ILLINOIS POLLUTION CONTROL BOARD
December 6, 1991

LAND AND LAKES COMPANY, JMC OPERATIONS, INC., and NBD TRUST COMPANY OF ILLINOIS AS TRUSTEE UNDER TRUST NO. 2624EG,	)	
Petitioners,	)	
v.	)	PCB 91-7 (Landfill Siting)
VILLAGE OF ROMEOVILLE,	)	
Respondent,	)	
COUNTY OF WILL, and PEOPLE OF THE STATE OF ILLINOIS,	)	
Intervenors.	)	

SUPPLEMENTAL OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

On September 27, 1991, the Village of Romeoville ("Romeoville") and the County of Will ("Will County") filed a motion to reconsider the Board's August 26, 1991 Opinion and Order in this matter. On October 15, 1991, Land and Lakes Company, JMC Operations, Inc. and NBD Trust Company of Illinois, as Trustee under Trust No. 2624EG ("Land and Lakes"), filed its response to the motion to reconsider. On October 23, 1991, Romeoville and Will County filed a reply to Land and Lakes' response as well as a motion for leave to file the reply instanter. On October 30, 1991, Land and Lakes filed a response to Will County's motion for leave to file a reply. The Board hereby grants the motion for leave to file a reply instanter. Because the Board grants Will County's motion for leave to file a reply, it will also allow Land and Lakes' October 30, 1991 response although it did not file a motion for leave to file such response. Finally, the Board grants the motion for reconsideration.

The Board, in its August 26, 1991 Opinion and Order, held that Romeoville's failure to provide Section 39.2(d) notice (see Section 39.2(d) of the Environmental Protection Act ("Act"), Ill. Rev. Stat. 1989, ch. 111½, 1039.2(d)) of its local siting hearing to the General Assembly members rendered its December 12, 1990 siting decision void on jurisdictional grounds. The Board then concluded that, as a result of such failure, siting approval of Land and Lakes' proposed landfill expansion on Parcel A was deemed issued because Romeoville's siting decision was not issued

within the 180-day deadline set forth in Section 39.2(e) of the Act.

In their motion for reconsideration, both Romeoville and Will County, in direct contravention to their prior arguments, now cite to various portions of the record in support of their argument that the record shows that Romeoville's Village Clerk provided Section 39.2(d) notice of its siting hearing to the General Assembly members of the district. Romeoville and Will County also argue that the Board should not have allocated the responsibility to Romeoville for giving notice of the hearing to the General Assembly members. More specifically, Romeoville and Will County argue that the applicant has the duty to establish all the jurisdictional pre-requisites (i.e., establish that it provided all of the required notices) before the 180-day deadline in Section 39.2(e) can become effective. Finally, Romeoville and Will County argue that the Board erred in interpreting the 250-foot notice requirement of Section 39.2(b).

In response, Land and Lakes argues that the Board lacks the power or jurisdiction to reconsider its final decision in this case because no express statutory authority exists for reconsideration in SB172 cases. Next, Land and Lakes argues that the Board failed to enter a timely decision in this matter because it failed to issue its written Opinion and Order by August 27, 1991, and that, as a result, Land and Lakes may deem its site application approved. Land and Lakes also argues that Romeoville and Will County waived any argument that the General Assembly members received no notice of the hearing when they submitted, at the Board's hearing, affidavits from two General assembly members attesting that the affiants had not received 39.2(d) notice of the hearings. Finally, Land and Lakes argues that ample evidence exists in the record to support the Board's interpretation of Section 39.2(b)'s 250-foot notice requirement to adjacent landowners.

Before addressing the merits of Romeoville's and Will County's motion for reconsideration, we wish to address two arguments raised by Land and Lakes in its response. First, with regard to Land and Lakes' assertion that the Board lacks the power to reconsider its decisions in SB172 cases, we note that Section 5(d) of the Act provides as follows:

> The Board shall have authority to conduct hearings upon...other petitions for review of final determinations which are made pursuant to the Act or Board rule and which involve a subject which the Board is authorized to regulate; and such other hearings as may be provided by rule.
>
> (Emphasis added).

