ILLINOIS POLLUTION CONTROL BOARD
July 19, 1990

NATIONAL ENVIRONMENTAL SERVICES CORPORATION,	)	
Petitioner,	)	
v.	)	PCB 89-129 (Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes to the Board on an August 15, 1989, Petition to contest conditions imposed on permit filed by National Environmental Services Corporation ("National"). On October 17, National filed an Amended Petition. Hearing was held December 13, 1989, in Clinton, Illinois. The Illinois Environmental Protection Agency ("Agency") Post Hearing Brief was filed January 19, 1990. National's Post Hearing Brief was due on January 19, 1990, but was not filed in a timely manner. On February 22, 1990, the Board, by Order, informed National that its brief was overdue and announced the Board's intention to dismiss this proceeding if appropriate documents were not filed. On February 26, 1990, National filed a motion for extension of time. On March 2, 1990, the Agency filed a response in opposition to the motion. On March 16, 1990, the Board granted National until March 30, 1990 to file it brief, and granted the Agency until April 30, 1990 to file any reply. On March 29, 1990, National filed its brief; on April 30, 1990, the Agency filed its reply.

National intends to operate an incinerator for infectious medical waste at their facility in Clinton, Illinois. They started the process by acquiring an option on some property and commencing a regional pollution control facility siting procedure under Section 39.2 of the Environmental Protection Act (hereinafter "the Act"). After the County of DeWitt granted site location approval, National applied to the Agency for a construction permit. Currently, National is operating on the construction permit which allows them to burn medical waste while they plan for and actually perform the trial burn and stack test. (R. 34-35).

National receives waste that has been contained at the point of generation by the local health care facility or hospital. The waste is in sealed leak-proof and burst-proof containers. The container sizes vary from approximately ten pounds to a limit of seventy pounds. The containers are not opened; the container and

waste are burned together and reduced to an inert ash. (R. 27-28). National does not accept wastes which have been identified or characterized as "Hazardous" under Subtitle C of the Resource Conservation and Recovery Act ("RCRA"). (R. 13). National does not possess and is not seeking a permit as a treatment, storage or disposal facility under RCRA Subtitle C.

National's incinerator system is designed to convert waste to a combustible gas and ash by burning the waste in an atmosphere with only sufficient oxygen to keep the temperature at 1800 degrees Fahrenheit. This process is called "sub-stoichiometric" or "starved-air" combustion. The gasses cooked out of the waste are conveyed by ducts to a secondary combustion chamber where they are mixed with sufficient air to burn. The temperature in the secondary chamber is approximately 2100 degrees and the gasses remain for at least two seconds to ensure complete burning. The hot gasses are cooled to 180 degrees by a water spray and then passed through an absorber bed to clean acid gasses, carbon monoxide and some carbon dioxide from the gas stream. (Amended Pet., Ex. A).

On March 13, 1989, National submitted a Special Waste Stream Application to the Agency for a permit to accept "infectious waste generated within hospitals which meets the definition of 'Hazardous (infectious) Hospital Waste' in 35 Ill. Adm. Code 809.901". (Administrative Record, p. 18). On July 10, 1989, the Agency issued to National a revised Development Permit (No. 1988-06-DE) and Supplemental Permit (No. 1989-092-SP) with generic waste stream permit attachment. That generic waste stream attachment contains one clause "Waste Classification : Hazardous Subject to Fee", which is challenged in the present action. The sole question on review is whether the hazardous waste fee was properly made applicable to the present factual circumstances.

The statutory provisions relating to the hazardous waste fees are found at Section 22.2 of the Act. The relevant portions of that Section, and related Section 3.49 are as follows:

> Section 22.2
>
> a. There are hereby created within the State Treasury two special funds to be known respectively as the "Hazardous Waste Fund" and the "Hazardous Waste Research Fund", constituted from the fees collected pursuant to this Section.
>
> b. 1. On or after January 1, 1989, the Agency shall collect from the owner or operator of each of the following sites a fee in the amount of:
>
> * * * * *

d. 2 cents per gallon or $4.04 per cubic yard for 1989, 2.5 cents per gallon or $5.05 per cubic yard for 1990, and 3 cents per gallon or $6.06 per cubic yard thereafter of hazardous waste received for treatment at a hazardous waste treatment site, if the hazardous waste treatment site is located off the site where such waste was produced and if such hazardous waste treatment site is owned, controlled and operated by a person other than the generator of such waste. After treatment at such hazardous waste treatment site, the waste shall not be subject to any other fee imposed by this subsection (b). For purposes of this subsection (b), the term "treatment" is defined as in Section 3.49 but shall not include recycling, reclamation or reuse.

