BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VILLAGE OF SOUTH ELGIN,	)	
	)	
Complainant,	)	No. PCB 03-106
	)	
vs.	)	(Enforcement)
	)	
WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on June 1, 2004, we filed with the Illinois Pollution Control Board, the attached **WASTE MANAGEMENT OF ILLINOIS, INC.'S RESPONSE IN OPPOSITION TO THE VILLAGE OF SOUTH ELGIN'S MOTION FOR SUMMARY JUDGMENT** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VILLAGE OF SOUTH ELGIN, a municipal corporation,	)	
Complainant,	)	
v.	)	No. PCB 03-106 (Enforcement)
WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
Respondent.	)	

WASTE MANAGEMENT OF ILLINOIS, INC.'S RESPONSE IN OPPOSITION TO THE VILLAGE OF SOUTH ELGIN'S MOTION FOR SUMMARY JUDGMENT

WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII"), by and through its attorneys, Pedersen & Houpt, P.C., submits this response brief in opposition to the Village of South Elgin's ("Village") Motion for Summary Judgment.

INTRODUCTION

The Village moved for summary judgment on the only issue raised in its Complaint, *i.e.*, whether by seeking to develop a waste transfer station on an 8.9-acre area in the southern part of the Woodland landfill property, WMII has violated: (i) Condition 4 of the September 13, 1988 local siting approval for the Woodland III landfill expansion granted by the Kane County Board in Resolution 88-155 ("Resolution 88-155") that "The site, commonly known as the Woodland site, shall not be expanded further"; and (ii) Condition 2 of Resolution 88-155 that "That the site will be developed and operated in a manner consistent with the representations made at the public hearing in this matter held on July 26, 1988 and to all applicable laws, statutes, rules and regulations of the Illinois Environmental Protection Agency, and the Illinois Pollution Control

Board, or their successors, as may be now or hereafter in effect and which are applicable to this site."

The Village is not entitled to summary judgment for the following reasons. The Village has not proven that WMII's proposal to site a waste transfer station constitutes an "expansion" of the Woodland III landfill. Furthermore, the Village has not established that WMII made any "representations" at the July 26, 1988 public hearing or anywhere else concerning an end use plan such that it became a condition to Resolution 88-155. Finally, the Village has not established that WMII's proposal to develop a waste transfer station would prevent the implementation of an end use plan. Therefore, the Village's request for summary judgment must be denied.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is warranted only where a case presents no genuine issue of material fact, and where the case can be disposed of by the application of recognized legal principles. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); Hansen v. Ruby Construction Co., 155 Ill. App. 3d 475, 480, 508 N.E.2d 301, 303 (1st Dist. 1987); People v. Jersey Sanitation Corporation, No. PCB 97-2 (April 4, 2002). The moving party bears the initial burden of production to prove the non-existence of any triable issue of material fact, and the motion must be supported with admissible evidence. Chicago Park District v. Richardson, 220 Ill. App. 3d 696, 703, 581 N.E.2d 97, 101 (1st Dist. 1991), appeal denied, 143 Ill. 2d 636, 587 N.E.2d 1012 (1992). It is axiomatic that in ruling on the motion, all of the evidence and all of the inferences reasonably drawn therefrom must be considered, and the evidence and inferences must be viewed in the light most favorable to the non-moving party. Id.

II. THE VILLAGE HAS FAILED TO DEMONSTRATE, AS A MATTER OF FACT OR LAW, THAT WMII'S PROPOSAL TO SITE A WASTE TRANSFER STATION VIOLATES ANY OF THE CONDITIONS IN RESOLUTION 88-155

A. The Village Has Not Proven That WMII's Proposal to Site A Waste Transfer Station Constitutes An "Expansion" of The Woodland III Landfill In Violation of Condition 4 of Resolution 88-155

WMII does not dispute that Kane County imposed certain conditions as part of its siting approval in Resolution 88-155. WMII asserts that there are no disputed issues of fact regarding the meaning of Condition 4 of Resolution 88-155. Condition 4 states: "The site, commonly known as the Woodland site, shall not be expanded further." Condition 1 defines the term "Woodland site" as "the area comprised of the Woodland I, II, and III landfill sites." Thus, the plain and unambiguous language of Conditions 1 and 4 of Resolution 88-155 clearly states that the only limitation placed on WMII with respect to the Woodland site concerns the further expansion of the sanitary landfill.