Moreover, Section 26 of the Act empowers the Board to adopt such procedural rules as may be necessary to accomplish the purposes of the Act. The appellate courts have held that the above two sections, when read together, authorize the Board to hold rehearings in order to correct any errors, omissions, or oversights that it finds in previous Opinions and Orders. Reichhold Chemicals, Inc. v. IPCB, 204 Ill. App. 3d 674, 649, 561 N.E.2d 1345 (3rd Dist. 1990); Waste Management v. Antioch,123 Ill. App. 3d 1075 (1984); Ottawa v. IPCB, 472 N.E.2d 150 (1984); Mathers v. PCB, 107 Ill. App. 3d 729, 438 N.E.2d 213, 221 (3rd Dist. 1982); Modine Manufacturing Co. v. PCB, 40 Ill. App. 3d 498, 351 N.E.2d 875, 878 (2d Dist. 1976). (See also Citizens Against the Randolph Landfill (Carl) v. PCB, 178 Ill. App. 3d 686, 533 N.E.2d 401 (4th Dist. 1988) holding that the filing of a motion for reconsideration extends the time for the filing of a petition for review of a Board order in an SB172 case to a date 35 days from the date the motion for reconsideration is ruled upon).[1]

As for Land and Lakes' assertion that the Board failed to issue a timely decision in this matter, we note at the outset that Section 40.1(a) of the Act states that a petitioner may deem its site location approved "if there is no final action by the Board within 120 days" (Emphasis added). In this case, Land and Lakes filed a motion for certification of interlocutory appeal on March 22, 1991. In that motion, Land and Lakes extended the statutory decision deadline to 120 days following the Board's receipt of the Appellate Court's mandate on the issue certified for interlocutory appeal. On or about April 9, 1991, Land and Lakes was advised to file either a waiver to a date certain or an open waiver. On April 10, 1991, Land and Lakes filed a waiver extending the Board's August 27, 1991 decision deadline to December 27, 1991. On April 11, 1991, the Board denied Land and Lakes' motion for certification of interlocutory appeal and, on April 17, 1991, Land and Lakes filed a purported withdrawal of its April 10, 1991 waiver. In its April 17, 1991 filing, Land and Lakes argued that its April 10, 1991 waiver was contingent upon the Board's granting of its motion for certification of interlocutory appeal. On April 25, 1991, the Board issued an Order stating that it does not allow waivers of decision

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[1]The Board wishes to note that Land and Lakes, in its response, has blatantly mischaracterized the holding in the Reichhold case. The appellate court in Reichhold specifically distinguished the reconsideration powers of the Board when it held that the Agency has no authority to reconsider its permit decisions. We do not look favorably upon Land and Lakes taking a passage from the case that specifically and repeatedly refers to the Agency, inserting the word "Board" for the word "Agency", and then characterizing its edits as "slight modifications" to the passage.

deadlines to be withdrawn and that the Board's procedural rules do not specifically prohibit contingent waivers. See 35 Ill. Adm. Code 101.105. Accordingly, the Board's statutory decision deadline remained December 27, 1991.

Even if we were to assume that the statutory decision deadline in this case expired on August 27, 1991, however, we remind Land and Lakes that the Board took final action at its August 26, 1991 special Board meeting by adopting an opinion and order reversing Romeoville's siting decision. There is nothing in the Act to indicate that the term "final action" in Section 40.1(a) requires the Board to circulate the written Opinion and Order on the 120th day. In fact, the Illinois Supreme Court, in Waste Management of Illinois, Inc. v. IPCB, ____ Il.2d ____ (Docket Nos. 71001, 7003 cons., Nov. 21, 1991.), determined that the Board took "final action" within the 120-day statutory time period set forth in Section 40.1(a) of the Act even though its opinion was issued after the 120-day deadline.

Turning to the merits of the motion for reconsideration, Romeoville and Will County have not presented any new arguments or case law that persuade the Board that it erred in concluding that Romeoville had the duty to oversee that notice of the Village's hearing was given to the appropriate parties or that it erred in interpreting the 250-foot notice requirement. However, a review of the record indicates that Romeoville's Deputy Village Clerk in fact had notified the relevant General Assembly members of the siting hearings via certified mail, return receipt requested. First, the record contains certified mail receipts, dated August 30, 1990, which Romeoville claims show that 39.2(d) notice was given to the General Assembly members. (C-2811). We note that the receipts alone are not the most persuasive evidence on the question of whether Romeoville's Village Clerk notified the General Assembly members of the hearing because no copies of the notice accompany the receipts, the receipts are mislabelled as "Certified Mail Receipts to State Elected Officials and IEPA for Filing Siting Application", and because the receipts are listed under the heading "Index of Pre-Hearing Documents" in the index to the certified record that was filed with the Board. However, the record also contains a memo, dated August 24, 1990, from the Deputy Village Clerk to the Village Clerk stating that she mailed notice of the hearing to the General Assembly members on that date.[2] (C-2928). This latter document, in combination with the certified mail receipts, persuades the Board that Romeoville's Deputy Village Clerk did indeed notify the General Assembly members of the siting hearing. While the Board is distressed about the wildly contradictory assertions in this case

