ILLINOIS POLLUTION CONTROL BOARD
November 8, 1990

LAND AND LAKES COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 90-118
	)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

FRED C. PRILLAMAN APPEARED ON BEHALF OF PETITIONER, AND

DONALD L. GIMBEL APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. D. Dumelle):

This matter comes before the Board on a Petition for Review filed by Land and Lakes Company ("Land and Lakes"). Land and Lakes seeks review of a single condition imposed by the Illinois Environmental Protection Agency ("Agency") on its May 17, 1990 Experimental Supplemental Permit.

PROCEDURAL HISTORY

Land and Lakes filed its Petition for Review on June 20, 1990. On July 16, 1990 the Agency filed a Motion for Leave to File the Agency Record Instanter and the Agency Record. On July 19, 1990 the Board issued an order granting the Agency's motion. On July 20, 1990, Land and Lakes filed a Motion to Supplement the Agency Record. On July 24, 1990 the Agency filed a Motion for Extension of Time to Reply to Land and Lakes' Motion to Supplement the Agency Record. The Board granted the motion on August 9, 1990, and the Agency filed its Objection to the Motion to Supplement on the same date. On August 13, 1990, Land and Lakes filed a Reply to the Agency's Objection. Hearing was held on August 16, 1990 in Romeoville, Illinois. On August 30, 1990, the Board issued an order stating that it would take the Motion to Supplement the Agency Record with the case. Land and Lakes filed its post-hearing brief on September 10, 1990. The Illinois Environmental Protection Agency filed its post-hearing brief on September 21, 1990. On September 27, 1990, Land and Lakes filed a Reply Brief.

BACKGROUND

Land and Lakes is the operator of a sanitary landfill known as the Willow Ranch Landfill. The landfill is owned by NBD Trust Company of Illinois as trustee for JMC Operations. The site is located southeast of Route 53 and Bluff Road in Romeoville, Will County, Illinois, and consists of approximately 33 acres. It is

adjacent to a quarry on one side and, on its southern edge, to the Will County Forest Reserve. (R. 121). It is permitted to accept general municipal solid waste. (R. 121).

The Agency granted Land and Lakes a Developmental Permit (Permit No. 1976-17-DE) for the site on May 13, 1976. On February 1, 1990, Land and Lakes submitted an application for an Experimental Supplemental Permit to allow it to modify the operation of the site to allow the use of a non-woven geotextile fabric (Fabrisoil) as an alternate daily cover material.

After receiving the experimental supplemental permit application, Mr. Chris Liebman, the Agency permit analyst on this matter, sent out a memo to the various sections within the Division of Land Pollution Control (including the Field Operations Section ("FOS")) asking for comments on it. (R. 48-49, 73). He received a written comment from Mark Retzlaff of FOS, as well as a suggestion from his supervisor, Ed Bakowski, to check with Will County which has a delegation agreement with the Agency pursuant to Section 4(r) of the Act. (R. 57, 92). On May 8, 1990, Mr. Liebman telephoned Ms. Kathryn Sachtleben, the Will County landfill inspector. (R. 58, 136). Ms. Sachtleben told him that she did not have experience with the use of Fabrisoil and that she did not know if it would prevent blowing litter in heavy winds, or how it would perform in heavy rains or with regard to burrowing animals. (R. 125). She also stated that the site was adjacent to a forest reserve, that Land and Lakes had experienced some problems in the past with an experimental daily cover called Sanifoam, and that it was her understanding, from conversations with site personnel, that there was no one at the landfill on weekends or holidays. (R. 65, 79, 103, 125). She then recommended that a soil cover rather than the Fabrisoil be applied on the day before weekends and holidays because there would be no one at the site at those times to rectify any potential problems (i.e. blowing litter, odors, burrowing animals, or fires) that could arise during those times. (R. 77, 107, 108, 127-128).

On May 17, 1990, the Agency granted Land and Lakes' Application for Experimental Supplemental Permit (Permit No. 1990-056-SPX). The permit is of a two year duration, and contains sixteen special conditions and four standard conditions. Land and Lakes appeals from the imposition of Special Condition 3, which provides as follows:

> 3. At the end of the working day on days before weekends and holidays, soil rather than non-woven geotextile fabric or Sani-Blanket shall be used as daily cover.

In its Petition for Review, Land and Lakes provides three reasons for its objection to the inclusion of Special Condition

3. First, Land and Lakes argues that the condition is neither required by any regulation promulgated by the Board under 35 Ill. Adm. Code 807, nor necessary to accomplish any purpose of the Environmental Protection Act ("Act") (see Ill. Rev. Stat. 1989, ch. 111½, par. 1039(a); 35 Ill. Adm. Code 807.206(a)). (Pet. par. 6(A)). Second, Land and Lakes alleges that the Agency acted arbitrarily and unreasonably in imposing the condition because there is no technical basis, nor any basis in law or fact, for its inclusion. (Pet. par. 6(B)). Finally, Land and Lakes asserts that the Agency included the condition solely at the behest of Will County and in violation of Section 39(a) of the Act. (Pet. par. 6(C)). In support of the above allegations, Land and Lakes points to the fact that the Agency did not include a similar condition in four of its other experimental permits (see below). (Pet. par. 6(C)).

