ILLINOIS POLLUTION CONTROL BOARD
June 8, 1989

BI-STATE DISPOSAL, INC., Petitioner,	)	
v.	)	PCB 89-49
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

THOMAS J. IMMEL OF IMMEL, ZELLE, OGREN, McCLAIN, GERMER AND COSTELLO, APPEARED ON BEHALF OF THE PETITIONER.

JOHN P. WALIGORE APPEARED ON BEHALF OF THE RESPONDENT.

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

This matter comes before the Board upon a permit appeal filed by Bi-State Disposal, Inc. (Bi-State) on March 8, 1989. Bi-State seeks review of a February 28, 1989 decision of the Illinois Environmental Protection Agency (Agency) to reject a permit application which Bi-State had submitted to the Agency. A hearing was held in this matter on May 3, 1989.

Motion to Close Record

On May 15, 1989, Bi-State filed its brief. The Board has not received any brief from the Agency. On May 30, 1989, Bi-State filed a Motion to Close Record. That is, Bi-State requests that the Board render a decision without waiting for an Agency brief. In the motion, Bi-State asserts that the Agency has not met the briefing deadlines set by the Hearing Officer. Counsel for Bi-State states that he will be working on a trial and out of the office for the week of May 30th. As a result, Bi-State claims that the lateness of the Agency's brief has "effectively rendered it impossible for Petitioner to file any Reply Brief... and still have said Brief considered by the [Board] before its effective decision deadline". Bi-State states that it will not waive the statutory decision deadline in this matter.

At hearing, the Hearing Officer addressed the timing for the submission of briefs:

> HEARING OFFICER: Back on the record, please. After consultation with counsel, we have agreed on a Briefing schedule as follows:

> The court reporter will have the transcript ready as soon as she can. She said she'll have it ready in a few days.
>
> Based on that I order Mr. Immel to have his main Brief postmarked, that is, sent from his office in Springfield to the Board not later than Friday, May 12th.
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> Mr. Waligore will have his Brief mailed to the Board and served on Mr. Immel not later than Wednesday, May 24th.
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> Mr. Immel will send any reply Brief to the Board to leave his office in Springfield not later than Friday, May 26th.
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> Mr. Immel, if you do not wish to file a reply Brief I would appreciate it if you simply send a copy to that effect to the Board and a copy to me, so the Board knows the case is ready for decision.
>
> That will permit the Board to make its decision in a timely manner.

(R. 89).

Neither has the Board nor the Hearing Officer received any motion by the Agency to extend the date for filing its brief. Yet, the Board still has not received the Agency's brief. The Board and the Hearing Officer have received a copy of a letter, dated May 31, 1989, sent to Bi-State's counsel from the Agency's counsel. In the letter, counsel for the Agency states that his brief will be late. The letter also purportedly confirms an agreement between Bi-State and the Agency concerning the late filing of briefs. Specifically, Bi-State would have an additional time to file its brief to the same extent that the Agency's brief was late.

However, the briefing schedule is set by the Hearing Officer Order. Only through a motion to the Hearing Officer or the Board can such a briefing schedule be effectively modified.

It is clear from the hearing transcript that: 1) the Hearing Officer consulted with the parties before setting the briefing deadlines and no party objected to the schedule; 2) the schedule set date certain deadlines for service of the briefs on the opposing party as well as the date for mailing the briefs for the Board; and 3) the deadlines were set deliberately to provide the Board with adequate time to consider the briefs, including a Bi-State Reply brief, given the statutory decision deadline of

this case. The Hearing Officer acted properly in setting the briefing schedule, and the schedule should be upheld. Bi-State's motion to close the record is granted. The Board notes that it does not construe Bi-State's motion as a motion for sanctions against the Agency. The Board has not made a finding as to the reasonablness of the Agency's noncompliance with the briefing schedule. Rather, the Board has closed the record to render a timely decision in this matter.

