ILLINOIS POLLUTION CONTROL BOARD
February 22, 1984

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| WASTE MANAGEMENT OF ILLINOIS | ) | |
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| Petitioner, | ) | |
| | ) | |
| v. | ) | PCB 82-55 |
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| BOARD OF SUPERVISORS OF TAZEWELL COUNTY, | ) | |
| | ) | |
| Respondent. | ) | |

ORDER OF THE BOARD (J. Anderson):

Procedural History

This matter comes before the Board on the January 10, 1984 conditional remand by the Supreme Court in the case City of East Peoria, Illinois et al. v. Illinois Pollution Control Board, et al. (Waste Management of Illinois, Inc., appellant) No. 59110. That case involves an appeal from a decision of the Third District Appellate Court in City of East Peoria, Illinois et al. v. Illinois Pollution Control Board, et al., 117 Ill. App. 3d 673 (1983), reversing the Board's August 5, 1982 Opinion and Order in PCB 82-55. In that Order, the Board had reversed the decision of the Tazewell County Board denying site location suitability approval, pursuant to Section 39.2 of the Environmental Protection Act (Act) Ill. Rev. Stat. ch. 111½, par. 1039.2, for a proposed new regional pollution control facility to be operated by Waste Management.

This action has been remanded to the Board by the Supreme Court in order to allow the Board to review a settlement agreement proposed by Waste Management, the Tazewell County Board, and the City of East Peoria. In its remand order, the Supreme Court dismissed the case without prejudice to reinstatement of an appeal within 90 days. The parties filed their Joint Motion To Approve Settlement Agreement and to Enter Order Granting Site Location Suitability Approval with the Board on January 11, 1984.

In their factual stipulation, the parties recite, inter alia, that they wish to settle this action because the currently operating Tazewell County landfill will reach capacity in one year, the proposed expansion facility is necessary to serve the municipal waste needs of the area served by the existing facility, and that Waste Management wishes to begin development of the expansion facility immediately (¶ 20-24, p. 6-7).

The proposed settlement was "expressly conditioned upon, and effective only with approval thereof in all respects of the PCB (sic)" (p. 7). At its Meeting on February 9, 1983, the Board discussed a draft Order rejecting this settlement. This lead to the parties' filing, on February 15, 1984, of a Joint Motion to Schedule Settlement Conference, Or, In The Alternative, To Approve The Settlement Agreement By Striking Or Modifying The Objectionable Provisions. This later motion asserts that

> "The existing Tazewell County Landfill has a remaining life of approximately 4-½ months based upon current receipts without seriously interfering with the development of the expansion site. The public health, safety and welfare requires that a settlement be promptly effectuated to insure that the solid waste disposal system in the Tri-County Area [of Tazewell, Peoria, and Woodford Counties] be promptly effectuated to insure that the solid waste disposal system in the Tri-County Area will continue without disruption.
>
> The parties are willing to modify or amend the Settlement as might be deemed necessary to comply with the requirements of the Board or of the Act. However, settlement of a landfill siting case before the Board is a matter of first impression and the parties cannot proceed further with the instant settlement in the absence of guidance or direction from the Board." (Joint Motion to Schedule, ¶6, 8, p. 3)

The Board declines to schedule a settlement conference. Pursuant to Section 5 of the Act, the Board speaks only through Orders adopted by a majority of its members, duly adopted at open meetings. Even if the Act could be read as providing for a settlement conference of the sort requested, the Board would question the seemliness of such a procedure.

Prior to discussion of the individual components of the proposed settlement, a brief review of the history of this action is in order.