[2]The Board wishes to point out that the memo was categorized as a "memo regarding publication" in the index to the certified record that was filed with the Board.

and the fact that the assertions were made only after this Board made a decision against Romeoville's and Will County's interests, the Board will give Romeoville and Will County the benefit of the doubt and attribute the parties' earlier argument that no 39.2(d) notice was given to an oversight on their parts. As for Land and Lakes' argument that the affidavits from the two General Assembly members indicate that they did not receive notice of the hearing, we note that both affiants only attested that there were no notices in their offices informing them of the September 24, 1990 hearing although any such notices would be kept and filed, and that they did not recall ever receiving such a notice. Moreover, we note that jurisdictional objections cannot be waived. Based upon the above, the Board reverses its August 26, 1991 finding that no Section 39.2(d) notice had been given to the General Assembly members and vacates its August 26, 1991 Order.

The Board must now proceed to the next step in reviewing Romeoville's decision. Specifically, the Board must determine whether Romeoville issued its decision on Land and Lakes' siting application within the 180 day deadline set forth in Section 39.2(e) of the Act. For the reasons set forth below, the Board concludes that Romeoville did not issue a valid decision on Land and Lakes' application for siting approval pursuant to Sections 39.2(a) and 39.2(e) of the Act, with the result that the case must be remanded to Romeoville for a clarifying vote.

At Romeoville's December 12, 1990 Board meeting where the Village Board made its final decision, Romeoville's Hearing Officer presented the drafts of two alternate resolutions for the Board's consideration. One resolution denied siting approval because Criterion 1 had not been satisfied and the other granted siting approval because all of the criteria had been satisfied. (C-9927). Each resolution also contained five conditions to approval (conditions to Criteria 2, 3, and 5). (C-9928). At that meeting, one of the Village trustees suggested that the following condition (i.e. Condition 6) be added as an amendment to the resolution:

> [I]f approved, the facility shall restrict solid waste received to waste originating in Will County and/or communities partly in Will County.
>
> (C-9929-9934).

The mayor then asked if there were any objections to the addition of this sixth condition to which all of the Village trustees answered no. (C-9933-9934). When asked to respond to the conditions, Land and Lakes stated that it did not agree with Condition 2 (requiring a full-time independent engineer to oversee daily landfill operations for quality control and assurance to be paid for by Land and Lakes and approved by Romeoville) or to Condition 6, but that it agreed to Conditions

1, 3, 4, and 5.[3] (C-9939-9943, -9959). Land and Lakes also provided two counter-proposals to Conditions 2 and 6, both of which the Village Board rejected. (C-9940-99431, -9946, -9958). The Village Board, by formal motion, then unanimously voted to amend the resolution to include Condition 6. (C-9961-9962). Romeoville's attorney then read the resolution to deny verbatim, with the inclusion of Condition 6 as an amendment to the resolution. (C-9963-9968). Specifically, after reading the resolution verbatim, Romeoville's attorney stated:

> That is the resolution; however, the Attachments Exhibit A [Decision Regarding Motions to Dismiss on Grounds of Jurisdiction] and Exhibit B [Findings of Fact and Decision], bear in mind, have been amended to include Criteria No.--Special Condition No. 6 as part of the special conditions of Exhibit B. That is this whole thing in its entirety is what you are voting on with this vote.
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> (C-9967-9968).

The Village Board then unanimously voted to approve the resolution, as amended, (i.e., to deny siting approval on jurisdictional grounds and, in the alternative, to deny the approval based on the merits in that Land and Lakes did not meet its burden of proof with regard to Criterion 1).[4] (C-4334-4372, -9962, -9967-9972). However, in spite of the Village Board's transcribed votes to include Condition 6 in its denial, the Village Board's written "Findings of Fact and Decision", which was attached to and made a part of the Village Board's final resolution, states that Land and Lakes met its burden with regard to Criteria 2 through 9 provided it agreed to follow and comply with Conditions 1 through 5 (i.e., Condition 6 was not included in the document). (C-4354-4372).

As can be seen above, there are several contradictions between the actions that the Village Board took at its December 12, 1990 meeting and the written account of those actions (i.e. the Village Board's resolution and its "Findings of Fact and Decision"). This Board notes that there are two substantive contradictions between the official transcribed votes taken at

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[3]We note that the Village Board's written "Findings of Fact and Decision" incorrectly states that Land and Lakes agreed to be bound by Condition 2. (C-4358).

