ILLINOIS POLLUTION CONTROL BOARD
July 21, 1982

AMERICAN FLY ASH COMPANY, AN ILLINOIS CORPORATION; KATHRYN SVENDSON AND JOHN SVENDSON, Petitioners,	)	
v.	)	PCB 81-188
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

FREDERICK C. PRILLAMAN: MAHAN, ALEWELT AND PRILLAMAN; APPEARED ON BEHALF OF THE PETITIONERS.
DONALD L. GIMBEL, ATTORNEY AT LAW, ENFORCEMENT PROGRAMS, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF THE RESPONDENT.

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

This matter comes before the Board upon the December 1, 1981 filing of a petition for review of a permit condition pursuant to Section 40(a) of the Illinois Environmental Protection Act. Therein, Petitioners challenge the inclusion of Special Condition No.7 of the Developmental Permit issued by the Illinois Environmental Protection Agency (Agency) to Petitioners on October 27, 1981. That condition requires "written evidence that the applicant and Tazewell County have an agreement relative to road maintenance and load limits."

American Fly Ash company (AFA) is the proposed developer and operator of a landfill of approximately 84 acres located on a 186 acre tract of land situated in Section 30 of Elm Grove Township in Tazewell County, three miles southeast of Pekin. American intends to purchase the site under an option from the owners, and nominal Petitioners, Kathryn and John Svendson. The landfill is intended to handle fly ash and well bottom boiler slag only, generated by Commonwealth Edison's Powerton Plant, which is also in an unincorporated area of Tazewell County.

On January 21, 1982 the Board dismissed this action based upon the retroactive applicability of SB 172 which established new procedures for the issuance of permits for new regional pollution control facilities. Dismissal was based upon the lack of any allegations by AFA that it was not a new regional pollution control

facility of that it followed those new procedures. However, the Board reinstated this action by Order of April 1, 1982, agreeing with a February 18, 1982 Opinion of the Attorney General which concluded that local general purpose units of government include only counties and municipalities, and based upon AFA's subsequent assertion that the facility was not regional. Given that construction and the facts alleged in this case, the Board concluded that the site at issue here was not in fact a new regional pollution control facility and, therefore, was not subject to SB 172 requirements which became effective as to non-regional facilities sixteen days after issuance of the permit at issue here. Hearing was held on May 20, 1982 in Pekin and briefs were filed in lieu of closing arguments by the Agency on June 8 and June 25, 1982, and by Petitioners on June 9 and June 18, 1982. The Agency's latter brief was accompanied by a motion for leave to file, since that filing is not by right, which is hereby granted. A motion to allocate costs was filed by AFA on June 22, 1982 and an Agency response was filed on June 25, 1982.

The only issue before the Board is whether the Agency properly included Special Condition No.7 in the October 27, 1981 Developmental Permit issued to Petitioners. Such a condition is proper only where it is necessary to accomplish the purposes of the Environmental Protection Act (Act) and is consistent with regulations of the Board. Unless both of these conditions are met, the condition must be stricken upon appeal (see Section 39(a) of the Act and Rule 206 of Chapter 7: Solid Waste). Under the facts of this case the Board finds that the appealed condition is not necessary to accomplish the purposes of the Act.

The Agency argues it correctly imposed the condition "to ensure that the county roads would be adequately maintained and thus, allow their use by other vehicles for other legitimate purposes" (Agency Br. pp. 5-6). In support of this argument, the Agency cites evidence which establishes that forty truckloads of waste would be brought into the facility each day (Pet. Ex. A and R. 43), carrying a total waste load of 960 tons (Resp. Ex. 2 and R. 42) in trucks weighing 25,000 to 30,000 pounds (R. 45), resulting in an average total weight per truck of approximately 36 tons. Further, the Agency established that the weight limit for the county roads which are proposed to be used is 15 tons (R. 68 and 87) and that while these roads (Towerline and Townline) are presently in good shape, the proposed increase in truck traffic would necessitate a considerable increase in maintenance (R. 45-47, 50-52 and 70-73).

While these facts are unrebutted and are accepted by the Board as true, the protection of county roads from damage is not, in itself, a purpose of the Act, and does not establish that any environmental harm is threatened. There has been no showing, for example, that the location of the facility and the attendant traffic would interfere with the land use of the area, that the road deterioration could cause spillage of any of the

wastes, or that any substantial noise or air pollution would result. On the contrary, the evidence shows that AFA is willing to assume responsibility for the maintenance of the affected roads (R. 11-12 and Pet. Ex. A, p. 24), that the roads are presently in good condition (R. 20-21, 59, 70, and 84), that the affected bridges and culverts can withstand the projected loads (R. 45-46 and 70), that the site is adjacent to another landfill (R. 23 and 27) and is located in an otherwise generally agricultural area (Permit App., p. 2).

