ILLINOIS POLLUTION CONTROL BOARD
January 22, 1981

| | | |
|---|---|---|
| MERCY HOSPITAL AND MEDICAL CENTER AND THE ILLINOIS HOSPITAL ASSOCIATION, Petitioners, | ) | |
| v. | ) | PCB 80-218 |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent. | ) | |

SUPPLEMENTAL OPINION AND ORDER OF THE BOARD (by J. Anderson):

By its Opinion and Order of December 19, 1980, the Board granted petitioners a one-year variance with conditions from its rules (Chapter 9 Part IX) implementing the prohibition of Section 21(h) of the Environmental Protection Act against deposit of hazardous hospital wastes in any landfill. On January 5, 1981, the Respondent Illinois Environmental Protection Agency (Agency) and the Attorney General filed a Motion for Reconsideration and for Evidentiary Hearing, to which petitioners responded January 19, 1981. This motion is hereby granted.

Respondent's first point concerns the scheduling of hearings concerning objections to the variance filed before December 24, 1980. As the Board on its own motion ordered such hearings by its Order of January 8, 1981, this point is moot. The Board acknowledges however its receipt of a late filed objection dated January 14, 1981 from a resident of Grant Park, Kankakee County, which states that notice of the variance petition was not published until after December 24. Although the Board notes that this objector waited 9 days after the date of publication, the Board will consider this last, late objection. The Board accordingly orders that a hearing be held in Kankakee County, pursuant to the same procedures established in its Order of January 8, 1981.

The second is that the Board issued a variance to a class, rather than to individuals. In this regard, the Agency reminds the Board that it had recommended that each petitioner be required to affirm the veracity of the facts alleged as applied to each petitioner. It is further noted that the Board granted variance to 18 hospitals which it, on its own motion, joined as parties, and also that some hospitals individually named in the petition were unaware that the Illinois Hospital Association had petitioned for variance on their behalf. For these reasons, an evidentiary hearing is requested.

Petitioners argue in effect that the Board did not grant a class variance, but instead granted variance to a number of hospitals whose individual requests were consolidated in one petition. Petitioners do suggest however that the Board adopt their proposed modifications to its Order, which would require hospitals currently owning or presently acquiring "incinerators or sterilizers which are properly permitted for the disposal or treatment of hazardous hospital waste"..."to utilize this means of disposal"..."to the maximum extent possible"..."as soon as practically possible" (emphasis added).

Before dealing with each of these specific points, the Board will address the "hazardous hospital waste" area generally. The Board remarked in its Opinion of December 24, 1980 in R80-19, that to its knowledge Illinois was the first state to legislate specific special handling of hazardous hospital waste. For this, and other reasons there mentioned, the establishment of the administrative mechanism for determining and enforcing compliance with the mandate of Section 21(h) has, regrettably, not been completed.

On December 19, 1980, the Board did complete what it views as the first phase of the implementation program, that is, the adoption of its emergency rules, effective January 1, 1981. These rules corrected some major misconceptions, by making clear, for instance, that "hazardous hospital waste" is not synonomous with "pathological waste;" that radiological and chemical wastes, while dangerous, are not statutory "hazardous hospital wastes;" and that "hazardous hospital wastes" cannot be deposited even in a hazardous waste landfill, according to the statute's terms. The emergency rules, based on the best information then available to the Board as a result of its inquiry hearings, remain in effect only for 150 days as dictated by the Illinois Administrative Procedures Act (APA).

On the same day, initiating the second phase, the Board adopted proposed rules which will be "fine-tuned" during the first 90-odd days of the emergency rule period pursuant to the public hearing and comment requirements of the Act and the APA. While these proposed rules are virtually identical to the emergency rules, the difference is noteworthy, as it highlights the interim, "first draft" nature of the emergency rules. The emergency rules state that issuance of a permit by the Agency for an incinerator for Chapter 2 air pollution emission limitation purposes is deemed issuance of a permit under Chapter 9, thus temporarily assuming that a given pathological incinerator can effect sterilization, i.e. kill all microorganisms in any or all specific types (e.g. human tissue, paper, plastic, glass) of "hazardous hospital waste." The proposed rules do not perpetuate this assumption, which was made only for emergency, phase-in, administrative need in recognition of inquiry hearing testimony by the Agency that:

> "At this time the Agency is not absolutely certain that such incineration, sterilization or [other] alternative

> [disposal] means do render these materials innocuous. We need to fully research this question." (R80-19 Inquiry Hearing of 11-17-80, p. 221. See also p. 227-233)

The Board anticipates receiving the fruits of that research during this second, permanent rulemaking phase.

