BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C.,	)	
	)	
	)	
Petitioner,	)	
	)	PCB 07-113
	)	
THE CITY OF ROCHELLE, an ILLINOIS MUNICIPAL CORPORATION and THE ROCHELLE CITY COUNCIL,	)	**RESPONSE BRIEF OF CITY OF ROCHELLE (AS APPLICANT)**
	)	
	)	
Respondents.	)	

THE CITY OF ROCHELLE, the applicant for siting in the above-captioned matter ("City), by its attorney Alan H. Cooper, hereby files its brief in response to the opening brief filed by petitioner Rochelle Waste Disposal, L.L.C. ("Operator").

For the reasons set forth in this brief, the City believes that the relief sought by the Operator with respect to all of the conditions in question (Conditions 8, 13, 22, 23, 26, 28, 33 and 34) should be granted. Some of the conditions could have been formulated in a manner that would have found support in the record and would have addressed the concerns which prompted them. However, as they were formulated and imposed, the challenged conditions find no support in the record, are not necessary in order for any of the required criteria to be met, and should be stricken.

I. BACKGROUND AND STANDARD OF REVIEW

The Operator's brief adequately sets forth the background, facts and standard of review in this appeal. Additional facts pertinent to the City's analysis will be set forth in the section of the argument to which they pertain.

II. ARGUMENT

The Operator's petition challenges eight of the 37 conditions imposed by the City Council on its grant of siting approval. The conditions at issue relate to litter control (Condition 8), exhumation of unit 1 (Condition 13), operational screening berms (Condition 22), perimeter berms (Condition 23), City involvement in the permitting of the expansion (Condition 26), City review of the groundwater impact assessment to be submitted to the IEPA as a permit application (Condition 28), and improvement of Mulford Road (Conditions 33 and 34).

These conditions, for the most part, did not have their origin in evidence presented in the hearings. Rather, they originated in a report from the City Council's reviewing engineering firm, Patrick Engineering (included in the Record at C-251 through C-270), which was submitted to the City Council after the close of the evidence. No one from the Patrick firm testified, and there was no opportunity for the City, the Operator, or any other party to cross-examine a representative from the Patrick firm. Unfortunately, the conditions proposed in the Patrick Report were adopted by the Hearing Officer with no analysis as to what evidence in the record supported them. They were then adopted by the City Council either *verbatim*, or with minor modifications, again with no analysis as to any evidentiary foundation.

The City believes that its Application, prepared by Shaw Environmental, Inc., and supported by lengthy, detailed and persuasive testimony, provides a comprehensive, thorough and wholly adequate plan for a small, environmentally sound and neighbor-friendly landfill, without the imposition of the challenged conditions. Accordingly, should the Board see fit to strike all of the challenged conditions as being unsupported by

the evidence, sufficient safeguards would remain in place to ensure that the landfill expansion would be constructed and operated properly.

A. Condition 8 (Litter Control)

The City's Application contains a litter control plan which imposes specific duties on the Operator, including the following: (1) requiring incoming refuse vehicles to be fully-enclosed or to have covers or tarps to prevent waste from blowing out of the vehicles; (2) keeping the active disposal area as small as possible, while still allowing safe operation; (3) daily cover; (4) a perimeter fence and exterior berm; (5) special requirements during high winds, including the suspension of operations when the City determines the Operator has not or is not able to adequately control blowing litter from leaving its facility; and (6) patrolling of the facility and surrounding property to collect any litter escaping the active fill area. (Application, Vol. 1, Sec. 2.6, pages 2.6-6 to 2.6-7).

Additionally, the litter control plan requires the operator to inspect public rights-of-way and adjacent areas along Mulford Road from the landfill entrance to Route 38, and along Route 38 from Mulford Road west to the Interstate 39 exchange, on at least a daily basis, with litter collection activities along these routes undertaken as needed. (Application, Vol. 1, Sec. 2.6, pages 2.6-6 to 2.6-7).

