

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY

MINUTE ORDER NUMBER 77-28

LOCATION - SUBJECT: SOLID WASTE

CONTROL DIVISION - CLOSING ORDER

PAGE 1 OF 1 PAGES

Batesville (Dump)

FINDINGS:

1. The city of Batesville presently operates an unpermitted disposal site northwest of the city.
2. Staff investigations have indicated that this site is unsuitable for a sanitary landfill, the results of which investigations were confirmed by the engineer for the city of Batesville in a presentation to the Commission on March 25, 1977, said engineer's conclusions being based on extensive soil borings and soil analysis.
3. The city of Batesville was allowed to continue its present unpermitted operation until May 27, 1977, the city having agreed at the Commission meeting of March 25, 1977, that it would use the intervening two months to locate a new site and present plans for a permittable solid waste disposal facility. No such plans have been submitted to the staff for their review.
4. Said two-month extension was conditioned on the city's continuing to submit weekly engineering reports on the operation of the site, which has not been done consistently.
5. No alternative means of disposal has been submitted which would justify any extended use of the present disposal site.

ORDER: The city of Batesville is ordered and directed to proceed to close its present disposal site northwest of the city of Batesville as promptly as possible, but not later than June 27, 1977, in compliance with the terms of the Solid Waste Disposal Code, including, but not limited to, the application of two feet of final cover with proper grading to prevent ponding of water to be completed on or before December 27, 1977.

COMMISSIONERS

~~_____~~
~~_____~~
~~_____~~
~~_____~~
~~_____~~
RAY HIGHTOWER
~~_____~~
~~_____~~

Billy Frank
Chairman

Submitted By: RAY HIGHTOWER

Date Passed MAY 27, 1977

File



EIGHTEENTH CHANCERY DISTRICT

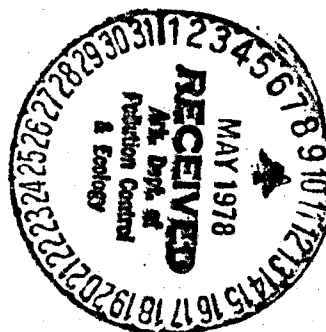
CARL B. MCSPADDEN, CHANCELLOR

P. O. BOX 129

HEBER SPRINGS, ARKANSAS 72543

COUNTIES:
INDEPENDENCE
CLEBURNE
IZARD
STONE
VAN BUREN

May 8, 1978



OFFICE
362-2939
HOME
362-2982

Mr. John Norman Harkey
HARKEY, WALMSLEY & BELEW, Attorneys
P.O. Box 2535
Batesville, Arkansas 72501

Mr. W. Christopher Barrier
Attorney at Law
400 Gaines Place
Little Rock, Arkansas 72201

RE: City of Batesville v. Department
of Pollution Control and Ecology
Independence Circuit #CIV-77-114

Gentlemen:

The issue in this case presented for decision was narrowed during the hearing to when the City's disposal site should be ordered closed. The issue was not whether the site should be closed but instead when it should be closed. This involves the question of whether the Minute Order Number 77-28 dated May 27, 1977, issue by the Department of Pollution Control and Ecology is lawful and reasonable and is warranted by the evidence.

There appears to be no argument concerning whether the disposal site should be closed. Both parties agree that it should and the evidence showed that the present site was not geologically acceptable for long-term use as a sanitary landfill. So, that portion of the Minute Order which orders the site closed is supported by substantial evidence and is found to be lawful, reasonable and warranted by the evidence.

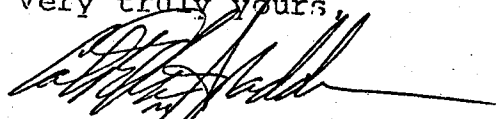
The more difficult question and the one which is the essence of the City's appeal is whether that portion of the Minute Order which sets the deadline on closing the site was reasonable and warranted by the evidence. I find that such portion of the Order was not reasonable under the circumstances of this case and was not warranted by the evidence and that the City of Batesville should be allowed to continue operating the disposal site until May 1, 1979, or until the incinerator which the City has agreed to purchase is installed and operating, whichever occurs sooner, on the condition that the City operate the present site during such interval in compliance with the Solid Waste Disposal Code and rules and regulations promulgated by the Department of Pollution Control and Ecology pursuant to that Code.

