

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C.,)	
)	
Petitioner,)	
)	
v.)	
)	PCB 07-113
THE CITY OF ROCHELLE, an Illinois)	(Third-Party Pollution Control Facility
municipal corporation, and THE)	Siting Appeal)
ROCHELLE CITY COUNCIL,)	
)	
Respondents.)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on December 10, 2007, the undersigned electronically filed with the Clerk of the Illinois Pollution Control Board **ROCHELLE CITY COUNCIL'S RESPONSE BRIEF** in the above entitled matter, a copy of which is attached hereto.

ROCHELLE CITY COUNCIL

By: /s/ Donald J. Moran
One of Its Attorneys

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ROCHELLE CITY COUNCIL'S RESPONSE BRIEF

Respondent, Rochelle City Council ("City Council"), by its attorneys, Pedersen & Houpt, submits this brief in response ("Response") to Petitioner, Rochelle Waste Disposal, LLC's ("RWD"), appeal of certain special conditions imposed in conjunction with the grant of site location approval.

INTRODUCTION

This third-party appeal arises out of the October 16, 2006 siting application ("Application") filed by the City of Rochelle ("City") with the City Council requesting site location approval for the expansion of the existing Rochelle Municipal Landfill (referred to herein as "Landfill"), pursuant to Section 39.2 of the Illinois Environmental Protection Act ("Act"). The Landfill is operated by RWD and owned by the City. On April 11, 2007, the City Council passed Resolution R07-10 granting site location approval subject to the imposition of thirty-seven special conditions. RWD filed a motion to reconsider before the City Council objecting to eight of the thirty-seven special conditions, namely Special Conditions 8, 13, 22, 23,

26, 28, 33 and 34 (collectively, "Subject Conditions"). On May 14, 2007, the City Council passed Resolution R07-18 modifying Special Condition 34 and affirming all other special conditions.

RWD filed the instant appeal challenging the Subject Conditions on the grounds that they are not reasonable and necessary to accomplish the purpose of Section 39.2, are not supported by the underlying record, and run contrary to the Restatement of Host Agreement and Agreement for Operation/Development of City of Rochelle Landfill No. 2 ("Host Agreement") between RWD and the City.

The City Council maintains that the evidence in the record¹ demonstrates that Special Conditions 8, 26 and 28 as written are reasonable and necessary to accomplish the purposes of the Act and are not inconsistent with Board regulations. With regard to the remaining Subject Conditions, the City Council asserts that the evidence warrants the modification of Special Conditions 13, 23, 33 and 34, and the deletion of Special Condition 22. Accordingly, the Board should affirm Special Conditions 8, 26 and 28 as written, modify Special Conditions 13, 23, 33 and 34 as stated herein, and strike Special Condition 22.

ARGUMENT

I. STANDARD OF REVIEW FOR CHALLENGE TO CONDITIONS

Section 39.2(e) provides:

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

¹ The record consists of the Application, the transcripts of the public hearing held over six days between January 22 and February 8, 2007, the exhibits and filings of the participants, and public comment.

regulations promulgated by the Board.
415 ILCS 5/39.2(e). In reviewing a condition to a site location approval, the Board must determine whether it is reasonable and necessary to accomplish the purposes of the Act and is not inconsistent with Board regulations. 415 ILCS 5/39.2(e); *see also Peoria Disposal Co., v. Peoria County Board*, PCB No. 06-184 (December 7, 2006), slip op. at 14. The petitioner has the burden of proving that the application as submitted, without conditions, would not violate the Act or the Board's regulations. *Browning Ferris Industries of Illinois, Inc. v. PCB*, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2d Dist. 1989). The Board cannot reweigh the evidence, but must determine if the decision to impose the condition is against the manifest weight of the evidence. *Fairview Area Citizens Taskforce v. PCB*, 198 Ill. App. 3d 541, 555 N.E.2d 1178 (3rd Dist. 1990). A decision is against the manifest weight of the evidence if the opposite conclusion is clearly evident, plain, or indisputable from a review of the evidence. *Turlek v. Pollution Control Board*, 274 Ill. App. 3d 244, 653 N.E.2d 1288 (1st Dist. 1995); *CDT Landfill Corporation v. City of Joliet*, PCB 98-60, slip op. at 4 (March 5, 1998).