MOTION TO SUPPLEMENT AGENCY RECORD

Before reaching the substantive merits of this permit review, the Board must address the issue raised in Land and Lakes' Motion to Supplement the Agency Record.[1] Land and Lakes requests that the Experimental Supplemental Permits for four of its other landfills (Land and Lakes Dolton [Permit No. 1990-075-SPX dated May 14, 1990], located at 138th and Cottage Grove in Dolton, Cook County; Land and Lakes #3 [Permit No. 1990-063-SPX dated May 8, 1990], located at 122nd and Stony Island in Chicago, Cook County; Land and Lakes #1 and #2 [Permit No. 1990-062-SPX dated May 7, 1990], located in Cook County; and Land and Lakes Wheeling [Permit No. 1990-194-SPX dated May 31, 1990], located on Milwaukee Avenue just north of Lake Cook Road in Wheeling, Lake County) be included in the record because they do not contain the objectionable condition. Land and Lakes argues that the above permits must be included in the record in order for the Board to appreciate the arbitrary nature of the Agency's decision to impose Special Condition 3.

In response, the Agency argues that it filed the record pursuant to 35 Ill. Adm. Code 105.102(a)(4), and that the Agency record contains the documents described in that section and all other documents which the Agency utilized in its permit review.

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[1]The Board notes that, at hearing, Land and Lakes made a motion to introduce the four experimental permits into the record. The Agency objected and argued that they were not relevant to the case. The Agency also objected to the introduction of the Wheeling landfill permit. The Agency argued that it should not be admitted into the record because it was issued after the Willow Ranch permit and the Board can only consider evidence that was available to the Agency at the time the permit was issued. The Hearing Officer in the matter allowed the introduction of the four permits into the record (see Exhibits 1, 2, 3, and 4). (R. 34-38).

The Agency also states that it did not utilize the other permits in its permit review and asserts that the documents are not relevant to this permit appeal.

The sole question before the Board in a permit review is whether the applicant proves that the application, as submitted to the Agency, demonstrates compliance with Act and regulations. (Joliet Sand & Gravel v. PCB, 516 N.E.2d 955, 958 (3d Dist. 1987).) Consequently, the Board's review of the Agency's permit decision is limited to a consideration of the material relied upon by the Agency. (Alton Packaging Corp. v. PCB, 516 N.E.2d 275, 280 (5th Dist. 1987).) While the applicant's burden of proof in an experimental permit review is somewhat different in that the applicant must prove that the process or technique has a reasonable chance for success and the environmental hazards are minimal (35 Ill. Adm. Code 203(a)), the scope of the Board's review remains the same.

Here, there is nothing to show that Agency should have considered information in other permit files simply because the same applicant is involved, but the permits apply to different facilities. The Board will not put itself in the position of second-guessing the Agency's permit decision based upon information in other permit files in the Agency's possession. Therefore, the motion to supplement the record with the four permit applications is denied. The Board notes that, in addition to the reasons stated above, it will not supplement the record with the Wheeling permit application because that permit was issued subsequent to the instant permit and, therefore, was clearly not available to the Agency at the time the instant permit decision was rendered.

BURDEN OF PROOF

Permits are granted by the Agency pursuant to Section 39(a) of the Act which sets forth the requirements for securing a permit as follows:

> When the Board has by regulation required a permit...it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility... will not cause a violation of this Act or of regulations hereunder....In granting permits the Agency may impose such conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder.

This standard is reiterated in the Board's waste disposal regulations, with one important exception. Specifically, 35 Ill. Adm. Code 807.207 provides:

> The Agency shall not grant any permit, except an Experimental Permit under Section 807.203, unless the applicant submits adequate proof that the solid waste management site: (a) will be developed, modified or operated so as not to cause a violation of the Act or the rules, or has been granted a variance pursuant to Title IX of the Act....(emphasis added)

When examining 35 Ill. Adm. Code 807.203, it becomes clear that experimental permits are exempt from the standard set forth therein. 35 Ill. Adm. Code 807.203(a) provides:

> To best aid the improvement of solid waste management technology, the Agency may issue Experimental Permits for processes or techniques that do not satisfy the standards for issuance set forth in Section 807.207, if the applicant can provide proof that the process or techniques has a reasonable chance for success and that the environmental hazards are minimal.

Although both parties refer to the above sections, there is some dispute and confusion regarding the applicable section and thus, the burden of proof that must be met in this case.