Without going into a great deal of detail, the basic reasons for this decision are that continued operation for an additional year at the present site will not cause any substantial increase in pollution problems nor any imminent danger to public health or welfare; and that compelling the City to immediately begin using the Independence County landfill would cause the life of the County landfill to be shortened and would cause a substantial increase to the City in current operating expenses occasioned by the necessity for increased travel and possibly the necessity of purchase of at least one additional truck for waste collection together with the necessity for hiring additional personnel to staff such truck.

Mr. Harkey, please prepare a proposed Judgment and forward it to Mr. Barrier for approval as to form and then to me for signature.

With kind regards, I am

Very truly yours,



Carl B. McSpadden
Circuit Judge on Exchange

cc. Court file.

P.S. I think the proper procedure under Ark. Stat. 82-1906, Subdivision 7, would be for the judgment to affirm that portion of the Minute Order providing for closing the site and to vacate that portion setting the deadline for closing and to remand the case to the Commission for further action in conformity with this decision.

Call to H. H. ...

file

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STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

8001 NATIONAL DRIVE
LITTLE ROCK, ARKANSAS 72209



501 371-1701 GEN. OFF.
501 371-1136 AIR DIV.

May 4, 1978

The Honorable Carl McSpadden
Chancellor
Cleburne County Court House
Heber Springs, Arkansas 72543

Re: City of Batesville v. Department of
Pollution Control and Ecology,
Independence Circuit No. CIV 77-144

Dear Judge McSpadden:

The record compiled and filed in this case by the Department, pursuant to the statute, contains a summary of events and documents from the file dating from September 5, 1968, through early February, 1977, when the summary was apparently prepared. I am enclosing an additional copy of the summary, as I believe it puts the present situation in perspective.

HISTORY: Basically, for nearly ten years the Department attempted to work with the City of Batesville to correct operational deficiencies at their city dump. A number of agreements and compromises were worked out along the way, such as that contained in my letter of February 18, 1977, to Mr. Thomas. The Department consistently showed a willingness to overlook past operational deficiencies and rely on the City's representations that things would be better in the future despite the fact that they seldom were. The Department was willing to give the City the benefit of the doubt and accept its representations that the site could in fact be operated properly.

It was only when Batesville's city attorney and their retained professional engineer presented evidence to the Commission that the geology was totally unsuitable for a sanitary landfill that a decision was made that disposal operations at the site would have to be halted. Even then, the Commission attempted to give the City time to work out a plan for the transition, an opportunity which the City chose not to utilize.

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The City has claimed it made every effort to comply with the Department's "demands", and specifically references its purchase of a bulldozer, supposedly purchased at the Department's insistence. Despite the fact that this bare allegation of "demand" is unsupported by the record, the City does not explain how it would have operated the site at all without such a piece of equipment.

The 40-acre tract was purchased against Department staff advice. The engineering and boring tests were the source of the decision to close the site - it is not simply conducting them but the results which are important. (Incidentally, the Department has learned that, contrary to Mayor Golden's testimony, the final Peabody Testing Report has been received. It should be made a part of the record.) Finally, the engineering oversight and reporting were spasmodic at best and there is no indication in the record that they continued beyond last summer.

What the City has essentially tried to do is characterize the Department as being vindictive and, therefore, inclined to seize upon minor deficiencies in operation to force the City to, in Mayor Golden's phrase, "roll over and play dead". In fact the Department was willing to overlook some rather significant operational deficiencies, counting on them to be corrected by future proper operation, until it discovered that there were uncorrectable deficiencies inherent in the site itself.

