

ILLINOIS POLLUTION CONTROL BOARD
March 31, 1994

BEARDSTOWN AREA CITIZENS)
FOR A BETTER ENVIRONMENT,)
)
Petitioner,)
)
v.) PCB 94-98
) (Landfill Siting Review)
)
CITY OF BEARDSTOWN AND)
SOUTHWEST ENERGY CORPORATION,)
)
Respondent.)

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on an appeal filed pursuant to Section 40.1(b) of the Environmental Protection Act (415 ILCS 5/40.1(b)(1992)) on March 25, 1994 by the Beardstown Area Citizens for a Better Environment (Citizens). Citizens appeals the decision of the City of Beardstown (City) granting local siting approval to Southwest Energy Corporation for a municipal solid waste incinerator facility, located in the City of Beardstown, Cass County.

Section 40.1(b) of the Act requires the Board to hear the instant petition, filed by a third party other than the applicant, if that party participated in the public hearing conducted by the county board or municipal governing body which has granted siting approval, unless the Board determines that the petition is duplicitous or frivolous, or that the petitioner is so located as to not be affected by the proposed facility. An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum (Brandle v. Ropp, PCB 85-68, 64 PCB 263 (1985)). An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board (Citizens for a Better Environment v. Reynolds Metals Co., PCB 73-173, 8 PCB 46 (1973)).

The petition indicates that Citizens participated in the previous public hearing. There is no evidence before the Board to indicate this matter is identical or substantially similar to any matter brought in another forum, nor is there any evidence that the Board cannot grant the relief requested. There is also no evidence before the Board to suggest that the petitioner is so located as to not be affected by the proposed facility. At this time, therefore, the Board finds that the petition is neither duplicitous nor frivolous, that the petitioner participated in the prior public hearing and that the petitioner is or may be so located as to be affected by the proposed facility. Accordingly, this matter shall proceed to hearing.

Section 40.1(a) of the Act provides that the hearing before the Board is to "be based exclusively on the record before the county board or governing body of the municipality". The statute does not specify who is to file with the Board such record or who is to certify to the completeness or correctness of the record.

As the City alone can verify and certify what exactly is the entire record before it, in the interest of protecting the rights of all parties to this action, and in order to satisfy the intention of Section 40.1(b), the Board believes that the City must be the party to prepare and file the record on appeal. The Board suggests that guidance in so doing can be had by reference to Rules 321 through 324 of the Illinois Supreme Court Rules. The record shall contain legible versions of all documents, transcripts, and exhibits deemed to pertain to this proceeding from initial filing through and including final action by the local government body. The record shall contain the originals of all documents, shall be arranged as much as possible in chronological sequence, and shall be sequentially numbered, placing the letter "C" before the number of such page. In addition to the actual documents which comprise the record, the City Clerk shall also prepare a document entitled "Certificate of Record on Appeal" which shall be an index of the record that lists the documents comprising the record and shows the page number upon which they start and end. Seven copies of the certificate, seven copies of the transcript of the City's hearing and three copies of any other documents in the record shall be filed with the Board, and a copy of the certificate shall be served upon the petitioner(s). The Clerk of the City is given 21 days from the date of this order to "prepare, bind and certify the record on appeal" (Ill. Sup. Ct. Rule 324). If the record is not legible, is not sequentially numbered, or fails to include an appropriate index of record, the Clerk of the Pollution Control Board may refuse to accept the document for filing.

Section 40.1(a) also provides that if there is no final action by the Board within 120 days, the applicant for site approval may deem the site location approved.

The Board has construed identical "in accordance with the terms of" language contained in Section 40(b) of the Act concerning third-party appeals of the grant of hazardous waste landfill permits as giving the person who had requested the permit the right to a decision within the applicable statutory time frame (now 120 days), and the right to waive (extend) the decision period (Alliance for a Safe Environment, et al. v. Akron Land Corp. et al., PCB 80-184, October 30, 1980). The Board therefore construes Section 40.1(b) in like manner, with the result that failure of this Board to act in 120 days would allow the site location applicant to deem the site location approved. Pursuant to Section 105.104 of the procedural rules, it is each party's responsibility to pursue its action, and to insist that a

hearing on the petition is timely scheduled in order to allow the Board to review the record and to render its decision within 120 days of the filing of the petition.

The issue of who has the burden of providing transcription in Board site location suitability appeals has been addressed in Town of Ottawa v. IPCB (3d Dist. 1984), 129 Ill. App. 3rd, 472 N.E.2d 150. In that case, the court ordered the Board to assume transcription costs (472 N.E.2d at 155). The supreme court denied leave to appeal on March 14, 1985. In cognizance of this ruling, the Board will provide for stenographic transcription of the Board hearing in this matter.

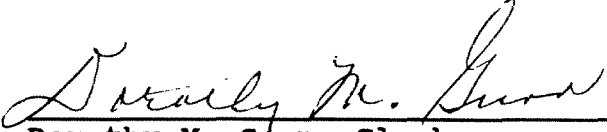
The hearing must be scheduled and completed in a timely manner, consistent with Board practices and the applicable statutory decision deadline, or the decision deadline as extended by a waiver. The siting applicant may file a waiver of the statutory decision deadline pursuant to 35 Ill. Adm. Code 101.105. The Chief Hearing Officer shall assign a hearing officer to conduct hearings. The Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing. Any briefing schedule shall provide for final filings as expeditiously as possible and, in time-limited cases, no later than 30 days prior to the decision due date, which is the final regularly scheduled Board meeting date on or before the statutory or deferred decision deadline. In this case, the statutory decision deadline is July 23, 1994; therefore the decision due date is July 21, 1994.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 3rd day of March, 1994, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board