In most permit appeals, a petitioner must show that the condition imposed by the Agency is arbitrary and not necessary to accomplish the purposes of the Act. Stated alternatively, a petitioner must establish that its permit, absent the condition, will not result in any future violation of the Act and the condition is, therefore, arbitrary and unnecessary (see John Sexton Contractors Company v. IEPA, PCB 88-139, 96 PCB 191, 196 (February 23, 1989), aff'd in part, rev'd in part and rem'd sub nom. John Sexton Contractors Company v. IPCB and IEPA, No. 1-89-1393, slip op. at 15 (4th Dist. June 29, 1990); Browning-Ferris Industries of Illinois, Inc. v. PCB et al., 179 Ill. App. 3d 598, 534 N.E.2d 616, 620, 622 (2d Dist. 1989); Sexton Filling & Grading Contractors Corporation v. IEPA, PCB 88-116, 100, PCB 189, 194, 197 (June 22, 1989); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 516 N.E.2d 275, 279 (5th Dist. 1987); EPA v. PCB, 118 Ill. App. 3d 722, 780, 445 N.E.2d 188, 194 (1st Dist. 1983). Once a petitioner establishes a prima facie case that the condition is unnecessary, it becomes incumbent upon the Agency to refute the prima facie case. John Sexton Contractors Company v. IPCB and IEPA, No. 1-89-1393, slip op. at 15 (4th Dist. June 29, 1990); Marathon Petroleum Co. v. IEPA, PCB 88-179, 101 PCB 259, 274 (July 27, 1989); See also Fred E. Jurcak v. IEPA, PCB 85-137, 103 PCB 506 (September 28, 1989).

A petitioner who is granted an experimental permit pursuant to 35 Ill. Adm. Code 807.203 need not prove that the permit, as proposed, will not result in a violation of the Act. Rather, the petitioner has a burden to show that the experimental process or

technique, as proposed, has a reasonable chance of success and that the environmental hazards are minimal.

DISCUSSION

As previously stated, the main issue in this case, and the question that the Board must ask, is whether Land and Lakes has demonstrated that the use of Fabrisoil, as proposed (i.e. at all times), has a reasonable chance of success and whether the environmental hazards are minimal.

In its briefs, Land and Lakes argues that the condition is arbitrary and unnecessary for several reasons. First, Land and Lakes notes that its permit application did not contain any information or reveal any special circumstances that would justify the imposition of Special Condition 3. Second, Land and Lakes states that there was no technical or factual basis for the inclusion of the condition. Rather, Land and Lakes argues that the Agency improperly delegated its authority because it imposed the condition solely at the behest of Will County. Third, Land and Lakes argues that there is nothing about the Willow Ranch facility that in any way differs from the other four landfills which would necessitate or require the imposition of Special Condition 3.

For its part, the Agency asserts that Fabrisoil is an unproven technology in Illinois, and that the burden of proof that Fabrisoil is an effective daily cover material is on Land and Lakes and not the Agency. According to the Agency, the only information that Land and Lakes submitted to the Agency regarding the effectiveness of Fabrisoil as a daily cover was a "self-serving" brochure from the manufacturer of the product. Because Land and Lakes did not submit any documentation from sources independent from the manufacturer as to the effectiveness of the product, the Agency concludes that it had no reliable information at the time of the permit application, either from Land and Lakes or elsewhere, that Fabrisoil would control litter, vectors, fire, or odors consistently and under all weather conditions.

In addition to the above reasons, the Agency asserts that it was justified in issuing an experimental permit pursuant to 35 Ill. Adm. Code 807.203 and imposing Special Condition 3 because the landfill was adjacent to a forest reserve and, as a result, had a higher susceptibility to burrowing animals than other sites, and because the site was unattended on weekends and holidays and no one would be available to correct any problems that could arise during those times.

In response to Land and Lakes' argument regarding improper delegation, the Agency contends that there is no evidence to show that Mr. Liebman delegated his permit responsibility to Will County. Rather, the Agency notes that permit reviewers commonly

seek the input of Agency field inspectors as well as county inspectors, where the county has a delegation agreement with the Agency pursuant to Section 4(r) of the Act, in making permitting decisions. The Agency adds that Mr. Liebman simply sought information concerning the site in accordance with this common practice and then exercised his independent judgment before placing Special Condition 3 in the permit.

The record reveals that the Agency added Special Condition 3 to guard against the possible risks of blowing trash, odors, animal burrowing, and fires, and that the Agency's actions were based on the conclusion that there was no reliable information that Fabrisoil would control such occurrences. Ms. Sachtleben stated:

> With an experimental permit I feel it's an opportunity to safeguard against problems in the future so I recommended that we be cautious, that we do not have-- I did not have experience with the use of Fabrisoil and to my knowledge the Agency did not have experience, their field operations people did not have experience with the use of Fabrisoil, that clay or dirt cover is more tried and true, and because of these reasons that we don't know how it performs in blowing conditions, heavy winds, if it would cause blowing litter or allow for blowing litter in heavy wind conditions that we did not have any proof of how it would perform in the field regarding burrowing animals or heavy rains. (Emphasis added).
>
> (R. 125).

