot. at 4. Waste Management opines that it is not seeking to expand the site, but simply to use part of the existing Woodland Site as a waste transfer facility. Waste Management further argues that, because it does not propose an expansion, it does not violate any condition of the Woodland III permit, and, hence, there is no actual controversy to adjudicate.

South Elgin states that the proposed transfer station constitutes an expansion because it would extend the lifespan of waste operations on the Woodland Site. Resp. at 6. Additionally, the transfer station would increase the intensity of the use by increasing the size and number of buildings, screening elements, well operations, septic system, amount of waste handled per day, and truck traffic in and out of the facility. *Id.* South Elgin claims that any attempt to site the transfer is, therefore, a violation of Condition 2 of the Woodland III permit that incorporated by reference Waste Management's promise that Woodland III would be its last attempt to expand the Woodland site. *Id.*

Ripeness

Waste Management also argues that, in any event, the Kane County Board denied siting of the waste transfer facility. Consequently, Waste Management argues it cannot perform the actions which South Elgin claims will violate the Act unless the Board reverses the Kane County Board decision. Mot. at 5. Thus, Waste Management asserts there exists no controversy ripe for determination by the Board at this time.

Waste Management further supports its arguments by stating that the Board has no authority to issue advisory opinions (*City of Geneva v. Kane County*, PCB 94-58, slip op. at 1-2 (Oct. 6, 1994)), and that mere speculation that the County Board's decision will be reversed is insufficient to support South Elgin's cause of action (*Rocke v. PCB*, 78 Ill. App. 3d 476, 397 N.E.2d 51 (1st Dist. 1979)). Waste Management maintains that, should the Kane County Board reverse its decision and grant siting approval for the waste transfer facility, South Elgin's claim may then be ripe for determination. However, until that time, Waste Management concludes there is no actual controversy for the Board to decide.

In response to Waste Management's argument that the issue is not yet ripe for review, South Elgin disagrees. South Elgin argues that Condition 2 of the resolution prohibits Waste Management not only from expanding the site, but from *attempting* to expand the site. Resp. at 2. South Elgin further contends that the transfer facility proposal constitutes an expansion (as

discussed above), and merely by applying for siting approval of this expansion with the Kane County board, Waste Management violated Condition 2 of the resolution. South Elgin concludes that this clearly is an “actual,” concrete, justiciable violation of the Act ripe for review by the Board.

DISCUSSION

Whether the Waste Transfer Facility Siting Application is a Proposed Expansion

As stated above, the Board will not dismiss a complaint unless no set of facts can be proven under the pleadings that would entitle the complainant to relief. Shelton, PCB 96-53. Here, Waste Management itself referred to the proposed Woodland Transfer Facility as an expansion in a letter from Waste Management to the Kane County Board, dated February 13, 2002. Comp. Exh. 2. The letter states: “The Application establishes that the proposed expansion meets all of the siting criteria.” *Id.* Furthermore, the Board has held that even an increase in the amount of waste received and handled at an existing permitted waste transfer facility constitutes an expansion of that facility. Continental Waste Industries of Illinois, Inc. v. Mt. Vernon, PCB 94-138, slip op. at 5, 20 (Oct. 27, 1994). In Continental Waste, the Board noted that a significant increase in usage and the addition of a second loading dock for outgoing trailers constituted an expansion of the then-permitted waste transfer facility. *Id.* at 20.

The waste transfer facility proposed by Waste Management is not merely an increase in usage of a current facility, but a proposal for siting a brand new waste transfer facility on property currently permitted as a landfill site. The site application is a proposal for a new transfer station on approximately nine acres of the Woodland site that will process, consolidate, store and transfer non-hazardous municipal waste. The facility would be capable of processing of 2,640 tons of waste per day. Comp. at 4. The Board finds there is enough information in the pleadings that Waste Management’s proposal may constitute a proposal for expansion within the meaning of Section 39.2 of the Act to proceed to hearing on this issue.

Ripeness

The Board is also persuaded by South Elgin’s argument that this controversy is ripe for review. Condition 4 of the Kane County Board’s resolution granting approval of Woodland III, mentioned above, states: “[t]he site, commonly known as the Woodland site, shall not be expanded further.” Comp. Exh. 1. Condition 2 of the resolution incorporated representations read into the record of a July 26, 1988 public hearing on that matter. Among the representations was a letter from Waste Management to the Kane County Board read into the record by attorney Don Moran on behalf of Waste Management. The letter promised that the Woodland III request would be Waste Management’s last attempt to expand the Woodland landfill site. Comp. Exh. 5.

By submitting an application for siting approval for the waste transfer facility on the Woodland site, Waste Management has arguably attempted to expand the site. Accordingly, South Elgin’s action is ripe for review.

ACCEPT FOR HEARING

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d) (2002); 35 Ill. Adm. Code 103.212(a). Waste Management's motion to dismiss automatically stayed the 60-day period to file and answer to the complaint. Therefore, the Board gives Waste Management 60 days from receipt of this order to file an answer to South Elgin's complaint. *See* 35 Ill. Adm. Code 103.204(e).

Failure to file an answer to a complaint within this deadline may have severe consequences. Generally, if Waste Management fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider Waste Management to have admitted the allegation. 35 Ill. Adm. Code 103.204(d). The Board directs the hearing officer to proceed expeditiously to hearing.

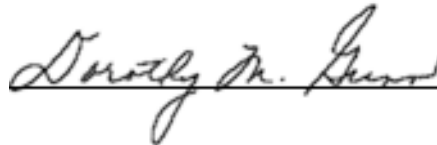
CONCLUSION

Today the Board denies Waste Management's motion to dismiss this complaint, finds this complaint is neither duplicative nor frivolous, and accepts the complaint for hearing.

IT IS SO ORDERED.

Board Member D.C. Karpiel abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 20, 2003, by a vote of 6-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board