Despite the plain language of Condition 4, the Village contends that its prohibition extends to the development of a waste transfer station on a southern portion of the Woodland property. This contention is unsupported. The undisputed facts demonstrate that while Condition 4 may prohibit WMII from seeking further expansion of the Woodland III landfill, it does not, in its express language or its intent, apply to the development of a waste transfer station on the Woodland property.

On April 29, 2004, WMII filed a Motion for Summary Judgment on the ground that neither Condition 4, nor any other condition in Resolution 88-155, contained a prohibition against the development of a waste transfer station on the Woodland property. In support of WMII's Motion for Summary Judgment, WMII presented the deposition testimony of Mr. Donald Price, the WMII vice president who signed the July 8, 1988 letter that became part of

Resolution 88-155 as a result of WMII's representations at the July 26 public hearing. WMII also presented the deposition testimony of Mr. Thomas Rolando, who was the mayor of the Village of South Elgin in 1988 and to whom the July 8 letter was directed.

Mr. Price testified that the waste footprint of Woodland III was configured to allow for the possible future development of a transfer station on a portion of the Woodland property. (Price Tr. at 19-24)[1]. By excluding an area on the southern portion of the Woodland property from the expanded waste footprint of Woodland III, WMII intended to permit the development of a transfer station. (Price Tr. at 21-24). Thus, Mr. Price did not intend or state in the July 8 letter that the agreement not to expand the Woodland landfill a third time was an agreement not to develop a waste transfer station.

Mr. Rolando testified that the principal concern expressed by the Village concerning Woodland III related to the possible danger to the Village's water supply and the potential threat of groundwater contamination. (Rolando Tr. at 24-25)[2]. Mr. Rolando further testified that, through his discussion with the Village Board, he understood WMII's statement that it would not seek to expand Woodland III to mean that WMII would not ask again to operate a landfill at the Woodland site. ("Rolando Tr. at 27"). He acknowledged that the plain language of the July 8 letter stated that WMII would agree to no more expansions of the Woodland landfill site, and that there was no reference in the July 8 letter to any agreement not to develop a transfer station on the Woodland property. (Rolando Tr. at 38-40). Mr. Rolando stated further that, as the matter of a transfer station was never raised, neither he nor the Village Council understood that WMII's

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[1] The deposition transcript of Donald Price will be cited to herein as "(Price Tr. at ___)." The Price Deposition Transcript is attached as Exhibit A.

[2] The deposition transcript of Thomas S. Rolando will be cited to herein as "(Rolando Tr. at __)." The Rolando Deposition Transcript is attached as Exhibit B.

agreeing not to further expand the Woodland III landfill included an agreement not to develop a waste transfer station. (Rolando Tr. at 40-41, 59-60).

Although the Village has moved for summary judgment, it has not presented any facts in support thereof to refute the testimony of Mr. Price and Mr. Rolando. Thus, the undisputed facts establish that Condition 4 was not intended to prohibit the development of a waste transfer station. In light of this factual evidence, as well as the plain language of Condition 4, there can be no dispute that Condition 4 does not contain any prohibitions with respect to the development of a waste transfer station on the Woodland property.