[4]We note that, when voting on the resolution, a majority of the Village Board members articulated their concerns and/or disagreement with certain aspects of Criterion 2. (C-9971-9972).

the December 12, 1990 meeting and the Village Board's written resolution and "Findings of Fact and Decision". First, the Village Board's written "Findings of Fact and Decision" incorrectly states that Land and Lakes agreed to be bound by Condition 2. Second, the Village Board's written resolution and "Findings of Fact and Decision" do not include Condition 6 although the transcript shows that the Village Board took two votes with regard to Condition 6 (i.e., the vote to amend the resolution to add Condition 6 (C-9961-9962), and the vote to approve the resolution as amended (C-9967-9972)). We can only speculate that the above-mentioned defects were perhaps due to an oversight on the Village Clerk's part.

In any event, we must analyze the actions of Romeoville's Village Board at its December 12, 1990 meeting in more detail in order to fully explain the Board's decision on reconsideration. Because the Village Board's written resolution and "Findings of Fact and Decision" do contain the above-mentioned defects, we will look to the actions of the Village Board at its December 12, 1990 hearing rather than to its written resolution or "Findings of Fact and Decision" for resolution of this issue.

As noted above, a review of the December 12, 1990 transcript clearly shows that Romeoville's Village Board conditioned its denial of Land and Lakes' request for site approval. Sections 39.2 (a) and (e) of the Act, however, do not contemplate the imposition of conditions upon a denial. Rather, any applicant who seeks site approval of a proposed regional pollution control facility has the right to expect the county board or municipal governing body to issue definitive approval (which allows for the addition of conditions that are reasonably related to the criteria) or denial of its siting application. To hold otherwise would be unfair to the applicant.

Romeoville's decision in this case does not correspond with the decision options set forth in the Act. As a result, the parties have had difficulty in deciphering what Romeoville's Village Board actually decided. For example, Land and Lakes initially characterized its petition for review before this Board as an appeal of Romeoville's denial, but then argued that Romeoville had actually approved its siting application and that it was appealing Conditions 2 and 6 to the approval. The State's Attorney of Will County argued in his filings before this Board that Romeoville denied site approval on Criteria 1 and 2 and, in the alternative, that Romeoville denied site approval on Criterion 1 alone. Finally, the Attorney General, in his post-hearing brief, initially stated that Romeoville granted site approval to Land and Lakes. He then amended the brief to read that Romeoville denied siting approval.

Irrespective of whether the Village Board can condition a denial, even if this Board were to construe the Village Board's

vote as an approval with conditions, the Village Board's decision is improper. To review, the transcript shows that Romeoville's Village Board denied site approval on the basis that Land and Lakes did not meet its burden with regard to Criterion 1 and that the Village trustees would change their vote on Criterion 1 if Land and Lakes agreed to restrict its service area by accepting the following amendment to the resolution (i.e., Condition 6):

> [I]f approved, the facility shall restrict solid waste received to waste originating in Will county and/or communities partly in Will County.

The "if approved" wording of Condition 6 itself, as well as the following exchange between the Village's attorney and the Village trustee who suggested the amendment, evidences the Village Board's intent to condition siting approval upon Land and Lakes' acceptance of the condition:

MR. TIEMAN: I think if I can rephrase what you are saying, Carl, as I understand it, you are saying that you want the waste to originate from Will County or one of the communities that is on the border line.

TR. ROSA: Correct.

MR. TIEMAN: And if [Land and Lakes' president] agrees to this, you're prepared to vote.

TR. ROSA: Correct.

MR. TIEMAN: If [Land and Lakes' president] doesn't agree to it, you're also prepared to vote but your vote may be different depending on whether he agrees to it or not?

TR. ROSA: Correct.

(C-9947).

Section 39.2(e) of the Act provides as follows:

> ...In granting approval for a site the county board or governing body of the municipality may impose such conditions as may be <u>reasonable and necessary to accomplish the purposes of this Section</u> and as are not

> inconsistent with regulations promulgated by the Board.
>
> (Emphasis added).

However, with regard to Criterion 1, it is well settled that it is the applicant seeking local siting approval, and not the county board or municipal governing body, that defines the intended service area for purposes of deciding whether site location is necessary for the area to be served. Metropolitan Waste Systems, Inc. v. IPCB, 558 N.E.2d 785, 787 (3rd Dist. 1990).