* * * * * * * *

Section 3.49

"TREATMENT" when used in connection with hazardous waste means any method, technique or process, including neutralization, designed to change the physical, chemical or biological character or composition of any hazardous waste so as to neutralize such waste or so as render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

These statutory provisions govern assessment and collection of the specified fees. The sole question in this proceeding is whether the term "hazardous waste" as used in Section 22.2, includes hazardous hospital waste; if it does, there is no question that National's operation meets the Section 3.49 definition of treatment, and that National would properly be subject to the fee. The statutory provisions relating to hazardous hospital waste are Sections 3.13 and 21 (m), which provide as follows:

Section 3.13

"HAZARDOUS HOSPITAL WASTE" means waste generated in connection with patient care that is contaminated with or may be contaminated with an infectious agent that has the

potential of inducing an infection and has not been rendered innocuous by sterilization or incineration.

* * * * * * *

Section 21

No person shall:

* * *

m. Deposit any hazardous hospital wastes in any landfill on or after January 1, 1981. All such waste shall be properly incinerated or processed by an alternative method pursuant to regulation adopted by the Board. This requirement shall take effect January 1, 1981.

In addition, the Act provides a definition of "hazardous waste". That definition is found at Section 3.15 and states as follows:

"HAZARDOUS WASTE" means a waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed, and which has been identified, by characteristics or listing, as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976, P.L. 94-580, or pursuant to Board regulations.

To support its imposition of the fee requirement, the Agency presents essentially three arguments. First, the Agency asserts that the general statutory and regulatory language involved makes it clear that this type of waste has a hazardous component and should be within the legislative directive to assess a fee on hazardous waste. Second, the Agency asserts that prior Board Opinions have articulated Illinois policy that Hazardous (infectious) Hospital Waste is an Illinois Hazardous Waste and that it must be assessed a fee under Section 22.2 of the Act. Third that Agency asserts that regulations it was required to adopt, at 35 Ill. Adm. Code Part 855, implementing the fee system (pursuant to Section 22.2 (c) of the Act) require Hazardous Hospital Waste Incinerators to pay the Hazardous Waste Fee.

Perhaps the most persuasive argument presented by the Agency pertains to the Board's Opinion adopting the Emergency Rule governing Hazardous Hospital Waste. In R 80-19 (December 24, 1980) the Board specifically addressed the relationship between Hazardous Hospital Waste and the hazardous waste fee system:

> It is the Board's opinion that Hazardous Hospital Waste, a special waste, is subject to the supplemental permit, and manifest requirements if transported off-site for sterilization or incineration. Also, such hazardous hospital waste received by the owner or operator of a hazardous waste disposal site is subject to the disposal fee system of Section 22.2. Assuming, of course, that no other special waste component is present, if a hazardous hospital waste is properly sterilized on-site, the resulting innocuous waste is no longer a special waste, subject to the special waste requirements or a fee since it no longer poses a "potential threat to human health or to the environment." The ashes from on-site incinerated hazardous hospital waste are to be treated as a special "industrial process waste." (Emphasis Added)
>
> (R80-19, In the Matter of: Hazardous Hospital Waste, Sections 3(jj) and 21 (h) of the Environmental Protection Act, Emergency Rule, p. 7, 12/24/80).

The Agency argues that further support for this position comes from the final opinion of the Board in that same regulatory matter:

> Pursuant to Section 22.2 and the Agency criteria, owners and operators of hazardous waste disposal sites must pay hazardous waste disposal fees if they receive [hazardous hospital waste].
>
> (R 80-19, May 28, 1981, p.3)

In its brief, National argues that the statutes and regulations involved cannot apply to hazardous (infectious) hospital wastes unless the relevant language is clear, definite, and free from ambiguities and vagueness, so as to be understood by all entities involved. National argues that the terms "waste", "hazardous waste", "hazardous hospital waste", and "hazardous (infectious) hospital waste" are all used throughout the statute to apply to the materials being incinerated by

National. Yet, they argue, not all of these materials are subject to the Section 22.2 fees.

National also argues that the framers of the legislation employed the measurement terms "gallons or cubic yards" as the units of measure for the hazardous waste fee collection. Since neither measurement term is used in the industry, National argues that the legislation could not have been intended to encompass this type of waste. Also, National asserts that the intent of the general assembly must be that the fee collected bear a reasonable relationship to the difficulties presented by the waste and that the difficulties posed by National's wastes do not compare with that of heavy industrial waste. National argues that the purpose of the fee is to fund clean-up of sites which clearly includes sites receiving wastes other than the type handled by National. Lastly, National argues that the Agency's regulations at 35 Ill. Adm. Code 855.101 fail to include hazardous hospital waste within the scope and, therefore, the fee cannot be collected.

Notably, National has not directly responded to any of the arguments raised by the Agency in its January 19, 1990 brief.

The Agency reply brief raised no new arguments relevant to the disposition of this matter.

