

ILLINOIS POLLUTION CONTROL BOARD
December 2, 1982

DONALD J. HAMMAN,)
)
) Petitioner,)
)
) v.) PCB 82-15
)
) ILLINOIS ENVIRONMENTAL PROTECTION)
) AGENCY,)
)
) Respondent.)

MS. TRIS MICHAELS BAKER and MR. JOSEPH H. BARNETT OF PUCKETT, BARNETT, LARSON, MICKEY, WILSON & OCHSENSCHLAGER APPEARED ON BEHALF OF THE PETITIONER.

MR. DONALD J. GIMBEL OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF THE RESPONDENT.

MR. ELIOT A. LANDAU OF LANDAU & CLEARY, LTD., APPEARED ON BEHALF OF THE TOWNSHIP OF WHEATLAND AND HARRY A. MATHERS, ET AL., INTERVENORS.

MR. VAN A. LARSON OF DE BARTOLO & DE BARTOLO APPEARED ON BEHALF OF RAYMOND GREENBERG, WHEATLAND TOWNSHIP HIGHWAY COMMISSIONER, INTERVENOR.

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

This matter comes before the Board upon a February 16, 1982 petition for permit review of a developmental permit issued by the Illinois Environmental Protection Agency (Agency) on December 31, 1981 for a 145-acre sanitary landfill site in the Township of Wheatland, Will County. That permit, issued in response to a November 19, 1981 Order in PCB 80-153 (44 PCB 73), purports to exclude all special wastes despite the fact that Donald Hamman's permit application specifically includes non-hazardous commercial and industrial wastes. It is that portion of the permit that Hamman requests the Board to review.

A hearing was held in this matter on April 23, 1982 at which time the Township of Wheatland, Harry A. Mathers and Raymond Greenberg, Wheatland Township Highway Commissioner, were allowed to intervene. Twenty to thirty members of the public were present, some of whom testified.

The issue in this appeal is a narrow one: whether the Agency acted properly in issuing a permit which excluded special wastes. Resolution of that issue is simplified by the Agency's admission in its May 19, 1982 Brief in Lieu of Closing Argument that "it erred in failing to issue a permit to develop the site for wastes specified in the permit application." That conclusion is buttressed by Petitioner's Exhibit No. 1, a stipulation entered into by Hamman and the Agency wherein it is stipulated that "petitioner sought authority to develop a solid waste disposal site handling general municipal, commercial and industrial non-hazardous wastes" (Stip. para. 3), that "the permit issued... excludes all... special... wastes" (Stip. para. 4), and that "the proposed site is suitable... [for] the disposal of non-hazardous commercial and industrial waste as requested in the Application" (Stip. para. 5). Further, the Board notes that the Board's November 19, 1981 Opinion and Order in PCB 80-153, which considered the same application, found that all of the technical (design) requirements had been satisfied.

These facts would be dispositive of the issue, but for the intervention of Wheatland, Mathers and Greenberg who argue that "justice required a continuance and the denial of same undeniably prejudiced Intervenor's ability to have proper persons brought before the Board for purposes of confrontation and cross-examination prior to admission of the aforementioned stipulation." (Intervenors' Memorandum of May 21, 1982), and that the stipulation resulted in a "sham" hearing.

Intervenors' note, in that regard, that they were unaware of the stipulation prior to hearing, that they had no opportunity to cross-examine those persons whose expertise was relied upon in preparation of the stipulation, and that due process rights were, therefore, violated. Certainly, the stipulation cannot act to bind Intervenor without their consent, and reliance solely upon such a stipulation would normally be improper.

However, in this case intervention was not allowed prior to the day of hearing. Hamman and the Agency were the only parties and, therefore, unless they violated some duty to notify Intervenor of the action, they were justified in reliance on the stipulation. They could not be expected to bring witnesses to hearing when the stipulation effectively resolved the case, and where Intervenor's request for continuance was properly denied.

Intervenors cite no authority for their proposition that a duty to inform was violated. While it is true that these same Intervenor had participated in an earlier permit appeal concerning the same site (PCB 80-153), the issues in this case differ markedly. The earlier case involved the sole issue of whether off-site roads were adequate while this action involves the sole issue of whether special wastes could be accepted. Further, Intervenor were aware of this action at least as early as March 29, 1982 when they filed an improper "special limited appearance" and requested

the setting of a hearing, for the sole purpose of challenging the Board's subject matter jurisdiction. They certainly could have moved to intervene at that time, thereby limiting the effect of the stipulation which was not yet in existence, but they chose not to.

The failure to intervene prior to hearing also justifies the Hearing Officer's denial of the motion for continuance. Proceedings before the Agency, the Board and the Courts have delayed the issuance of a permit (which both the Board and the Courts have determined should have been issued) for more than two years. To allow intervention on the day of hearing to further postpone the action would have been improper.

The stipulation was in existence at the time of intervention and had apparently been agreed upon by the only parties in the case at that time (though it is possible that the Agency had not yet signed it). Therefore, since continuance had been properly denied, and no evidence was presented rebutting it, and since Intervenor must take the case as they find it, the Board may properly accept the statements contained in the stipulation as true.

As stated earlier, that stipulation is dispositive of the central issue of the case. Since the Agency admits that the site is acceptable for the disposal of special wastes and since the permit application requested authorization to accept such wastes, it could not have been necessary to accomplish the purposes of the Environmental Protection Act to exclude those wastes. The Board thus concludes that such exclusion was improper.

Other issues raised by Intervenor are not material to this action. The permit under review here is that which was issued in response to the Board's November 19, 1981 Order which indicates that final action was taken on this permit on January 8, 1981 and that all that remained was Agency completion of the "now-ministerial task of issuing the permitting paper" (Hamman v. IEPA, PCB 80-153, 44 PCB 84). That statement remains true, despite the fact that the Agency erred in its ministerial task. Thus, SB 172 (Section 39.2 of the Environmental Protection Act) remains inapplicable with respect to the permit as it should have been issued as explained in that earlier Order. The suitability of the site to accept special wastes was determined years ago and is not at issue here. The issue of the off-site roads is being determined upon appeal of PCB 80-153 and is also not in issue here. The hearing was not a "sham;" Intervenor's simply misunderstood its scope and entered the case too late to take full advantage of their rights at hearing.

The Agency now takes the position that the Board should remand this case "to the Agency for issuance of a developmental permit to accept those wastes specified in Petitioner's application, subject to lawful conditions" (Agency Brief of May 19,

1982, pp. 2-3). Hamman, "would object, however, to any construction that would attempt to define the exclusion of special waste as a 'condition'" (Hamman Brief of May 20, 1982, p. 7). It is unclear whether the parties consider these positions to be adverse. If Hamman is arguing that no conditions may be imposed which limit the acceptance of special wastes through the supplemental permit process, that proposition cannot be upheld. The Board and the Agency are charged with the duty of protecting the environment and a condition which requires disposal of only special wastes for which a supplemental permit has been obtained is justified to protect the environment. That is what should have happened as of January 8, 1981.

The Board notes that in its October 14, 1982 Order in PCB 80-153 a stay was imposed upon the effectiveness of the September 15, 1982 Order pending a final determination of this proceeding. That stay, therefore, is no longer in effect.


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

ORDER

This matter is remanded to the Agency for issuance of a developmental permit subject to the condition that if an operating permit is obtained, Hamman may accept for disposal only those special non-hazardous wastes for which a supplemental permit has been issued by the Agency under Rule 210 of Chapter 7: Solid Waste.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 3RD day of JULY, 1982 by a vote of 3-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board