DEFICIENCIES: Unquestionably, however, the operational deficiencies compounded the deficiencies in the site itself. The lack of available cover material led the City to scrape off the hillsides on either side of the fill site, exposing the fractured limestone and accelerating the infiltration of rainwater into the landfill mass. This infiltration has also been exacerbated by the City's inattention to proper drainage and its inattention to proper compaction and proper use of daily cover. The result has been erosion, which the Court was able to observe on the site, a compounding of the leachate problem and the existence of essentially an open face of exposed garbage on the site, also observed by the Court.

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The City argues that another year will make little difference. However, Mr. Hughes testified that the more garbage now, the more leachate later. Obviously, the volume of wastes taken to the site has been increasing and that practices of the City, such as exposure of the fractured limestone, have increased the likelihood of infiltration, so that the harm done by 1978's garbage will certainly be significantly greater than 1938's garbage.

ECONOMICS: The City has essentially defended this worsening of an already bad situation in terms of economics. Enclosed is an analysis prepared by Mr. Drinkwater, comparing the operation of the present system to hauling to the county landfill. Mr. Drinkwater is Programs Supervisor of the Solid Waste Program of the State's Energy Conservation and Policy Office. This sort of thing is Mr. Drinkwater's business. His are hard, businesslike computations, attempting to compare apples to apples in looking at the two systems.

Mayor Golden seemed to take the position that because a given piece of equipment was paid for, and the City maintained its own repair shop, the only costs to be considered were the wages of the operator. Mr. Drinkwater's \$35.00 per hour (and all his hourly figures) take into consideration depreciation of equipment, as all equipment obviously has a limited useful life; cost of maintenance, as maintenance costs money no matter who does it; cost of fuel; and a reasonable wage for a qualified operator.

Mr. Drinkwater's figures also take into consideration the amount of equipment time actually required for proper operation - daily cover, compacting, grading, etc. - although, presumably improper operation might be cheaper. The mileage figures are based on actual map measurements, starting from the center of waste generation, not the city limits.

The conclusion has to be that, because it does not consider all of the relevant cost factors, the City of Batesville does not actually know how much it costs to operate its present site. Even if using the county landfill

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were more expensive (which it plainly is not), according to Mr. Boylan's figures, as contained in the April 12, 1978, article in the Batesville Guard, the City could cut its expenses by over \$6,000 per month by going to curbside pickup (Batesville being one of the few cities left which still picks up waste at the back of the house, a method which is enormously expensive in terms of personnel and fuel).

THE CITY'S POSITION: Essentially, the City's position rests on three points: (1) the available alternative to operation of the present dump is too expensive; (2) another year on the site won't make much difference; and (3) the Department is being irrational in applying requirements to the City of Batesville not applied to other cities.

1) Cost: In computing the comparative cost, the City has used figures and methods which I am sure Mayor Golden would not even consider using in running his own business. The City's present operation is not only more expensive than the alternative, but its entire disposal system is significantly more costly than it really needs to be.

2) Another Year: As soon as the Department realized that the geology of the present site was as dangerous as it is, in the spring of 1977, it moved to get the site closed in a matter of months. However, after essentially ignoring the Department's attempts to work out an orderly transition, the City resisted the closing altogether by filing this appeal, claiming not only that the dump should not be closed but that the City was in fact entitled to some sort of permit-by-variance for the site. The Department then began seeking a trial date, finally getting a special setting in order to assure that the matter would be heard. The Department has certainly felt that a prompt closing was necessary. The site sits on the Boone limestone formation, with a high incidence of fractures, which allows groundwater to travel over the bedding planes into and through the mass of garbage. The situation has been made worse by the City's futile attempts to scrape cover material

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off the sides of the hills, exposing more of the limestone. What little cover material was obtained in this manner and the bulk of the cover material used by the City contains a high incidence of chert, which makes it undesirable as cover material, as it allows entirely too much surface water to filter through it. The longer the dump operates, the worse the leachate problem will be and the harder it will be to deal with. The dump site needs to be finished off with the proper contours and given two feet of a good final cover material as soon as possible to minimize this problem.