CONCLUSION

As a preliminary matter, the Board notes that many of National's arguments are not on point. The question presented is one of Illinois state law regarding assessment of a tax or fee on certain activities. The fact that federal regulatory law under RCRA or CERCLA, does not include particular infectious wastes under certain statutory definitions (R. 13-19), seems not to be controlling. Section 22.2, setting fees on hazardous waste activities, was originally part of House Bill 453, which was signed by the Governor to become Public Act 81-856 on September 21, 1979. There were no federal regulations defining hazardous waste at that time. P.A. 81-856 became effective on January 1, 1980. There were no federal regulations defining hazardous waste at that time. Section 22.2 required the Agency to establish criteria and procedures for the fee system and required the fee system to be operational by April 1, 1980. There were no federal regulations defining hazardous waste at that time. The first federal regulations defining hazardous waste were promulgated on May 19, 1980 (45 FR 33084, May 19, 1980) and became effective November 19, 1980.

In a similar manner, National's testimony that they were never aware that the activity would be taxed, and that their operations might not be profitable if the fee applies is not relevant to the question of statutory interpretation.

As discussed below, the Board determines that it was the intention of the General Assembly that hazardous (infectious) hospital waste be subject to the hazardous waste fee provisions of Section 22.2, and that such intent has been clearly expressed in Agency regulations and Board Opinions for almost ten years.

The primary reason for concluding that such wastes are subject to the fees of Section 22.2 is the statutory language. The General Assembly used the word "hazardous" in the definition of hazardous hospital waste (Section 3.13). The General Assembly could have used the terms "infectious waste" or "pathological wastes" or "biological wastes" to connote a material in need of management without entrapping it in the hazardous waste schematic of the Act. Since they used the term hazardous, the Board must conclude they intended such an association. Further, the statutory definition of "hazardous waste" (Section 3.15) includes the term "infectious characteristics", a strong indication that the General Assembly intended that biologically active materials could and would fall within the definition of hazardous waste subject to a fee. Also, the General Assembly in the definition of "industrial process waste" (Section 3.17), includes hospital pathological waste among the traditional types of materials which National urges (Brief, p.4) as appropriately subject to the fee system. In total, the Board concludes that the term "hazardous waste" as used in the fee provisions of Section 22.2 of the Act includes the term "hazardous hospital waste" as used in Section 3.13.

In addition, Section 22.2 of the Act, as originally adopted in P.A. 81-856, required the Agency to adopt procedures and criteria for the implementation of that system not later than April 1, 1980. The Agency originally adopted emergency rules to implement the fee system, later adopting them, essentially unchanged, as final rules on August 27, 1980 (4 Ill. Reg., No. 36, p. 125, September 9, 1980). The Agency stated the purpose of the criteria: "These criteria for identifying hazardous wastes are necessary for the operation of the fee system since a site operator must be able to identify a waste by utilizing the criteria to determine if a waste is hazardous and therefore subject to the fee." Section 2.0 of those criteria state: "A waste is hazardous if it exhibits one or more of the following characteristics: corrosive, flammable, reactive, infectious, toxic, or persistent or a potential hazard." Later, in Section 3.4, the criteria provide a definition of infectious waste that includes, "Any pathological specimens and any articles attendant thereto that may be disposed of from humans and animals known to be contaminated..." with a variety of listed diseases which must be reported to the Department of Public Health. These statutorily mandated Agency criteria would clearly include the type of wastes that National places at issue here today.

In addition, present Agency regulations regarding the fee system at 35 Ill. Adm. Code Part 855, include the definition of

"hazardous hospital waste" within Section 855.102. Also, Section 855.203 requires that records be maintained by, "On-site hazardous waste disposal sites, including underground injection wells, and hospitals to the extent that they treat or dispose of on-site hazardous hospital waste..." The Board must find that Agency criteria and regulations clearly contemplate hazardous hospital waste within the scope of the fee provisions of Section 22.2 of the Act.

Last, but not least, this Board has addressed the issue of the applicability of the fee provisions to hazardous hospital waste on at least two occasions. As argued by the Agency in this proceeding, the Board stated on December 24, 1980, that hazardous hospital waste transported off-site for sterilization would be subject to the supplemental permits and manifest requirements as well as the fee requirements of Section 22.2 of the Act (R80-19, In the Matter of: Hazardous Hospital Waste, Sections 3(jj) and 21 (h) of the Environmental Protection Act, Emergency Rule, p. 7, 12/24/80). Later, when the final rule was adopted in that proceeding, the Board quoted from the Agency criteria which included infectious waste within the fee system. (R80-19, Adopted Rule Final Action, p.3, 5/28/81).

In summary, the Board finds that the statutory language, Agency regulations and criteria, and prior Board Opinions all support the conclusion that hazardous hospital waste is subject to the fee provisions of Section 22.2 of the Act. Therefore, the Agency imposed condition in National's permit is appropriate.

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

ORDER

The supplemental permit condition "Waste Classification: Hazardous Subject to Fee" in the supplemental permit issued to National Environmental Services is hereby affirmed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987, ch. 111½, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 19th day of July, 1990, by a vote of 5-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board