As no facts exist to support the Village's contention, it attempts to argue that the development of a waste transfer station constitutes an "expansion" as a matter of law, and relies on People v. Triem Steel & Processing, 5 Ill. App. 2d 371, 125 N.E.2d 678 (1st Dist. 1955) and Continental Waste Industries of Illinois, Inc. v. Mt. Vernon, PCB 94-138 (October 27, 1997). However, in Triem Steel, the court considered the expansion of an existing facility whose operation was the same as the proposed expansion, that is, a transfer facility. Likewise, in Continental Waste, the issue before the Illinois Pollution Control Board concerned an increase in the amount of waste received and handled at an existing permitted waste transfer station. The Village has failed to present any legal authority in support of its position that a proposal to develop a new waste transfer station on a portion of the property that is separate and apart from the landfill operations constitutes an expansion of an existing sanitary landfill.

Under the Illinois Environmental Protection Act ("Act"), the expansion of a sanitary landfill is distinct from the development of a waste transfer station. The Act considers a transfer station to be a fundamentally different activity than a landfill. See 415 ILCS 5/3.445 (sanitary landfill) and 5/3.500 (transfer station). Moreover, the Act defines an "expansion" as the area

"beyond the boundary of a currently permitted" sanitary landfill. 415 ILCS 5/3.330(b)(2). As such, an expansion of a landfill involves the increase of disposal capacity through a vertical and/or horizontal extension of the waste footprint in order to extend the period the landfill would continue to receive and dispose of waste. A horizontal or vertical expansion of a waste footprint is not equivalent to the development of a waste transfer station.

Here, WMII attempted to develop a waste transfer station on an approximate 9-acre portion of the Woodland property that is separate and apart from the 121-acre waste footprint on which the landfill known as Woodland III was operated. WMII's application to develop a waste transfer station did not request an increase in the size, capacity or waste footprint of Woodland I, II, or III. Therefore, it cannot be deemed to be a request to further expand the Woodland landfill. The fact that the cover letter to a superseded application to develop the waste transfer station inaccurately used the term "proposed expansion" does not alter the fact that, as a matter of law, WMII's attempt to site a waste transfer facility does not constitute an expansion of the Woodland landfill. Therefore, WMII's attempt to develop a waste transfer station on a parcel of land apart from the Woodland landfill does not constitute a violation of Condition 4 of Resolution 88-155, and the Village is not entitled to summary judgment on this issue.

B. The Village Has Not Established That WMII Made Any Representations At The July 26, 1988 Public Hearing Concerning An End Use Plan

The Village contends that Condition 2 of Resolution 88-155 contains a condition that WMII turn the entire Woodland site into a passive recreation area post-closure and, therefore, WMII's proposal to develop a waste transfer station violates that condition. However, Condition 2 provides only: "That the site will be developed and operated in a manner consistent with the representations made at the public hearing in this matter held on July 26, 1988 and to all

applicable laws, statutes, rules and regulations of the Illinois Environmental Protection Agency, and the Illinois Pollution Control Board, or their successors, as may be now or hereafter in effect and which are applicable to this site." Thus, the plain language of Condition 4 does not contain any prohibition against the development of a waste transfer station, nor does it contain a condition concerning the development of an end use plan for the Woodland site. In fact, not one of the conditions contained in Resolution 88-155 in any way addresses the issue of end use plans or post-closure proposals.

Nonetheless, the Village argues that WMII made a representation at the July 26 public hearing concerning its obligation to implement an end use plan, and that this representation was included in Condition 2. The Village relies on a half-page excerpt from WMII's siting application for Woodland III which briefly discussed the proposed end use for the site. However, a section in an siting application discussing proposals in general terms does not constitute a representation.

The Village also relies on three sentences, taken out of context, that were made by Mr. Gerard Hamblin at the July 26 public hearing. Mr. Hamblin testified at the July 26 public hearing in his capacity as design engineer and gave his expert opinion on whether the design of Woodland III would protect the health, safety and welfare of the public, *i.e.*, whether the siting application satisfied criterion (ii) of Section 39.2(a) of the Act. Mr. Hamblin was not presented at the hearing as an expert to testify on the end use plan. He certainly did not make any representations during his testimony on criterion (ii) regarding an end use plan that would be binding on WMII, or that were intended to be made a part of Condition 2. Indeed, it would be absurd to interpret Condition 2 as turning every statement made at the July 26 public hearing into a binding representation, and ultimately a separate condition of the siting approval.