Condition 8 (imposed as a condition to a finding on criterion (ii)), requires the Operator to inspect not only the rights-of-way described in the Application, but also to conduct a daily inspection of Route 38 from Mulford Road east through Creston to Woodlawn Road, and to conduct litter collection along all of the foregoing routes at least

weekly, and more often if the City Manager determines from the evidence that the Operator is responsible for the litter.

While these additional burdens do not seem significant, there is nonetheless nothing in the record that supports the City Council's finding that they are reasonable and necessary in order for the requirements of Criterion (ii) to be met.

The final session of the landfill hearing, on February 8, 2007, was devoted almost exclusively to an analysis of the Operator's operating history, which seems to have been the concern which prompted Condition 8. During that hearing, Operator's exhibit 2 was admitted in evidence without objection. It was a document prepared by Steve Rypkema, the Ogle County Solid Waste Administrator, entitled "Summary of Inspections and Apparent Violations Noted by Ogle County Solid Waste Management Department during Inspections at the Rochelle Municipal Landfill #2 Landfill April 1991-December 2006." Tom Hilbert, the engineering manager for the Operator, was questioned extensively about the report by all counsel (Tr. Feb. 8, 2007, pp. 8-166). Neither Mr. Rypkema's report nor any of the testimony about it support the conclusion that there has been a significant litter problem at the landfill, or that litter from the landfill would not be adequately controlled by the requirements set forth in the Application.

Mr. Rypkema's summary contains only two references to apparent violations related to litter during the entire 11-year period that the Operator had operated the landfill, beginning in 1995 (Tr. Feb 8, 2007, p. 110; Operator's Exhibit 2). There was, to the best of the City's recollection and review of the record, no evidence that the landfill had allowed litter to blow onto the rights-of-way anywhere on Route 38, or that refuse trucks going to and from the landfill had caused a litter problem there. Accordingly, the

requirements contained in the Application would be sufficient to protect the public health, safety and welfare from any litter problems originating from the landfill.

Condition 8, in imposing additional inspection and collection requirements, is not supported by the evidence, or alternatively is against the manifest weight of the evidence, and should be stricken, leaving in place the wholly-adequate litter control requirements of the Application.

II. CONDITION 13 (EXHUMATION OF UNIT 1)

Unit 1 of the existing landfill is an unlined unit which was in operation from 1972 to 1995, when it was closed. The Host Agreement between the Operator and the City, as amended and restated on September 26, 2006, provides that in any application for siting approval for an expansion of the landfill, the City may require the excavation and redisposal of the waste from Unit 1 into a new Subtitle D unit, and that this process (referred to in the hearing as "exhumation") must "...be commenced and completed within a commercially reasonable time". (Application, Vol. 2, Ex. C, Sec. 7.4, pp. 19-21). The City agreed to pay the first $850,000.00 of the exhumation costs and the Operator agreed to bear the remaining costs. (Application, Vol. 2, Exhibit C, Sec. 7.4(b), p. 19).

The Host Agreement's "commercially reasonable" standard was intended to take into account the significant uncertainties associated with exhumation, while still imposing an obligation on the Operator to proceed as promptly as circumstances allow.

Condition 13, on the other hand, deviates from the flexible standard contained in the Host Agreement, in favor of a firm deadline. It requires the exhumation to be completed as soon as practicable, "but in no event later than six (6) years from the date an

IEPA permit is issued for the expansion, except as otherwise provided by the City Council for good cause shown." The evidence does not support a finding that exhumation can be completed within six years, or that a firm deadline of six years is appropriate.