Under these circumstances the only potential harm appears to be to the roadways themselves, and even that should be remedied by AFA's offer to maintain them. Thus, AFA has demonstrated that the appealed condition is not necessary to fulfill the purposes of the Act.

Moreover, the Board has held that denial of a permit "for failure of a local official, for whatever reason, to agree to do that which he is empowered to do, and has the duty to do--improve township roads--at the cost of a permit applicant, was improper. The Board is persuaded that in so doing, the Agency has unlawfully delegated its permitting authority" (Hamman v. IEPA, et al., PCB 80-153, November 19, 1981). The same reasoning applies here.

In both cases the permit applicant was required to obtain a written agreement with local authorities regarding improvements to the affected roads prior to development of the site, and none of the differences between the fact situations would lead to a contrary conclusion. Under pre-SB 172 law, to in essence allow a locality to veto the permitting of a landfill site is inconsistent with the establishment of a unified state-wide program supplemented by private remedies (Carlson v. Village of Worth, 62 Ill. 2d 406, 343 N.E. 2d 493, 499; S.Ct. 1975 and cases cited therein, and see County of Cook v. John Sexton Contractors, 75 Ill. 2d 494, 389 N.E. 2d 553, applying this rationale to non-home-rule units).

AFA argues that Hamman is controlling and that the differences are in AFA's favor: namely, that the roads involved here are in good shape, whereas in Hamman the roads were inadequate, and that here, unlike in Hamman, another landfill is adjacent to the subject site. The Agency, on the other hand, attempts to distinguish Hamman on the basis that AFA's application affirmatively shows that site operations would violate a local ordinance.

AFA does propose to exceed the county weight limit, whereas there was no weight limit question in Hamman. However, the fact that the weight limit has not been posted on the affected roads, that other present truck traffic exceeds the weight limit, including those trucks which serve the adjacent Pekin Metro landfill, and that the limit is not being enforced, are undisputed (R. 21-23, 26-27, 74-77 and 86-87). Terry Gardner, Superintendent of Highways of Tazewell County, did testify, on the other hand, that if the overweight vehicles began to cause road damage, the County would post and enforce the weight limit (R. 74-77, 85-87).

If, in fact, the County refuses to reach an agreement with AFA, and if the County posts and enforces its weight limit, and if AFA commences operation, a conflict between AFA and the County will arise. However, the reasoning of Carlson, County of Cook and Hamman will remain applicable. To allow a locality to bar a landfill, whether through a zoning ordinance or through weight limits on roads, or by refusing to reach an agreement on road construction or maintenance is not generally acceptable under the State landfill siting permit system, and such restrictions may only be considered insofar as they relate to protection of the environment. The Act does not grant the Agency authority to insure compliance with all local ordinances.

On June 28, 1982 the Third District Appellate Court remanded the Hamman proceeding to the Board (Harry Mathers, et al. v. IPCB, Donald J. Hamman and the IEPA, No. 81-741) and directed that the Board order the Agency to issue a permit containing a condition that the access road be improved according to Agency specifications which it had earlier agreed to. The basis for that decision appears to be that Hamman "conceded the necessity of the required action" and has not "even intimated that the failure to upgrade the road would do anything but cause environmental damage." However, having avoided facing the issue directly, the Court, through dictum and by requiring that the Agency specify acceptable road improvement, intimated that allowing a road commissioner to block the improvement of the road might well be viewed as an improper delegation of the Agency's permitting authority.

AFA has certainly not conceded that environmental harm will be caused through use of Townline and Towerline roads. The roads are presently in good shape and AFA appears to be willing to assure they remain so. Unlike Hamman the roads do not need to be improved prior to commencing operations to ensure that the environment is protected. If the roads are allowed to deteriorate to a point where environmental harm is caused, an appropriate action may be brought, and the permit can be revoked upon a showing that AFA is the cause.

Therefore, the Board concludes that Special Condition No.7 is improper and that the permit should have issued without the appealed condition on October 27, 1981 and that reference should be made to that date in determining the applicability of any legislative enactments, regardless of the date on which the Agency completes the now-ministerial task of issuing the permit.

Finally, the Board will deny Petitioners' motion to allocate costs. Hamman was under appeal by the Agency at the time of its permitting decision, and the Agency advanced arguments in this case which it could have in good faith decided distinguished this case from Hamman.

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

ORDER

This matter is hereby remanded to the Agency for issuance of a developmental permit consistent with this Opinion. Petitioner's motion to allocate costs is denied.

IT IS SO ORDERED.

I. Goodman dissented.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 21st day of January, 1982 by a vote of 4-1.

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