3) Rationality: The City's final position is that the Department has been conducting some type of vendetta against the City, being overly harsh in application of its rules and regulations. If the Department has erred in this regard, it has been on the side of being overly tolerant of operating deficiencies, not overly strict. And surely, in the face of its own engineering data as to the unsuitability of the site itself, the City is not contending that it could have somehow been permitted for any purpose other than an orderly closeout. It is in fact the City which has been irrational. It continues to cling to its present site, against the advice of its own engineer. It spent \$35,000 to purchase adjacent land to prolong the life of an unsuitable site, despite advice from the Department that it withhold such a large expenditure until it had made the appropriate tests. The City has persisted in using a garbage pickup system that borders on the extravagant, at a monthly charge (\$1.50) that could not reasonably be expected to cover fuel and salaries, much less the replacement of equipment. The City has essentially blinded itself to what its present operation is actually costing it by ignoring common business concepts such as depreciation of equipment. It has refused certified mail from the Department. It has refused to cooperate with the County, largely on the basis of alleged past grievances. And, finally, verbal assaults on adverse witnesses by name-calling can hardly be considered rational and businesslike.

SUMMARY: It is essential that the Court consider the issues actually raised by this appeal, the procedural context, and the options actually available.

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The City operated a disposal facility without the required permit for many years. For the past several years at least, the Department attempted to work with the City to make the present site "work" and to get it into shape so that a permit might be granted.

When the Commission was advised in March, 1977, that the site could not be permitted due to unacceptable geology, the City was given notice (see my letter of March 28, 1977) that the matter would be considered at the May 27, 1977, Commission meeting. The City did not appear at the meeting, as admitted in its petition.

Having given notice and an opportunity for a hearing pursuant to Ark. Stat. Ann. §82-2707(i), the Commission issued its closing order, pursuant to the same statute. The City appealed that closing order pursuant to Subdivision 3 of Ark. Stat. Ann. §82-1906, after getting an extension pursuant to the same section.

In its petition, the City asked that the Department be compelled to grant a variance pursuant to Ark. Stat. Ann. §82-1939, even though (1) a variance was never applied for, as required by this section, (2) the evidence at the trial does not support one, and (3) the granting of such variances is discretionary and not subject to judicial review in the absence of a gross abuse of that discretion.

Under Subdivision 9 of Ark. Stat. Ann. §82-1906, the Commission's action is presumed to have been reasonable, valid and lawful. The burden of proof is on the City and, unless it is met, the Commission is to be upheld, under Subdivision 7 of the same statute.

No mere difference of opinion between this Court and the Commission as to the wisdom of the Commission's action is adequate for reversal. The Commission has "broad regulatory quasi-judicial authority and discretion in formulating and applying appropriate remedial measures to prevent pollution." Ark. Pollution Control Comm'n. v. Coyne, 252 Ark. 792, 481 S.W.2d 322 (1972). In the Coyne case, the circuit court had reversed the Commission's decision to refuse approval for eight septic tank tie-ons in the Hot Springs area.

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Although there was disagreement over whether or not the applicants had met the technical requirements for the tie-ons, the Supreme Court stated that the question was whether or not there was "substantial evidence to support the order", in which case "it automatically follows that the ruling of the Commission would not be unreasonable or arbitrary." 252 Ark., pp. 799-800.

What the City has in fact disputed is the wisdom of the Commission's decision, which the trial court is simply not allowed to question in such cases. City of Fort Smith v. Southwestern Bell Tel. Co., 220 Ark. 70, 77, 247 S.W.2d 474 (1952).

With regard to solid waste management, and the granting of permits, the Commission is clearly granted broad powers and authority by Ark. Stat. Ann. §82-2707. Pursuant to subsection (g) of that statute, the Commission is authorized to "issue, continue in effect, revoke, modify, or deny, under such conditions as it may prescribe, permits for the establishment, construction, operation and/or maintenance of solid waste management systems, disposal sites and facilities..." (Emphasis added.) Under subsection (1) of the same statute, the Commission is given the power and duty to "establish policies and standards for effective solid waste disposal and management systems..." (Emphasis added.) Only if the judgment exercised is exercised in a manner which is arbitrary, unreasonable or capricious may that exercise be questioned judicially. In this case, no such determinations can be reasonably made from the record.