Overall, the Board must conclude that for the particular circumstances at issue here Special Condition 3 is necessary to accomplish the purposes of the Act. Land and Lakes has not demonstrated that, absent Special Condition 3, the exclusive use of Fabrisoil has a reasonable chance of success and that the environmental hazards are minimal. The Agency's reliance on the information from the county inspector supports a conclusion that minimal environmental harm has not been demonstrated as it relates to erosion and vectors. In addition, no reliable information on the temporary cover's performance as to odor and fires appears in the record.

The permit writer concluded that he lacked information on the performance of this new temporary cover. By putting in Special Condition 3 the existing Board rule for clay or earth cover, adopted in 1973, then remains in force. That rule, which generally applies to all landfills in Illinois, has more than 17 years experience behind it and is known to safeguard the environment against odors, fires, vectors, and erosion.

With regard to the question of the Agency's delegation of authority, the Board has no quarrel with the Agency's attempt to seek such information which it judges will or may be of use to it when it is evaluating a permit application. It makes sense that the Agency would ask about the experiences of a county inspector functioning under a delegation agreement.

FAIRNESS ISSUES

Finally, there is a question about whether the Agency had followed the proper procedures in issuing the permit in question. In Wells Manufacturing Company v. IEPA, 195 Ill. App. 3d 593, 552 N.E.2d 1074 (1st Dist. 1990), the Appellate Court concluded that the Agency violated Wells' due process rights when it denied the company's application for renewal of an air operating permit on the basis of an alleged air pollution violation. The Court concluded that because the company had certified that information in previous construction and operating permits was accurate and unchanged at the time of the renewal application, the Agency should have approved the renewal application or given the company an opportunity to submit evidence during the application process that it was not violating the Act and air pollution regulations.

In the instant matter, Mr. Liebman, on direct examination, testified that there was never a discussion between the Agency and Land and Lakes regarding the imposition of Special Condition 3 or the permit before the permit was issued. (R. 24). The following exchange then took place with Mr. Liebman during cross-examination:

> Q. Now, what attempt did you make, if any, to talk to somebody at Land and Lakes about the presence or absence of people on the landfill on weekends or holidays or the problems, if any, of burrowing animals, animals or any other problem that might be present because of the proximity of this landfill to the forest reserve?
>
> A. I don't remember attempting to communicate that.
>
> Q. You didn't tell anybody from Land and Lakes about this, did you?
>
> A. Actually, I thought that I had. I thought that I had talked to Jim Ambrosm (environmental manager for Land and Lakes) about condition 16, and, at the same time, mentioned this condition.
>
> Q. You think you made a telephone call to Mr.

Ambrosm and mentioned this Special condition 3?

A. Yes. The purpose of the phone call wasn't to discuss condition number 3, it was to discuss condition number 16 and let him know that was going to be there, and I had thought at the same time that I ought to let him know that we would be considering condition number 3.

Q. Do you remember reading it, Special condition 3 prior to Mr. Ambrosm at that time?

A. I don't remember.

Q. But your recollection is that you had already made a determination to put in special condition Number 3 and you think you told Mr. Ambrosm that you intended to do that. That's your testimony, right?

A. Well, yes. I decided that I would include it in the draft that I had prepared.

(R. 83-85).

Mr. Dan Wierec, an engineer for Land and Lakes, testified that the Agency did not contact him or, to his knowledge, anyone at Land and Lakes, to discuss the Agency's underlying concerns leading to imposition of Special Condition 3. (R. 23-24). Mr. Ambrosm, Land and Lakes' environmental manager, testified that he talked with Mr. Liebman about Special Condition 16, but that he did not recall any discussion about Special Condition 3. (R. 154-155). Overall, the Board finds as a matter of contested fact that Mr. Liebman did discuss Special Condition 3 with Mr. Ambrosm. Therefore, Wells does not apply. In any event, the Board is not prepared here to extend the Wells rationale from the factual situation of a routine permit renewal to that of an experimental permit scenario.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The Board affirms Special Condition 3 of Land and Lakes' Experimental Supplemental Permit (Permit No. 1990-056-SPX) dated May 17, 1990.

Section 41 of the Environmental Protection Act, Ill.Rev. Stat. 1989, ch. 111½, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Chairman J. Marlin and Board Members J. Anderson and J.T. Meyer Dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution control Board, hereby certify that the above Opinion and Order was adopted on the 8th day of November, 1990, by a vote of 4-3.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board