We note that we are not here holding that the statute precludes an applicant from initiating a change in its service area during the proceedings if the local procedures so provide, or that the county board or municipal governing body cannot agree to that change. Rather, the county board or municipal governing body does not have the power itself to revise the applicant's service area when considering Criterion 1. We find that since Romeoville did not have the authority to revise the service area when considering Criterion 1, it did not have the authority to include a revised service area as a condition of approval or a reason for denying siting. In other words, Romeoville cannot use indirect means (i.e., the addition of a condition) to revise a service area when it cannot do so directly.

The transcript indicates that the Village Board was aware of the fact that it had no legal ability to redefine Land and Lakes' service area. Specifically, one of the Village's trustees, when addressing the Village's attorney, stated as follows:

> ...municipalities specifically Will County or local governments do not have the ability to legally put that restriction on .....
>
> (C-9947).

The transcript also clearly shows that Land and Lakes did not agree with Condition 6, but was willing to amend the condition. The following exchange between the Village's attorney and Land and Lakes' attorney, also evidences the fact that Land and Lakes did not agree with Romeoville's redefinition of its service area:

> Q: ...Then the next step, I guess, would be to try and attempt to summarize what [Land and Lakes' attorney] has said. As I understand the answer to my questions of Mr. Cowhey, concerning the six proposed conditions, they agree with our condition no. 1; they agree with our Condition No. 3; they agree with our Condition No. 4; and they agree with our Condition No. 5; disagree

with our Condition No. 6; and disagree with our Condition no. 2.

Is that a fair statement, Mr. Prillaman?

A: Well, not entirely. We disagree with the way you have worded it but not the concepts. We think we have substituted better concepts.

Q: But as worded, as worded and as part of our proposed resolutions, you do not stand here this evening and agree to have those conditions imposed upon your client; is that correct?

A: Not as worded, no sir.

(C-9959-9960).

However, the Village Board rejected Land and Lakes' counter-proposal. The Village Board's final vote as well as the following statement by one of the Village's trustees evidences such rejection:

TR. ROSA: We are asking and have been asking that specifically waste only generated within Will County or communities on the border of Will county, that waste only be accepted into the landfill. Okay.

You gentlemen are asking for an allowance of 5,000 cubic yards a day; and if that is not met, that you be allowed to go outside the County to achieve that goal. I can't agree with that because I don't know how we would ever police that. There is no way of us knowing how much waste you're going to be taking in per day.

(C-9948).

In conclusion, given the confusion to the parties and the Board resulting from Romeoville's action, this case must be remanded to Romeoville as a matter of fundamental fairness. Remand is necessary to provide a complete decision for the Board to review, to prevent extending the review process and to conform with case law, e.g. Waste Management v. Pollution Control Board, 175 Ill. App.3d 1023, 125 Ill. Dec. 524, 530 N.E.2d 682 (2nd Dist. 1988).

We emphasize that the sole issue before Romeoville on remand is whether Land and Lakes has met its burden of proving whether there is need for the proposed facility pursuant to criterion 1

of Section 39.2 and applicable case law. In light of its decision on criterion 1, the Village Board must issue either a definitive approval without conditions, or a definitive approval with conditions, or a definitive disapproval of Land and Lakes' siting request. Nothing in this Opinion should be construed to imply that the Board requires additional hearings in this matter.

Finally, we note that this remand action does not activate Section 40.1(d), which provides for automatic approval if no final decision is made by the Board within 120 days. In City of Rockford v. County of Winnebago, 175 Ill.App.3d 1023, 134 Ill.Dec. 244 530 N.E.2d 682 (2nd Dist. 1989) the court found that a remand order from the Board is a proper and final order within its 120-day decision period.

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

ORDER

The Board hereby grants Will County's October 15, 1991 motion for leave to file a reply instanter and Land and Lakes' October 30, 1991 motion to file a response to Will County's motion. The Board also grants the Village of Romeoville's and Will County's motion to reconsider our August 26, 1991 Opinion and Order and vacates that portion of our Order finding that Romeoville failed to comply with Section 39.2(d) of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111½, par. 1039(d).

The Board hereby remands this matter to the Village of Romeoville for a definitive determination on Criterion 1 of Section 39.2(a) consistent with the foregoing Supplemental Opinion.

IT IS SO ORDERED.

J. G. Anderson and B. Forcade concurred.

J. D. Dumelle and J. T. Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Supplemental Opinion and Order was adopted on the 6th day of December, 1991, by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board