In discussing the decision of a local planning body, the Arkansas Supreme Court noted in Newton, Circuit Clerk v. Am. Sec. Co., 202 Ark. 943, 148 S.W.2d 311 (1941) at p. 951-952 as follows:

"It has been uniformly held by this Court that where boards are lawfully appointed and charged with the duty to investigate and determine certain facts, the Court cannot substitute its judgment for the judgment of the board, and the judgment of the board provided for the purpose of ascertaining the facts is controlling unless there is evidence that

The Honorable Carl McSpadden
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it was arbitrarily exercised...It would be useless to have a planning board if, after it had investigated and reached its conclusion, the Court, without any evidence at all and without any claim that the board acted arbitrarily, could set aside its judgment." (Emphasis added.)

This same substantial evidence standard is applied by case law or statute to virtually all regulatory agency action. Springdale Monuments Co. v. Allen, 216 Ark. 426, 226 S.W.2d 42 (1952) (Worker's Compensation Commission); Bockman v. Ark. State Medical Board, 229 Ark. 143, 313 S.W.2d 826 (1958) (State Medical Board); Piggott State Bank v. State Banking Board, 242 Ark. 328, 416 S.W.2d 291 (1967) (State Banking Board); Arkansas Savings and Loan Ass'n. Board v. Central Arkansas Savings and Loan Ass'n., 260 Ark. 58, 538 S.W.2d 505 (1976) (Arkansas Savings & Loan Ass'n. Board).

The same substantial evidence test, derived from §82-1906, Subdivision 7, as to the Commission, is contained in the Arkansas Administrative Procedure Act at Ark. Stat. Ann. §§5-713(h)(5) and (h)(6). The Arkansas Supreme Court has held that that Act should be construed in the same manner as the federal administrative procedures act (5 U.S.C.A. §701 et seq) Arkansas Savings & Loan Ass'n. Board v. Central Arkansas Savings & Loan Ass'n., supra. In construing the federal act as it concerned the granting of a charter to a national bank in Fayetteville, the Eighth Circuit Court of Appeals held:

It is well established that in rendering a decision on the basis of such an administrative record the reviewing "court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, supra, 401 U.S. at 416, 915 Ct. at 824.... It is in this respect that the District Court erred, for rather than resolving the evidentiary conflicts in favor of the Comptroller's action, he independently weighed the evidence and reached his own conclusions. First National Bank of Fayetteville v. Smith, 508 F.2d 1371, 1378 (8th C.A. 1974).

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This standard for reviewing agency actions is absolutely necessary if agencies are to act effectively. Earlier this year, in Gordon v. Cummings, et al, 262 Ark. 737, 740-741, 561 S.W.2d 285, 287 (1978), the Arkansas Supreme Court stated:

It is well settled that administrative agencies are better equipped than courts, by specialization, insight through experience and more flexible procedures to determine and analyze underlying legal issues; and this may be especially true where such issues may be wrought up in a contest between opposing forces in a highly charged atmosphere. This recognition has been asserted, as perhaps, the principal basis for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency.

What the City is asking for is for this Court to act as a sort of appellate Commission, second-guessing the Commission, and to construct equitable remedies in a circuit court proceeding for which procedures and remedies are clearly dictated by statute and as to which the Commission's reasonable judgments are final.

The petition should be dismissed, the mandamus should be refused, and the City should be required to begin hauling its wastes to the Independence County Landfill immediately, leaving the remaining equipment on the site to properly close it out with proper grades and cover under a plan prepared by a registered professional engineer in compliance with Section 6 of the Arkansas Solid Waste Disposal Code. Any other extension would be unauthorized by statute, unwarranted as a matter of fact and law, and would result in unnecessary pollution of the environment and a continuation of unnecessary expenses to the City.