In the City's Application, Shaw Environmental included a detailed plan for the exhumation, including the equipment to be used, the method of excavation and cover, the proposed hours and times of the year when exhumation would occur, the nature and quantity of cover to be used in the event hazardous waste is encountered, the air monitoring program that would be required to avoid dangers from explosive gases and VOC's , stormwater management requirements during exhumation, and additional safety procedures to be implemented and safety equipment to be used during exhumation (Application, Vol. 1, pp. 2.6-24 to 2.6-28). Waste relocation would be limited to the months of October through March, in order to minimize odor, absent express written approval by the City Council (Application, Vol. 1, p. 2.6-25)

Taking into account the requirements imposed by the Application and what is presently known (and not known) about Unit 1, Shaw Environmental concluded that "[it] is anticipated that relocation of Unit 1 will be performed over a 5-10 year period." (Application, Vol. 1, p. 2.6-24).

The only witness who testified regarding the time needed for the exhumation was Devin Moose of Shaw Environmental. He described the sequencing of exhumation (Tr. January 24, 2007, pp. 321-323) and concluded that "we think that that's going to take on the order of about 10 years to accomplish that". (Tr. January 24, 2007, pp. 323). He testified that, based on his experience, he would expect to find municipal solid waste,

industrial waste from the industrial processes in the City, and possibly small portions of hazardous waste in Unit 1 (Tr. January 24, 2007, p. 320), and that "you never know what you're going to find when you embark on these types of projects". (Tr. January 24, 2007, p. 303).

No one testified that the exhumation could be completed within six years. To the extent there may have been public comments urging a shorter time period for exhumation, they were not based on kind of informed, expert analysis that would render them competent or credible.

Based upon the Application and the testimony of Mr. Moose, the City Council could possibly have imposed a ten-year requirement for completion, barring unforeseen and unavoidable delays, but there was nothing to support a six-year limitation. Nor does the proviso that the Operator may come back and ask for an extension for "good cause" act as a substitute for the missing evidence, because it does not provide any standards for the City Council's determination as to what constitutes "good cause". The Operator's decision to challenge a condition that was unsupported by any evidence and which might prove impossible (or impossibly costly) to fulfill, and its reluctance to rely on a future City Council's unguided and unpredictable determination of "good cause", is certainly understandable.

Condition 13, in imposing a firm six-year deadline for exhumation, is not supported by the evidence, or alternatively is against the manifest weight of the evidence, and should be stricken, leaving in place the Host Agreement requirement, negotiated between the parties and approved by the City Council, that the exhumation "be commenced and completed within a commercially reasonable time".

C. Condition 22 (Operational Screening Berms)

The Operating Plan included within the Application contains requirements concerning cell development, waste placement and compaction and placement of cover materials. (Application, Vol 1, pp. 2.6-17 to 2.6-19). It also requires a perimeter screening berm with vegetation and trees on top of the berm along Creston Road. (Application, Sec. 3.1 p. 8; Sheets 5 and 6). However, the Application does not contain an additional requirement for operational screening berms, and neither does the Host Agreement.

Condition 22 requires operational screening berms between six and eight feet in height along the southern edge, and partially along the eastern and western edges, of any operating cells. This Condition was associated only with criterion (ii). The stated purpose of the operational screening berms is "to block the operations from view from Creston Road as well as help contain litter and reduce noise impacts."

No one testified that a condition requiring operational screening berms was reasonable and necessary in order to ensure compliance with criterion (ii). Indeed, the only discussion of operational screening berms (as opposed to perimeter screening berms) in the entire record consists of brief comments by Devin Moose included in his responses to questions addressed to other topics.

In answer to questions from Creston's attorney concerning whether consideration had been given to a perimeter berm on the east of the landfill to screen a new subdivision from the landfill, Mr. Moose indicated that the 100-foot height of the landfill would mean that it could not be completely screened from the subdivision. He then indicated that what is normally done is to use an operational screening berm for above-grade portions of

the landfill so that landfilling activities took place in a bermed-in area on top of the landfill, and that this would be the more appropriate approach for this subdivision (Tr. January 25, 2007, pp. 201-202).