Tazewell County denied site location suitability approval on the grounds that "the site a) was not necessary to accomodate disposal needs for waste generated and coming from outside the State of Illinois [Criterion 1], b) that the facility is not so designed, located, and proposed to be operated so that the public health, safety and welfare will be protected inasmuch as the applicant is authorized to dispose of special waste [Criterion 2]; and c) the facility is not so located as to minimize incompatibility with the character of the surrounding area and minimize the effect on the value of surrounding properties in that one residential property immediately adjacent and abutting

the property exists [Criterion 3]. (Opinion, PCB 82-55, p. 4) However, in the event of reversal of its denial, Tazewell requested the Board to impose certain conditions. In reviewing the decision, the Board found that the County would have considered Criterion 1 satisfied by inclusion of the condition to buy certain property as requested by the County, and that Criterion 3 did not give the County "authority to deny approval solely based on its desire to prohibit out-of-state waste", "even apart from probable conflicts with the Commerce Clause of the Constitution of the United States" (Id, p. 7-8). The bulk of the Board's discussion revolved around "the public health, safety, and welfare" Criterion 2. Based on a comment made by the sponsor of SB 172 that local authorities "are not to make technical decisions as to the suitability of the site, rather that power still lies in the Environmental Protection Agency", the Board, over one dissent, found that there "was no intent to give the local authorities concurrent jurisdiction with the Agency to review highly technical details of the landfill design and construction" (Id. at 7). The Board therefore did not include the "highly technical" conditions contained in subparagraphs a-f of Condition 2 as requested by the County Board (which, as will be discussed, are again presented here verbatim).

The Third District Appellate Court reversed the Board's decision and remanded it, for reasons related to Criterion 2. The Court found that the Board "erred in its conclusion that the County Board had no jurisdiction to consider the public health ramifications of the proposed landfill's design". In the Court's opinion this resulted in Board review of the record de novo, instead of Board application of a manifest weight of the evidence standard. The cause was remanded for reconsideration in light of the latter standard.

In considering this stipulation, the Board must initially note that, as a matter of good government and in the public interest, even if the conditions of this settlement were otherwise acceptable, the Board would not favor settlement of this action insofar as it frustrates early judicial review of the Criterion 2 issue by the Supreme Court. In 1982-1983, the Board rendered decisions in 9 site location suitability approval cases most of which involved criterion 2. Several more of these actions are on the Board's 1984 docket.

In the only other decided Criterion 2 case, the Second District Appellate Court's discussion of the issue was limited to a single sentence "We see no reason to depart from the decision in the City of East Peoria case and will adhere to it", County of Lake v. IPCB et al., No. 83-3, December 12, 1983 (slip op. at 16). While the Board will, of course, conform to the mandates of the Appellate Courts in this matter, it respectfully maintains its disagreement. The rationale for this disagreement was more

fully expressed in Browning - Ferris Industries of Ill.,Inc. v. Lake County Board of Supervisors, PCB 82-101, December 2, 1982, than in this action.* The earliest possible judicial review of the criterion 2 issue by the Supreme Court issue will obviously assist the Board in its deliberations. More importantly however, it will provide guidance to the cities and counties who must implement Section 39.2, many of which have already expended thousands of dollars in an attempt to make "highly technical" decisions.

Specific Provisions of this Settlement

Several terms of this settlement proposal are unacceptable to the Board.

Paragraph 5 of the settlement contains, save one, the same conditions which were reviewed by the Board in its prior Opinion in this case. As to subparagraphs a-f specifying construction details, the Board objects to these conditions. The Board notes that the Agency had issued a development permit for the proposed expansion facility, on the strength of the Board's August 5, 1982 Order (Exhibit 1). Without resort to the documents on which permit issuance is based, the Board could not determine whether the County's conditions would conflict with Agency permit conditions.