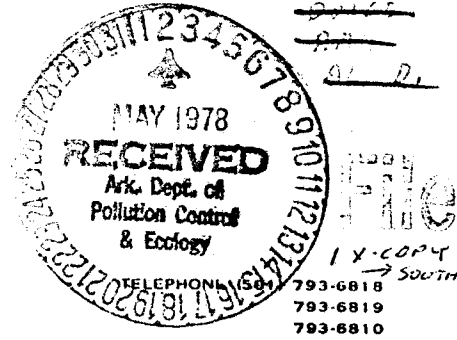
Respectfully submitted,

W. Christopher Barrier
Special Counsel
400 Gaines Place
Little Rock, Arkansas 72201
501-376-3151

WCB:pd
Enclosure

HARKEY, WALMSLEY AND BELEW
ATTORNEYS AT LAW
415 ALLEN STREET
P. O. BOX 2535
BATESVILLE, ARKANSAS 72501

JOHN NORMAN HARKEY
BILL H. WALMSLEY
JOHN M. BELEW



April 27, 1978

Judge Carl McSpadden
Chancery Judge
Courthouse Building
Heber Springs, Ark. 72543

Re: City of Batesville vs. Department of
Pollution Control and Ecology
Independence Chancery No. CIV 77 114

Dear Judge McSpadden:

The pure economics of the testimony, aside from all the other proof, declare against the position of the Department that you order the City of Batesville to use the sanitary land fill of the county. The undisputed testimony is that four (4) garbage trucks now makes two trips daily to the present county sanitary land fill which involves 96 miles of travel each day. The same number of trips to the county sanitary land fill would require 320 miles per day. This means an additional 214 miles of travel at an undisputed costs of \$1.00 per mile for a total gross additional costs to the City of \$4,708.00 monthly based on twenty-two (22) week days each month. The only benefit the county would gain from this would be the comparative small daily amount realized by not having to use a backhoe operator and two truck drivers parttime. This great financial loss to the City is further compounded by the fact that it would be physically impossible for the four (4) present dump trucks to make all of the rounds of garbage pick-up in Batesville and still travel the eighty (80) miles round trip for each truck daily in the county sanitary land fill.

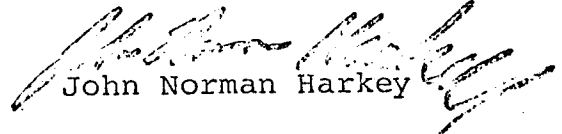
Mayor Golden and the City of Batesville have done everything humanly possible to comply with the demands of the Department. A new D-6 Caterpillar Dozier was purchased. Forty (40) acres of land was purchased. Engineering and boring test were conducted. A regular professional engineer was employed to oversee and make reports on the operation.

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What, then, is the real problem involved? No doubt should exist in your mind or in the mind of any other person that if the rules and regulations of the department were strictly applied no sanitary land fill in the State of Arkansas would be without technical violations. However, the present site for the City of Batesville has been in operation in excess of forty (40) years. All of the testimony on behalf of the Department, particularly that of Mr. Durham, the Geological Engineer, confirms that if the operation was closed immediately and the proper cover material was applied and compacted, the leachate would continue to be a problem for many, many years. We now know positively that the City of Batesville will have an approved incinerator in operation within nine (9) to twelve (12) months. Therefore, it seems to me only reasonable that the Court by proper order grant to the City of Batesville the right to continue its operations for a period of twelve (12) months or until the incinerator, is in operation whichever is sooner. This is a logical, reasonable and equitable answer to this litigation.

If the Court feels that certain conditions should be placed on the continued operation, this would certainly be appropriate, but surely nobody can legitimately argue that continued operations for a period of twelve (12) months could in any way harm humanity or the ecology.

RESPECTFULLY SUBMITTED,


John Norman Harkey

JNH:jh

cc: Chris Barrier