Mr. Moose also commented on operational screening berms in answer to a question from the CCOC's attorney concerning the use of daily and intermediate cover. After responding directly to the question, Mr. Moose added the comment that as a part of the permit for the exhumation plan, he would include the use of operational screening berms along the south and east edges of the active. These berms would be about six to eight feet in height. (Tr. January 25, 2007, pp. 65-68).

Notwithstanding these comments, Mr. Moose testified that, in his opinion, the design of the landfill expansion included in the Application, which did not include a requirement of operational screening berms in addition to perimeter screening berms, met the requirements of criterion (ii). (Tr. January 24, 2007, p. 195). No one testified to the contrary. While screening berms might be desirable, and might be included in a future plan or permit application, there is no legal foundation for imposing them as a condition to siting approval.

Condition 22, in requiring operational screening berms, finds no support in the evidence, or alternatively is against the manifest weight of the evidence, and should be stricken.

D. Condition 23 (Perimeter Berm)

The Application calls for a ten to twelve foot undulating screening berm adjacent to Creston Road to be planted with a variety of plant material, including masses of conifer trees, canopy trees and ornamental trees. The proposed landscape plan, prepared

by the Lannert Group, is depicted in sheets 5 and 6 included in Section 3.1 of the Application. The trees and grasses would be installed to provide immediate impact and mature over time. Deciduous shade trees would reach a mature height of 40 feet to 50 feet. Masses of conifer trees would have a height of 6 feet to ten feet at installation, and would reach a height of 35 feet to 50 feet. Ornamental trees would have a height of from six to ten feet at installation, and would reach a height of 15 feet to 25 feet. Ornamental grass clusters would be massed at the base of the conifer trees to additionally enhance the screening effect. (Application, Sec. 3.1, p. 8; Sheets 5 and 6).

Chris Lannert testified that the berm and plantings were designed to filter and screen the existing operations at the landfill from view along Mulford and Creston Roads. He indicated that there might be places where one would be able to see some of those operations, but in most cases the entire periphery of the site would be screened from miscellaneous views into it. (Tr. January 22, 2007, p. 110). He further testified that the berm would be an undulating berm eight to ten feet in height along Creston Road. (Tr. January 22, 2007, p. 98). Mr. Lannert gave the opinion that the proposed expansion, including the landscape plan, complied with the requirements of criterion (iii). No one testified to the contrary.

Condition 23 imposes the requirement that the perimeter berm be fourteen feet in height, rather than the 10 to 12 feet set forth in the Application or the eight to ten feet to which Mr. Lannert testified. Interestingly, that condition is not related to criterion (iii), but only to criterion (ii). Condition 23 lacks any support in the record in two respects. First, there was no testimony suggesting that the berm should be fourteen feet in height.

Second, there was no testimony that such a berm was necessary to meet the requirements of criterion (ii) (or, for that matter, to meet the requirements of criterion (iii)).

Condition 23 finds no support in the evidence, or alternatively is against the manifest weight of the evidence, and should be stricken.

E. Conditions 26 and 28 (City Involvement in Permitting and Groundwater Impact Assessment)

Condition 26 provides that the City and its legal and technical consultants shall have the right to be involved in the permitting of the expansion, including the right to be present at meetings between the Operator and its consultants, and the IEPA, and to review and comment on the Operator's applications prior to submission, all at the Operator's cost.

Condition 28 provides that the City shall have the right to review and comment on any proposed Groundwater Impact Assessment before its submission as part of any permit application.

Conditions 26 and 28 are associated only with criterion (ii).

Regardless of whether these conditions might be desirable from the City's point of view, they were not included in the Host Agreement and, to the best of the City's knowledge, there was simply no evidence presented that would form an evidentiary basis to support them. Not only did no one testify that these conditions were reasonable or necessary to meet the requirements of criterion (ii), to the best of the City's knowledge, no one testified about these matters at all. They seem to have originated with the Patrick Report in the absence of any evidentiary support, and should therefore be stricken.