II. THE BOARD'S AUTHORITY TO MODIFY AND AMEND CONDITIONS

Section 40.1 of the Act provides that the siting appeal before the Board is governed by Sections 32 and 33(a). 415 ILCS 5/40.1(a). Section 33(a) provides that "the Board shall issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances." 415 ILCS 5/33(a). In accordance with Section 33 of the Act, the Board has the authority to affirm, strike, or modify conditions, as it has deemed appropriate under the circumstances. *See Browning Ferris Industries of Illinois, Inc. v. Lake County Board of Supervisors*, PCB No. 82-101, slip op. at 30-31 (December 2, 1982) (Board amends condition imposed in connection with local siting approval); *see also Community Landfill Company v.*

IEPA, PCB Nos. 01-48; 01-49, slip op at 13 (Apr. 5, 2001) (Board amends condition imposed in connection with IEPA permitting).

In *Browning Ferris*, the Lake County Board of Supervisors granted local siting approval subject to various conditions. On appeal, the Board affirmed, struck and modified the conditions where appropriate. For example, the Board struck part of a condition that allowed the county to require additional monitoring wells because it was "standardless," while letting stand the unchallenged part of the condition that allowed the county to receive copies of monitoring reports. *Browning Ferris*, PCB No. 82-101, slip op. at 27-28. The Board affirmed part of another condition only to the extent it required notification before pumping of water off-site because this was agreed to at hearing, but struck the remaining part that gave the county the right to test for pollutants before pumping begins because the condition was vague and unspecific. *Browning Ferris*, PCB No. 82-101, slip op. at 31-32. The Board also amended a condition which gave the Lake County Department of Public Health the right to discuss and require additional measures to control vectors, dust, odors, blowing and erosion problems. *Browning Ferris*, PCB No. 82-101, slip op. at 30-31. The Board found "it entirely proper for the [Lake County Department of Public Health] to 'discuss and recommend' control measures, but not to 'require' measures which might conflict with permit conditions." *Id.* Therefore, the Board ordered that "Condition H will be amended to confer a parallel right to 'recommend', but not to 'require.'" *Browning Ferris*, PCB No. 82-101, slip op. at 31.

Thus, as shown in the Board's ruling in *Browning Ferris*, the Board has the authority to modify local siting conditions by either striking or amending those portions that are not supported by the record, that would be inconsistent with the purposes of the Act, or that are

agreed upon and not disputed by the parties. *See also Community Landfill Company*, PCB Nos. 01-48; 01-49 (Board exercises authority to modify permit condition imposed by the Agency where Agency and petitioner both agreed that the condition, as written, made compliance very difficult).

III. THE RECORD SUPPORTS SPECIAL CONDITIONS 8, 26 AND 28

RWD argues that Special Conditions 8, 26 and 28 are not necessary to accomplish the purposes of the Act or Board regulations. The City Council submits that the evidence in the record supports the affirmance of Special Conditions 8, 26 and 28.

Condition 8 – Litter Control

Special Condition 8 requires that:

The Operator shall, at a minimum, inspect on a daily basis the public rights of way, and areas adjacent to these rights of way, from the landfill facility gate North on Mulford Road and along Route 38 West to the Interstate 39 interchange and Route 38 East through Creston to Woodlawn Road. Litter collection along these rights of way shall be performed at least once per week, and more often if the City Manager determines from review of evidence that the Operator is responsible for the litter.

The Application outlines the plan for litter control along Mulford Road from the Landfill entrance gate extending north to Illinois Route 38 and also along Illinois Route 38 from the intersection of Mulford Road extending west to the Interstate 39 exchange. (Application, Section 2.6, p. 2.6-6-2.6-7.) The litter control plan does not, however, include daily inspections and weekly litter collection for the public rights of way and adjacent areas along Route 38 east through Creston to Woodlawn Road, as required by Special Condition 8. The evidence in the record about RWD's operating history and the litter control problems at the Landfill demonstrate the reasonableness and need for daily inspections and weekly litter collection along these additional public rights of way and adjacent areas.