Basis for Agency Rejection

Bi-State sought modification of the development and operating permits for a 40-acre non-hazardous waste disposal facility. Specifically, Bi-State requested modification of the permits to enable Bi-State to begin the disposing of waste in a mine cut which bisects the 40-acre facility. Bi-State is requesting that the Board reverse and remand to the Agency Bi-State's permit application which the Agency has deemed not filed and rejected.

In rejecting Bi-State's application the Agency asserted that Bi-State is required to obtain local site location suitability approval, in accordance with Section 39(c) of the Act, before seeking the permit modification. The Agency also stated that the required number of notification letters were not provided. Since this case may be disposed of by addressing the first issue, the Board will not address the issue concerning notification letters.

On appeal to the Board, Bi-State claims that its planned expansion is not a new regional pollution control facility under Section 3.32 of the Act. As a result, Bi-State asserts its proposal is not subject to the site location suitability approval process of Section 39.2 of the Act.

Before one can follow Bi-State's argument, the history of the site needs to be retraced. In 1982, Bi-State received a permit to operate a 40-acre landfill. That permit did not allow for the deposit of waste in the mine cut. However, in 1976, the previous operator of the site had obtained a development permit, which allowed the deposition of non-putrescible waste in the mine cut. The site was operated by that operator from 1978 until the permit was transferred to Bi-State in 1982. Evidently, though, waste was never deposited in the mine cut. In 1985, another permit was issued to Bi-State which incorporated a closure and post-closure plan. The 1985 permit did not allow waste to be deposited in the mine cut. (R. 47-48). Now, Bi-State wants its permit modified so that waste may be deposited in the mine cut.

It is undisputed that the mining drainage cut lacked a permit from 1982 to the present time. (R. 23-25, 34-36, 48). The proposed modification would raise the vertical elevation of the mine cut by 80 to 90 feet. (R. 57).

As basis for its contention that this permit modification does not constitute a new regional pollution control facility, Bi-State relies upon a particular interpretation of Section 3.32 of the Act. Specifically Bi-State cites to the provision which states:

> A new regional pollution control facility is:
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> * * *
>
> 2. The area of expansion beyond the boundary of a currently permitted regional pollution control facility; (emphasis added)
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> * * * *

Bi-State claims that the word "currently" refers to the instant in time when SB 172 (the bill which created the site location suitability process for new regional pollution control facilities) became effective.[1] Bi-State then points out that the mine cut was removed from the permit in 1982, after the effective date of SB 172.[2] Consequently, on the effective date of SB 172, a permit existed for the site (although Bi-State was not the permit holder) which allowed for the deposition of waste in the mine cut.

Bi-State asserts that such a construction is arrived at by a "plain reading" of the statutory definition of a new regional pollution control facility. Bi-State argues that the Agency permit review incorrectly interpreted the word "currently" to mean the date the application was received and not the effective date of the SB 172. Additionally, Bi-State claims that the words "currently permitted" modify the word "facility" and that the Agency's permit reviewer construed the words "currently permitted" as modifying the word "boundary". Bi-State cites only one case as authority for its statutory construction of the term "currently". That case is Rhymer v. Government of Virgin Islands, 176 F. Supp. 338 (1959). The case, which was decided by the Federal District Court of the Virgin Islands, involves the interpretation of the word "currently" which was found in a deed and ordinance. The Federal District Court held:

> Normally, 'currently' designates the very time of the utterance or the instrument using

[1] Bi-State gives an effective date of July 1, 1981 for P.A. 82-682, but the effective date was actually November 12, 1981.

[2] Apparently the mine cut was removed from permit consideration in 1982 at the request of Bi-State itself. (R. 50-51).

> the word. It is equivalent to 'presently'.
>
> (Rhymer, 176 F. Supp. at 341).

The court went on to find that the word "currently" referenced the point in time of the deed's effective date.

While Bi-State asserts that Rhymer is analogous to the situation at hand, and should be followed, the Board does not give great weight to the case. Rhymer does not involve the interpretation of an Illinois statute and is actually in conflict with Illinois case law.