Conditions 26 and 28 find no support in the evidence, or alternatively are against the manifest weight of the evidence, and should be stricken.

F. Conditions 33 and 34 (Improvements to Mulford Road)

Mulford Road is a two-lane, north-south road partly under the jurisdiction of the Township and partly under the jurisdiction of the City of Rochelle. It has a weight limit of 73,280 pounds. (App., Sec. 6, p. 6). It runs on the west side of the existing landfill.

The City's Application provides that, as part of the proposed expansion, Mulford Road would be reconstructed and upgraded to a two-lane road with a weight limit of 80,000 pounds from Illinois Route 38 to just south of the site access drive. (App., Sec. 6, p. 6).

While it was virtually undisputed that Mulford Road should be upgraded as part of the landfill expansion, there were two associated matters that were not addressed in the Application or in the Host Agreement. First, there was no agreement as to whether the improvements would end at the new landfill entrance (to be located about 1,500 feet south of the existing entrance and 500 feet north of the intersection of Mulford Road and Creston Road) or would also include the intersection. Second, there was no agreement as to who was going to pay the cost of the improvements.

The City introduced in evidence a letter from Curtis Cook, the Ogle County Highway Engineer, which suggested that if Mulford Road were improved, the improvements should include the Creston Road intersection (Applicant's Exhibit 8). Michael Werthman of the firm of Kenig, Lindgren, O'Hara, Aboona, Inc., who prepared the traffic portion of the City's Application, testified that the Application provides for improvements only to the new landfill entrance because the impact of the expansion on the portion of Mulford Road south of the new entrance is minimal and that portion of the

road would be used only by collection trucks whose weight is below 80,000 pounds. (Tr. January 23, 2007, p. 48).

With respect to the allocation of costs for the improvements, both Mr. Werthman and Mr. Moose testified that they did not know who was to pay the costs (Tr. January 23, 2007, p. 110-111; Tr. January 25, 2007, p. 135).

Conditions 33 and 34 require that Mulford Road be improved from Route 38 all the way south to Creston Road, and that all of the cost of the improvements be borne by the Operator, except with respect to the portion between the new landfill entrance and Creston Road. With respect to that portion, the Operator would bear its proportionate share as determined by a traffic study.

The City Council's allocation of costs is not supported by any evidence in the record. With all due respect to the City Council, these conditions appear to be an attempt to impose on the Operator, in the form of a siting condition, costs which should have been negotiated and included in the Host Agreement.

It is self-evident that the improvements to Mulford Road will benefit both the Operator and the City, as well as surrounding properties which are anticipated to be developed for industrial uses in the future. Some form of equitable allocation (perhaps including rights of recapture against adjacent properties) is clearly called for in this situation. The evidence certainly would have supported a condition that would have required the City and the Operator to allocate the costs between themselves in an equitable fashion, and to further amend the Host Agreement to include that allocation. However, the specific allocation contained in Conditions 33 and 34 is simply without foundation in the record.

Conditions 33 and 34 are without support in the record, or alternatively are against the manifest weight of the evidence, and should be stricken, leaving the City and the Operator to negotiate an agreement between themselves with respect to an appropriate allocation of costs.

CONCLUSION

For the reasons set forth in this brief, the City, as Applicant, respectfully requests that the Board strike all of the challenged conditions.

THE CITY OF ROCHELLE

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NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Illinois Pollution Control Board RESPONSE BRIEF OF CITY OF ROCHELLE (APPLICANT) on behalf of the City of Rochelle, as applicant, a copy of which is herewith served upon you.

/s/ Alan H. Cooper
ALAN H. COOPER

Date: December 10, 2007

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STATE OF ILLINOIS)
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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing RESPONSE BRIEF OF CITY OF ROCHELLE (APPLICANT) and notice of filing was served upon :

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