Rather, it is clear that Condition 2 was designed to incorporate as conditions to the siting permit the representations made by WMII in the July 8 letter, which were not only read in to the record at the July 26 public hearing by WMII's attorney, but were also attached to Resolution 88-155 as an exhibit. On the other hand, neither WMII's attorney, nor anyone else on WMII's behalf, made any representations at the July 26 public hearing about the end use plan. Nor were there any such representations contained in the July 8 letter. As such, none of the conditions contained in Resolution 88-155, including Condition 2, concern an end use plan for the Woodland site, nor were they intended to.

Because Resolution 88-155 does not contain a condition that WMII turn the Woodland site into a passive recreation area post-closure, WMII's proposal to develop a waste transfer station is not a violation of the local siting approval, and the Village is not entitled to summary judgment on this issue.

C. The Village Has Failed To Present Any Facts That WMII's Proposal To Site A Waste Transfer Station Would Prevent The Implementation Of An End Use Plan

Notwithstanding the foregoing arguments, WMII has not failed or refused, and is not refusing, to implement an end use plan for the Woodland site. In fact, WMII intends to take whatever steps are necessary and appropriate to implement an end use plan. The Village has not presented any facts to the contrary. Instead, the Village states that it is entitled to summary judgment based on its unsupported statements that WMII's attempt to develop a waste transfer station constitutes a violation of Conditions 2 and 4 of Resolution 88-155. However, WMII's attempts to site a waste transfer station do not equate to a failure or refusal to implement an end use plan for the Woodland site.

The Village's motion for summary judgment also presumes that Resolution 88-155 and WMII's application to site Woodland III contained a final and definitive end use plan, and that WMII, alone, is responsible for implementing any such plan. However, any steps toward implementing an end use plan must first be coordinated with, and approved by, the appropriate governmental authorities. The Woodland III application specifically states that "[p]ost closure on-site improvements to facilitate the end use program will be the responsibility of the Kane County Forest Preserve District or other public recreation providers." (See Village's Motion for Summary Judgment, Ex. 6 at p. 11). To date, nothing has been approved or adopted. Therefore, unless and until WMII receives the approval and assistance of the appropriate authorities, WMII is unable to implement an end use plan.

The practical reality is that once the requisite agreements and approvals to implement an end use plan are obtained, the plan can be implemented. The implementation will occur in stages and will take years to complete. Under such circumstances, WMII's present attempts to site a waste transfer station on a southerly 8.9-acre portion of the Woodland property will have no effect on WMII's ability to implement an end use plan, once such plan is agreed upon and approved by all necessary parties.

CONCLUSION

For all of the foregoing reasons, WASTE MANAGEMENT OF ILLINOIS, INC. respectfully requests that this Board deny the Village of South Elgin's Motion for Summary Judgment, grant WASTE MANAGEMENT OF ILLINOIS, INC.'s Motion for Summary Judgment, and award such other and further relief as it deems appropriate.

Respectfully Submitted,
WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
One of Its Attorneys

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PROOF OF SERVICE

Victoria L. Kennedy, a non-attorney, on oath states that she served the foregoing **WASTE MANAGEMENT OF ILLINOIS, INC.'S RESPONSE IN OPPOSITION TO THE VILLAGE OF SOUTH ELGIN'S MOTION FOR SUMMARY JUDGMENT** on the following party by depositing same in the U.S. mail at 161 N. Clark St., Chicago, Illinois 60601, at 5:00 p.m. on this 1st day of June, 2004:

Mr. Derke J. Price
ANCEL, GLINK, DIAMOND, BUSH, DICANNI & ROLEK, P.C.
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Victoria L. Kennedy