Specifically, the Board is bound by the interpretation of the Illinois Supreme Court in Kozak v. Retirement Board of the Fireman's Annuity and Benefit Fund of Chicago, 95 Ill. 2d 211 447 N.E.2d 394 (1983). In Kozak the Supreme Court interpreted the word "current" as used in an Illinois statute dealing with benefits to the widow of a fireman who was killed in the line of duty. The statutory language at issue provided direction as to how the particular benefits to the widow would be calculated. The benefits were to be based upon "the current annual salary attached to the classified position to which the fireman was certified at the time of his death". (Emphasis added). Kozak, who was a widow of a fireman, contended that the phrase provided for the increase of benefits to her whenever the salary of the type of position which was held by her deceased husband was increased. Conversely, the Retirement Board asserted that the Kozak's benefit was dependent only upon the salary received by the deceased husband at the time of his death. The Appellate Court had ruled in Kozak's favor. The Supreme Court affirmed the Appellate Court and construed the word "current" as follows:

> The words used in a statute are to be given their ordinary and popularly understood meaning. (Illinois Power Co. v. Mahin, (1978), 72 Ill.2d 189, 21 Ill. Dec. 144, 381 N.E.2d 222). The appellate court relied in part on the definition in the Random House Dictionary of the English Language Unabridged Edition (1966) to determine the meaning of "current". There, the word is defined as meaning "passing in time or belonging to the time actually passing; new, present, most recent". Webster's Third New International Dictionary 557 (1971) defines its meaning as "occurring in or belonging to the present time". We accept and apply these definitions, which are supported by the following cases: Warren Co. v. Commissioner (5th Cir.1943), 135 F.2d 679; Graham v. Miller (3d Cir. 1943), 137 F.2d 507; American Fruit Growers, Inc. v. United States (9th

Cir. 1939), 105 F.2d 722, 726; Commissioner v. Keller (7th Cir. 1932), 59 F.2d 499.

(Kozak, 447 N.E. 2d at 396).

It is clear from the Court's discussion in Kozak that the word "current" means "the most recent" or "not fixed in time". Alternatively, Bi-State essentially advocates that the statutory phrase "the area of expansion beyond the boundary of a currently permitted regional pollution control facility" in reality means "the area of expansion beyond the boundary of a regional pollution control facility as permitted on the effective date of SB 172.

Bi-State's argument is that its proposed permit modification is not an expansion to the facility as permitted on the effective date of SB 172. However, Bi-State has not contended that its proposed modification is not an expansion to the boundaries of the facility as presently permitted. Indeed, the purpose behind the permit modification is to receive permission to deposit waste in areas beyond those allowed by the present permit. Therefore, the sole issue of this case is the determination of what is meant by the phrase "currently permitted regional pollution control facility". Is it the extent of the facility permitted as of the effective date of SB 172, which was November 12, 1981? Or, is it the extent of the facility permitted as of the date when Bi-State's application was submitted to the Agency?

Utilizing the reasoning of Kozak, the Board finds that the statutory language refers to the present permitted status of the facility, not the facility as it was permitted on November 12, 1981. Since Bi-State is seeking an expansion of its presently permitted facility, the proposed expansion constitutes a new regional pollution control facility pursuant to Section 3.32(2) of the Act. As a result, Bi-State must first be granted site-location suitability approval pursuant to Section 39.2 of the Act before it may apply for development or construction permits for the proposed expansion. Ill. Rev. Stat. 1987, ch. 111½, par. 1039(c). The Agency was justified in rejecting Bi-State's application.

Bi-State asserts that legislative history supports its interpretation of the definition of "new regional pollution control facility". However, the Supreme Court in Kozak also stated that when a statute is unambiguous and clear "there is no reason for courts to search for the motives of the legislature to justify giving the statute a meaning different than the words of the statute indicate...." Kozak, 447 N.E.2d at 399. As in Kozak, the statutory language at issue here is unambiguous. Hence, there is no reason to delve into legislative intent as evidenced by floor debates in the General Assembly.