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*In that case, the Board stated:

"The Board accordingly reaffirms its Waste Management finding that there is a separation of review criteria between the Agency and local authorities. The Agency, with its broad-based staff and research experience and capabilities, continues to have administrative jurisdiction over the detailed, specific, uniform "environmental" specifications of a landfill's construction, waste disposal procedures, and the like; pollution events resulting from faulty design or operation can easily cross the boundaries of the unit of local government having site location approval authority. It is given to the municipal and county authorities to review, and base its decision on, matters of more traditionally "local" concerns raised by potential conversion of a site from one use to another; these include odor, noise and pest nuisances, road maintenance and cleaning, increased call on police and fire departments, visual aesthetics, and so on. This is not to say that both the Agency and the County cannot focus on a similar subject matter, but for different reasons. For example, the Agency's interest in a final cover designed to prevent a "bathtub" effect and the County's interest in a final planting cover designed for visual aesthetics emanate from different jurisdictional responsibilities, the former to protect the State's waters--which do not respect local boundaries--and the latter to prepare for, say, ultimate recreational uses--which do respect local boundaries.

(footnote continued on next page)

Subparagraph g, the insurance conditon, is a condition which the Second District Appellate Court has held to be beyond the power of a County to impose pursuant to Section 39.2 in County of Lake v. Illinois Pollution Control Board, et al. No. 83-3, December 12, 1983, slip op. at p. 23. The same rationale would apply to the performance bond required in Paragraph 7 (p. 10-11). Subparagraph h provides that no out-of-state waste be accepted at the site. As the Board noted in its original Opinion (p. 8) it doubts whether such an exclusion would be any less repugnant to the Commerce Clause of the United States Consitution than an attempt by Illinois to ban out-of state nuclear waste. The Board is not inclined to authorize the County to impose indirectly, by private agreement, a condition which it has no authority to impose directly.

Paragraph 6, concerning a disposal ratio of liquid to solid waste, does not even refer to the proposed site, but instead relates to the existing landfill, over which the Board has no jurisdiction. The paragraph provides that the stated ratio takes precedence over any Agency policy to the contrary. This condition upon another facility most clearly invades the Agency's sole authority to issue permits, Landfill. Inc., v. PCB, 74 Ill. 2d 541 (1978), and cannot be accepted by the Board

Paragraph 9 (p. 10) provides that the stipulation may be from time to time modified upon agreement of the parties, while paragraph 4 provides that special waste may be accepted only upon express written approval of the City and County. Both are

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(footnote continued from preceding page)

Also, regardless of the quality and quantity of local staffs, to construe SB 172 as giving counties and municipalities the power over regional facilities to co-regulate in technical areas, especially as related to the Agency's permit purview, is to assure chaos. It is easy to visualize the consequences of counties, municipalities and the state collectively dictating conditions for, say, the proper placement, depth, numbers, use of, capping etc. of testing and monitoring wells. And to expect the Agency to later "adjust" county technical conditons that are incompatible with the Agency's view of the proper and safe use of testing and monitoring probes is to ignore the fact that, if the Agency does so, it can be contravening the County approval upon which the Agency's power to issue the permit is derived. And after the County's 120 day decision period is up, there is no "going back" for fine-tuning.

The County's site location suitability approval is a power which precedes the Agency's power to issue a permit, and is not a substitute for it or a site management overlay upon it. However, SB 172 places the County and its citizens in a strengthened and better informed position to effectively seek sanctions against a landfill operator who affronts the sensibilities of the person in the surrounding areas." (slip op. at 10)

unacceptable for multiple reasons. The Board cannot accept an agreement which can be changed in its entirety once the Board accepts it. This brings up a related problem, that of resolution of conflicts in interpretation of this settlement, e.g. can the City and County impose yet more conditions as part of a special waste authorization? The Second District Appellate Court in County of Lake, supra, at p. 21, has stated that siting location approval conditions are enforceable before the Board. This settlement, open-ended in a manner which the Board believes would be impermissible in a County decision pursuant to Section 39.2, would promise to embroil the Board in conflict resolution for years to come.

Again, and in summary, this stipulation and proposal for settlement is rejected.

IT IS SO ORDERED.

Board Members J.D. Dumelle, B. Forcade and J. Marlin concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 22nd day of February, 1984 by a vote of 7-0.

Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board