In short, until completion both of the Board's permanent rulemaking processes, and the substantive and procedural review of the resulting rules under the APA by the Joint Committee on Administrative Rules, neither the Board, the Agency, the hospitals, nor the landfill operators will be absolutely certain of the compliance requirements of Section 21(h).

Accordingly, one of the arbitrary or unreasonable hardships to which the Board gave weight in its deliberations concerning the petitioners' variance petition was the uncertainty concerning ultimate compliance requirements, which uncertainty will continue for approximately another four months. Given the fact that increased health care costs are shared by the entire community of Illinois citizens, and given the Board's belief that the Act implicitly charges it to avoid imposition of unnecessary costs, the Board in granting variance required each individual hospital to submit a compliance plan only after compliance requirements are reasonably solid.

As petitioners correctly point out, the Board did not grant variance to a class. Variance was granted to individually named hospitals, each of which must individually certify acceptance of the variance on or before 45 days after the December 19th Order (February 2, 1981) and each of which must file a compliance plan for its own facility, taking its own individual circumstances into account, on or before 150 days after the date of the Order. The Agency and the Attorney General essentially are arguing that the Board should have severed the consolidated petition into 276 separate proceedings, and instituted 18 additional ones for the hospitals not named in the petition. Interrogatories and/or amended petitions would have been required from each hospital, attesting to and describing their individual circumstances. Yet, from the way their argument is framed, the Agency and the Attorney General seem to suggest that the Board should consolidate the cases for the purposes of an evidentiary hearing. (The Board must point out that neither the Agency nor the Attorney General exercised their statutory right to object to grant of the variance, which would have triggered Board authorization of hearing in this matter even though petitioners had waived hearing. As previously stated, the Board has already authorized hearings on objections filed.)

The early consolidation approach taken by the Board, which requires individual submission of certification and a compliance plan, satisfies the recognized need for specific, individual information at a more appropriate time, and in a more appropriate manner, than does the late consolidation approach. The Board did not and will not require each petitioner to immediately verify,

perhaps inaccurately, its ability to comply with regulations currently in a state of flux.* The 18 hospitals joined by the Board, as well as the "previously unaware" hospitals to which the Agency refers, each shares the aforementioned administrative uncertainty hardship alleged by the original petitioners. Each also has the same option to refuse the variance if it so chooses, by doing nothing (i.e. not filing an acceptance).

For much the same reasons, the Board declines to incorporate petitioners' suggested language into its Order of December 19, 1980. However, it has come to the Board's attention that its variance is being construed by some persons as an exemption or "total pass" from any conditions for a year. The Board believes that the last sentence of its previous Opinion, stating that the variance was not to "be construed as authorizing petitioners to relax the level of control presently required" made it reasonably clear that each petitioner was to comply to the utmost extent possible currently or in the near future. Until such time as full compliance is achieved, the Board expects each petitioner to dispose of as much of its hazardous hospital waste as is practicable and environmentally safe by incineration or sterilization.

---

*In addition, the Board wishes to prevent a situation in which, for public relations or other reasons, a hospital might certify its ability to incinerate all of its waste, but then proceed to overload or improperly "charge" its incinerators in order to do so. Incomplete burning and the resulting discharge and widespread dissemination of infectious agents through the incinerator's stack might create a greater public health threat than disposal of the waste in an authorized landfill.

ORDER

1. Hearing on the objection filed January 14, 1981 shall be scheduled and held in Kankakee County pursuant to the procedures established in the Board's Order of January 8, 1981.

2. Having reconsidered its Opinion and Order of December 19, 1980 pursuant to respondent's Motion of January 5, 1981, the Board supplements that Opinion and affirms that Order.

IT IS SO ORDERED.

Mr. Werner concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion and Order Order was adopted on the 22nd day of January, 1981 by a vote of 5-0.

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