However, it is significant to note that subdivision (1) of Section 3.32 states:

> A new regional pollution control facility is:
>
> 1) a regional pollution control facility initially permitted for development or construction after July 1, 1981.

Bi-State asks the Board to accept an interpretation of Section 3.32(2) such that "currently permitted" means "permitted as of July 1, 1981". (Bi-State asserts that July 1, 1981 is the effective date of SB 172.) If that were the intent of the legislature, why did it not use the date "July 1, 1981" in subdivision (2) as it did in subdivision (1) of that same Section? The absence of the date in subdivision (2) is significant. It is the Board's position that the legislature deliberately drafted subdivision (2) in a broad manner so that it would apply to all expansions of regional pollution control facilities regardless of when the expansions were sought.

Accepting the construction of Bi-State effectively gives the county board or municipality only one chance to review site location suitability for any regional pollution control facility. That is, under Bi-State's interpretation, an expansion to any facility which was initially permitted after the effective date of SB 172 would not be considered a new regional pollution control facility pursuant to Section 3.32(2). Such a facility would not have been permitted on the effective date of SB 172, therefore there could be no expansion to the "currently permitted" facility - with "currently permitted" meaning "permitted on the effective date of SB 172". Therefore, any new regional pollution control facility pursuant to Section 3.32(1) which has already gone through the site location suitability process could expand in an unlimited fashion without ever triggering another local review of site location suitability. Such a result is clearly contrary to the purpose of SB 172 as enunciated by the Illinois Supreme Court.

In M.I.G. Investments, Inc. v. Environmental Protection Agency, 122 Ill. 2d 342, 523 N.E.2d 1, (1987), the Supreme Court held that a vertical expansion to a landfill was considered a new regional pollution control facility pursuant to the statutory definition. In making its decision, the Supreme Court reviewed the purpose behind SB 172.

> As stated earlier, the legislature amended the Act in 1981 to give local governmental authorities a voice in landfill decisions that affect them. From the language of section 3(x)(2) [now Section 3.32(2)], it is clear that the legislature intended to invest local governments with the right to assess not merely the location of proposed

> landfills, but also the impact of alterations in the scope and nature of previously permitted landfill facilities. In section 3(x)(2) a "new regional pollution control facility" is defined as "the area of expansion beyond the boundary of a currently permitted" facility. Ill. Rev. Stat. 1985, ch. 111½, par. 1003(x)(2).
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> To expand the boundaries of a landfill, whether vertically or laterally, in effect, increases its capacity to accept and dispose of waste. An increase in the amount of waste contained in a facility will surely have an impact on the criteria set out in section 39.2(a), which local governmental authorities are to consider in assessing the propriety of establishing a new pollution control facility. Indeed, adjusting the dimensions of a landfill facility to increase the amount of waste stored will surely have an impact on "the danger to the surrounding area from fire, spills or other operational accidents" and "the character of the surrounding area". Ill. Rev. Stat. 1985, ch. 111½, pars 1039.2(v),(iii). (emphasis added)
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> (M.I.G. Investments, 523 N.E.2d at 4-5).

The Board's view would allow local units of government to scrutinize proposed expansions to existing reigonal pollution control facilities irrespective of whether those facilities were permitted as of the effective date of SB 172. Such an outcome is certainly more consistent with the purpose of SB 172 than the view propounded by Bi-State.

In conclusion, Bi-State's proposed permit modification constitutes a new regional pollution control facility. Therefore, Bi-State must first seek site location suitability approval pursuant to Section 39.2 of the Act before applying to the Agency for a permit modification. As a result, the Agency properly rejected Bi-State's application in accordance with Section 39(c) of the Act. The Agency's February 28, 1989 permit decision is affirmed.

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

ORDER

The February 28, 1989 decision of the Illinois Environmental Protection Agency to reject an application for permit

modification submitted by Bi-State Waste Disposal, Inc. is hereby affirmed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111 ½ 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 8th day of June, 1989, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board