Pursuant to Section 39.2(a):

The county board or the governing body of the municipality may also consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent corporation) in the field of solid waste management when considering criteria (ii) and (v) under this Section.

415 ILCS 5/39.2(a).

RWD has operated the Landfill since July 1995 through an operating agreement with the City. (Application, E-1; E-16; Section 10-1.) Information concerning RWD's operating history is contained in the Application and was also provided at the public hearing by Mr. Thomas Hilbert, the engineering manager responsible for the construction, permitting and compliance of the Landfill. (Application, App. U, Table 10-1; 2/8 Tr. at 9-165.) The Ogle County Solid Waste Management Department has conducted inspections at the Landfill throughout its operations, and a summary of inspections and administrative citations was introduced into evidence. (2/8 Tr. at 66.) Based on the evidence, RWD has received at least eight administrative citations for "insufficient daily cover," "intermediate cover," "uncovered refuse²," "lack of litter fencing in above grade areas," and "litter from previous operating day." (Application, App. U, Table 10-1; 2/8 Tr. at 66, 69-72.) In an inspection report prepared by inspector Steve Rypkema concerning the litter problem at the Landfill, Mr. Rypkema stated: "I also suggested they install secondary fencing around the perimeter of the site or hire additional laborers to pick up the litter prior to the end of the operating day." (2/8 Tr. at 85.) RWD has not installed secondary fencing per Mr.

² Mr. Hilbert explained that the administrative citation on March 20, 2003 for "uncovered refuse" was for refuse and standing water. He further explained that such an occurrence was indicative of insufficient daily cover. (2/8 Tr. at 82-83.)

Rypkema's recommendation, nor is that proposal contained in the Application as part of the litter control plan. (2/8 Tr. at 85; Application, Section 2-6, p. 2.6-7.)

Mr. Devin Moose, a director of Shaw Environmental and a professional engineer licensed in Illinois, testified for the City on criterion (v), and specifically, about the operational plan for litter control. He stated that there can be a "very good operating plan and if it's not followed the operating plan is of little value." (1/25 Tr. at 50.) He acknowledged that litter is a "valid nuisance" and that "litter should not be leaving the site." (1/24 Tr. at 224, 219.) He further acknowledged that frequent inspection and prompt collection are the keys to a successful litter control plan, stating:

On a well-run landfill that garbage should be contained to the landfill site and should not go off property. It does happen occasionally. If it does it should immediately be picked up which means they should deploy their own litter pickers that day and if it's overwhelming for them they're going to have to call in some temporary work force and get it taken care of quickly. If it's -- if it's taking more than 48 hours on a very bad day then there's a problem. It needs to be collected.

(1/25 Tr. at 70.)

Based on the foregoing evidence, the imposition of Special Condition 8 is warranted as reasonable and necessary to satisfy criterion (ii) and (v) of Section 39.2, and as such should be affirmed.

Condition 26 – Imposition of Costs of City's Review of Plans and Permit Application

Special Condition 26 provides that:

The City Manager, and its legal and technical consultants, shall have the right to be involved in the permitting for the horizontal and vertical expansion of the Rochelle Municipal Landfill. As part of this involvement, the City Manager and its consultants may attend meetings between the Operator and its consultants and the IEPA. The City Manager and its consultants may also review and comment on the Operator's applications (provided such technical review and comment is

conducted within 30 days of receipt of the information) prior to the Operator's submission of the applications to the IEPA. The technical review comments shall be incorporated into the applications or addressed to the satisfaction of the City Manager. The Operator agrees to reimburse the City for reasonable costs of its consultants to review and comment on the Operator's applications and submissions.

