

ILLINOIS POLLUTION CONTROL BOARD
March 24, 1988

WASTE MANAGEMENT OF ILLINOIS, INC.,)
)
 Petitioner,)
)
 v.) PCB 88-39
)
MCHENRY COUNTY BOARD,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on a petition of the McHenry County Defenders (Defenders), filed March 11, 1988. On March 14, 1988, Waste Management of Illinois, Inc. (WMI) filed a motion to dismiss the Defender's petition. On March 21, 1988, the Defenders filed a response. The Defenders' petition requests a hearing and review of the McHenry County Board's (County) decision that WMI satisfied Criterion #1 of Section 39.2(a) of the Environmental Protection Act (Act).

On August 31, 1987, the County denied WMI's request for site location suitability approval of a regional pollution control facility (commonly referred to an "SB172" proceeding); the denial was based on failure of WMI to satisfy Criteria #2 and #3 of Section 39.2(a) of the Act. The County found that WMI had satisfied Criteria #1, #4, #5 and #6. On February 25, 1988, WMI filed an appeal of the County's action. The Defenders support the County's action on Criteria #2 and #3, oppose its action on Criterion #1, and did not comment in its filings about the County's findings that WMI satisfied Criteria #4, #5 and #6.

The Defenders' assert that its participation in the County hearing was principally directed to contesting WMI's showing on Criterion #1. The Defenders volunteered that the Board may feel bound by the decision of the Appellate Court in McHenry County Landfill v. Illinois Pollution Control Board, 154 Ill. App. 3d 89, 506 N.E. 2d 372 (2nd Dist. 1987), which ruled that Section 40.1 of the Act does not allow for cross-appeals by objectors in the case of a denial of an SB172 site location suitability approval. The Defenders argue, however, that the McHenry County Landfill appellate court decision misconstrues Section 40.1 of the Act, and stated that its petition, at the very least, is filed to preserve its appellate rights.

The Defenders also argue that this instant case is distinguishable because the Board had affirmed the County in McHenry County Landfill, whereas in this case a reversal is possible and, if so, would adversely affect the third-party objectors.

WMI argues that the principle that third party objectors may not cross-appeal a county denial is well established, citing McHenry County Landfill and also the City of Rockford v. Winnebago County Board, PCB 87-92, (November 19, 1987).

The Board does not agree that the McHenry County Landfill appellate court decision, which reversed the Board on this issue, turns on whether or not the Board upholds a county or municipal denial. Since the McHenry County Landfill decision, the Board has consistently, and it believes properly, denied third party appeal status when there is a local SBl72 denial. The Board has, however, allowed the submission of amicus curiae briefs.

In Waste Management of Illinois, Inc. v. Lake County Board, PCB 87-75, (July 16, 1987), the Board, basing its decision on McHenry County Landfill, rejected an attempt to intervene in a SBl72 appeal of a denial of site location suitability approval. However, in A.R.F. Landfill, Inc. v. Lake County, PCB 87-51 (August 20, 1987), the Board allowed the submission of an amicus curiae brief by an interested person. Similarly, the Board denied intervention to a citizen's group and treated the group's brief as an amicus curiae in City of Rockford v. Winnebago County Board, PCB 87-92 (November 19, 1987). The Board also allowed the filing of amicus curiae briefs in Waste Management of Illinois, Inc. v. Lake County Board, PCB 87-75 (December 17, 1987), and Laidlaw Systems, Inc. v. McHenry County Board, PCB 88-27 (March 10, 1988).

Regarding the filing of an amicus curiae brief in this case, the Board notes that a) the Defenders did not petition for this relief, and b) the petition for hearing was requested solely:

to review the specific finding of Respondent McHenry County Board ("County Board"), in its decision on February 24, 1988 denying landfill siting approval to Waste Management of Illinois, Inc. ("Waste Management"), that Waste Management satisfied its burden of proving that its proposed landfill is "necessary to accommodate the waste needs of the area it is intended to serve." Ill. Rev. Stat., ch. 111 1/2, Section 1039.2(a)(i) (hereinafter "Criterion #1). (Pet. p. 1,2, March 11, 1988).

The Board has already disallowed briefing on subject matter that is not an issue on appeal. The Board has stated:

However, in its brief, STL attempts to litigate the sufficiency of the evidence supporting the County's decision that criterion (iv), relating to flood plains, was met. The Board notes that this criterion is not an issue on appeal, and therefore, the Board accordingly strikes pages 80 and 81 of STL's October 13, 1987 brief. Although they will not be considered by the Board, they will physically remain in the record for transmittal to any reviewing court. (City of Rockford v. Winnebago County Board, PCB 87-92, November 19, 1987, p. 4,5)

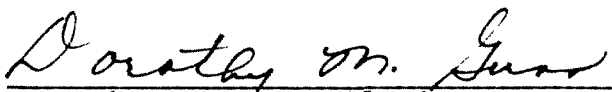
The Defenders here present arguments concerning Criterion #1; it does not present any argument concerning criteria #2 and #3 in either its Petition or Response. Nor has the Defenders indicated a desire to do so. Nevertheless, the Board will allow the Defenders to file an amicus curiae brief except insofar as the Defenders address any criteria other than Criteria #2 and #3, the only two criteria which are at issue in this appeal. The timing of the brief's submission shall be determined by the Hearing Officer when the briefing schedule is set.

The motion to dismiss the petition is granted. The Petitioner is granted leave to file an amicus curiae brief subject to the conditions contained in this Order.

IT IS SO ORDERED.

J. D. Dumelle and B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 24~~th~~ day of March, 1988, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board