RWD objects to Special Condition 26 only in that it requires it to pay the City's oversight costs. RWD has failed to show that this condition is unreasonable or unnecessary to satisfy the purpose of the Act, or is inconsistent with any Board regulations. In fact, this Board has held that local governments have the right to discuss and recommend administrative and remedial measures relating to landfill operation as a proper means of addressing concerns regarding the public health and safety. *Browning Ferris*, PCB No. 82-101, slip op. at 30-31. The reasonableness of this condition is built into the very language of the condition which expressly provides that the City can only be reimbursed for "reasonable costs." Furthermore, the necessity of the City's review and comment on RWD's permitting applications has been amply demonstrated by the evidence in the record of RWD's operating history. Special Condition 26 should be affirmed in its entirety.

Condition 28 – City Review and Comment of Groundwater Impact Assessment

Special Condition 28 provides that:

The operator shall submit the groundwater impact assessment (GIA) planned to be submitted to the IEPA as a permit application to the City Manger for review. The City Manager and its consultants may provide the Operator comments (within 30 days of receipt of the information) that must be incorporated or addressed prior to submitting the GIA to the IEPA as a permit application.

In light of the evidence of RWD's operating history, the requirement that RWD incorporate or address the City's comments on the GIA prior to submitting it to the IEPA is not unreasonable or unnecessary. As the Board stated in *Browning Ferris*:

As SB 172 requires that a regional pollution control facility apply for local government site location approval a) prior to seeking any initial permit, b) prior to any physical expansion, and c) prior to seeking any first-time permit to accept special or hazardous waste, SB 172 clearly contemplates an ongoing relationship between a county or municipality and a site.

Browning Ferris, PCB No. 82-101, slip op. at 30. Based on *Browning Ferris*, the City Council's right to discuss and confer with RWD on a matter of public health and safety is well-established. RWD contends that Special Condition 28 should be stricken because it would undermine the cooperative arrangement contemplated by the Host Agreement. This contention, however, is not sufficient to satisfy RWD's burden to demonstrate that the Application, without this condition, would not violate the Act or the Board's regulations. Thus, Special Condition 28 should be affirmed.

IV. THE RECORD SUPPORTS THE MODIFICATION OF SPECIAL CONDITIONS 13, 23, 33 AND 34, AND THE DELETION OF SPECIAL CONDITION 22

Condition 13 - Time Required for Exhumation and Redisposal of Waste from Unit 1

Special Condition 13 provides that:

The Operator shall complete the exhumation and relocation of the waste from Unit 1 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 waste exhumation and redisposal shall be restricted to the months of November, December, January, February and March unless it is demonstrated to the City Council that the process can occur in other months without off-site odor migration or other impacts associated with the process.

The Application includes a report by Shaw Environmental that provides detailed plans and procedures for the exhumation and redisposal of the waste from Unit 1 that had been continuously deposited at the site over a twenty-three period from 1972-1995. (Application, Section 2.6, p. 2.6-24.) The plans include detail about the equipment to be used, the method of

excavation and cover, the proposed hours and times of the year for the exhumation, the nature and quantity of cover to be used, the procedures to be used in the event any hazardous waste is encountered, an air monitoring program designed to avoid dangers from explosive gases and VOCs, stormwater management requirements and other safety procedures and equipment to be implemented during exhumation. (Application, Section 2.6, pp. 2.6-24-2.6-28.)

The Shaw Environmental report estimated that the exhumation and relocation of the waste from Unit 1 could be completed over a 5 to 10 year period. (Application, Section 2.6, p. 2.6-24.) Mr. Moose, the only witness who testified about the timing of the exhumation of the waste from Unit 1, also testified that the exhumation process would take "about 10 years" to complete. (1/24 Tr. at 321-23.) There was no other credible information introduced into evidence on the issue of the timing of the exhumation process. The public comment that suggested an abbreviated timetable for the exhumation process was not based on reliable information.

The Host Agreement between RWD and the City provides that the exhumation be commenced and completed within a commercially reasonable time. (Host Agreement, Section 7.4.)

It is not disputed by the City Council that the evidence in the record supports the imposition of a ten year period for completing the exhumation and redisposal of waste from Unit 1, and Special Condition 13 should be modified accordingly.

Condition 22 & 23 – Requirement for Operational Screening and Perimeter Berms

Special Condition 22 proposes:

The plan of operations shall include the construction of operational screening berms of between six (6) and eight (8) feet in height along the Southern edge and

partially along the East and West edges of operating cells to help to block the operations from view from Creston Road as well as help contain litter and reduce noise impacts. The Operator shall propose, and the City Manager shall consider for approval, the placement and limits of the operational berms prior to each cell's development. Final approval must be obtained prior to new cell construction. The City Manager shall consider the height of the active face, the distance from the site boundary, and the presence of other visual barriers (such as Unit 2) and the effectiveness of other litter and noise control strategies (such as litter fences and permanent perimeter berms) in making its determination.

Special Condition 23 states:

Perimeter berms shall be built in advance of the cells in order to screen operations to a reasonable extent. It is recommended to require the berms to be built at least 500 feet in advance of the Easternmost edge of the cell being constructed. By way of example, prior to completion of Cell 3's liner, the Southern berm along Creston Road shall be constructed from E 4,200 to E 6,500, which extends approximately 600 feet East of the cell. The vegetation shall be established (with at least a one-year growing period) prior to waste being placed within 400 feet of a cell with active waste placement. The berm shall be at least 14 feet in height, placed between the waste footprint and Creston Road, and located between E 4,500 and E 7,500.

The Application proposes a vegetated earthen berm or fence around the perimeter of the facility with a total height of not less than eight feet. (Application, Section 3.1, Table 2.1-1.)

The Application does not propose operational screening berms. Mr. J. Christopher Lannert of The Lannert Group explained further in his testimony at the public hearing that the Application proposes undulating perimeter berm eight to ten feet in height with plant material on top of the berm, including trees with a minimum height of six feet. (1/22 Tr. at 92, 100, 153.)

No witnesses testified and no other evidence was introduced that operational screening berms, or a fourteen-foot perimeter berm, were necessary.³

³ While Mr. Moose mentioned operational screening berms generally in response to a question about the plan for daily and intermediate soil cover to screen the active area during the first five-year phase of the exhumation process, he did not testify that operational screening berms were necessary or required.

While there was no evidentiary support for the imposition of an operational screening berm or a fourteen-foot perimeter berm, the evidence did support the requirement of an undulating perimeter berm eight to ten feet in height with plant material, including trees no less than six feet in height, on the top of the berm. Thus, Special Condition 22 should be stricken in its entirety and Special Condition 23 should be modified to require an undulating perimeter berm eight to ten feet in height with plant material on the top of the berm, including plant material in excess of six feet in height.

Conditions 33 & 34 – Imposition of Cost of Road Improvements

Special Condition 33 provides:

The following roadway improvements shall be made to Mulford Road, at the expense of the Operator, prior to acceptance of waste within the expanded facility waste footprint:

- The reconstruction of Mulford Road between Route 38 and the existing landfill entrance shall be designed to a rural standard with a dust free, all weather surface, provide a design weight limit of 80,000 pounds and shall be at least two lanes wide.

Special Condition 34 provides:

The improvements to Mulford Road as described in special condition 33 above shall be completed from the existing landfill entrance to Creston Road no later than the date on which the proposed new entrance for the expansion is built and completed as required in Special Condition 16. The Operator shall pay all costs of said improvements to the new landfill entrance, and a portion of the cost of the improvements from the new landfill entrance to Creston Road proportionate to the anticipated traffic attributable to the expanded facility, as determined by a traffic study.

The Application proposes that Mulford Road be reconstructed and upgraded to a two-lane road with a weight limit of 73,280 pounds from Illinois Route 38 to just south of the access drive. (Application, Section 6, p. 6.)

Mr. Michael Werthmann of Kenig, Lindgren, O'Hara, Aboona, Inc., was the sole witness to testify concerning roadway improvements. Mr. Werthmann testified that the Application's proposal to improve Mulford Road to accommodate transfer trailers and to reconstruct the road as a two-lane road with an 80,000-pound weight limit was necessary. (1/23 Tr. at 21, 110-11.) He also testified that the increased volume of traffic on Mulford Road as a result of the expansion would not be significant because the expansion is a continuation of existing operations and most of the traffic is already using that road. (1/23 Tr. at 23-24, 29, 30-31, 34-35.)

There was no testimony or the introduction of any other evidence as to who would or should bear the costs of the proposed improvements to Mulford Road. There is no evidence supporting the conclusion that RWD should bear the entire cost of improving Mulford Road between Route 38 and the Landfill entrance.

The City Council concedes that the allocation all of the costs for improving Mulford Road on the operator was not supported by the record. Rather, the evidence supports a condition that the cost of improving Mulford Road between Illinois Route 38 and Creston Road should be allocated between the operator and the City on an equitable basis to be agreed upon between them and incorporated into the Host Agreement, and therefore, Special Conditions 33 and 34 should be modified to that effect.

CONCLUSION

Based on the evidence, Special Conditions 8, 26 and 28 should be affirmed as written, Special Condition 22 should be stricken, and Special Conditions 13, 23, 33 and 34 should be revised as set forth below (deletions shown by strikethroughs, and insertions by underline):

Condition 13. The Operator shall complete the exhumation and relocation of the waste from Unit 1 as soon as practicable, but in no event later than ~~sixten~~ (610) 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 waste exhumation and redisposal shall be restricted to the months of November, December, January, February and March unless it is demonstrated to the City Council that the process can occur in other months without off-site odor migration or other impacts associated with the process.

Condition 23. Perimeter berms shall be built in advance of the cells in order to screen operations to a reasonable extent. It is recommended to require the berms to be built at least 500 feet in advance of the Easternmost edge of the cell being constructed. By way of example, prior to completion of Cell 3's liner, the Southern berm along Creston Road shall be constructed from E 4,200 to E 6,500, which extends approximately 600 feet East of the cell. The vegetation shall be established (with at least a one-year growing period) prior to waste being placed within 400 feet of a cell with active waste placement. The berm shall be ~~at least 14~~ an undulating berm at least eight (8) to ten (10) feet in height, with plant material on top of the berm in accordance with the landscape plan in the application, including without limitation plant material in excess of six (6) feet in height, placed between the waste footprint and Creston Road, and located between E 4,500 and E 7,500.

Condition 33. The following roadway improvements shall be made to Mulford Road, ~~at the expense of the Operator~~ prior to acceptance of waste within the expanded facility waste footprint:

- The reconstruction of Mulford Road between Route 38 and the existing landfill entrance shall be designed to a rural standard with a dust free, all weather surface, provide a design weight limit of 80,000 pounds and shall be at least two lanes wide.

Condition 34. The improvements to Mulford Road as described in special condition 33 above shall be completed from the existing landfill entrance to Creston Road no later than the date on which the proposed new entrance for the expansion is built and completed as required in Special Condition 16. ~~The Operator shall pay all costs of said improvements to the new landfill entrance, and a portion of the cost of the improvements from the new landfill entrance to Creston Road proportionate to the anticipated traffic attributable to the expanded facility, as determined by a traffic study~~ improvements to Mulford Road shall be allocated between the Operator and the City on an equitable basis to be agreed upon between them and incorporated in the Host Agreement.

Should, however, the Board decide that it does not have the authority to modify the conditions, then the City Council concedes that the evidence in the record does not support

Special Conditions 13, 22, 23, 33 and 34 as written, and would acknowledge that in such case these five conditions should be stricken.

WHEREFORE, Respondent, Rochelle City Council, respectfully requests that the Board affirm Special Conditions 8, 23 and 28, modify Special Conditions 13, 23, 33 and 34, strike Special Condition 22, and grant such other and further relief as the Board deems appropriate.

Respectfully submitted,

THE ROCHELLE CITY COUNCIL

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CERTIFICATE OF SERVICE

I, Donald J. Moran, an attorney, on oath certify that I caused to be served the foregoing, **ROCHELLE CITY COUNCIL'S RESPONSE BRIEF**, upon the following:

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Donald J. Moran