

ILLINOIS POLLUTION CONTROL BOARD
May 14, 1987

IN THE MATTER OF:)
)
REQUEST FOR SITE APPROVAL FOR) PCB 87-51
A.R.F. FACILITY FILED BEFORE) 87-57
THE COUNTY BOARD OF LAKE COUNTY)

CONCURRING OPINION (by B. Forcade):

I concur that the cross-appeal in PCB 87-57 must be dismissed, but believe additional explanation is warranted.

Historically, the Board allowed third parties (anyone other than the landfill applicant or the local government decision-maker) to appeal a local government decision to approve siting. The Board also allowed third parties to cross-appeal or intervene in a proceeding brought by the landfill applicant to challenge a siting denial. In part, that prior philosophy was based on the somewhat vague statutory language and in part it was based on the theory that the General Assembly intended to grant third parties the right to participate in and to appeal decisions granting local siting approval whether those decisions were made by the local government or made by this Board in overturning a local government denials. That approach to allowing third party cross-appeals in siting denials was changed by the Second District's holding in McHenry County Landfill v. IPCB (Second District, Slip Opinion, March 30, 1987).

The court in McHenry County evaluated the statutory language of Section 40.1 of the Environmental Protection Act (hereinafter, the "Act") and the factual scenario which brought the case to the Second District. In the factual scenario, the County Board of McHenry County denied an application of McHenry County Landfill for site location approval on October 15, 1985 (after a prior remand from this Board in PCB 85-56, September 20, 1985), and McHenry County Landfill appealed that October denial to this Board (PCB 85-192). Several objectors also filed cross-appeals, which the Board accepted. On March 14, 1986, this Board affirmed the October 15, 1985, denial of site location suitability approval. The McHenry County Landfill appealed that decision to the Second District and the third parties (also called objectors) cross-appealed. Thus, when the case arrived at the Second District, the McHenry County Board had denied site location approval and this Board had affirmed denial. With this factual background, the Second District reviewed the statutory language and concluded the objectors had no standing to appeal to this Board or the Second District.

Section 40.1 of the Act, which governs appeals to the Pollution Control Board provides:

"If the county board ... refuses to grant (site) approval ... the applicant may ... petition for a hearing before the (PCB) to contest the decision...

(b) If the county board ... grants (site) approval ... a third party other than the applicant ... may petition the (PCB) ... for a hearing to contest the approval ... (Ill. Rev. Stat. 1985, ch. 111 $\frac{1}{2}$ par. 1040.1(a), (b)).

The Act thus does not provide for a third-party appeal where the PCB has refused to grant site approval. (See. E & E Hauling v. Pollution Control Board, (1985), 107 Ill. 2d 33, 41 (concluding that Section 40.1 as written adequately recognizes and protects the rights of third parties).) The PCB is powerless to expand its authority beyond that which the legislature has expressly granted to it. (Landfill, Inc. v. Pollution Control Board, (1978), 74 Ill. 2d 541, 557-58; see also, Schalz v. McHenry County Sheriff's Department Merit Com. (1986), 113 Ill. 2d 198, 204.) We, therefore, conclude that the PCB improperly permitted the objectors to become parties to the proceeding before it. The objectors therefore have no standing to appeal to this court under Section 41 of the Act (Ill. Rev. Stat. 1985, ch. 111 $\frac{1}{2}$ par. 1041), and their cross-appeals are hereby dismissed.

This language is certainly dispositive in the instant proceeding. The County Board of Lake County did, in fact, deny site location approval and William Alter and the LaSalle National Bank, as third-parties, are precluded from cross-appealing to this Board. The larger issue of whether a third party can seek review if this Board grants approval (by overturning a County Board denial) is less clear.

The Second District in McHenry County did not dismiss the objectors from the Second District proceeding because of the action of the County Board, but rather because of the action of this Board:

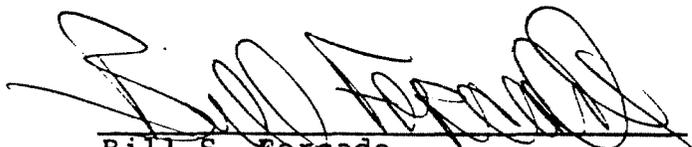
The Act thus does not provide for a third-party appeal where the PCB has refused to grant site approval (Citation Omitted). Slip Opinion at 7.

At page six of the Slip Opinion, the court states that standing to appeal a decision of this Board under Section 41(a) of the Act depends on whether one is adversely affected by the decision of the Board:

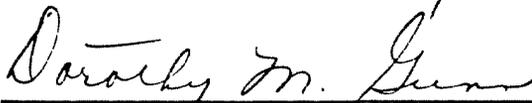
We will first consider Landfill's motion to dismiss the cross-appeals. Due process of law does not encompass the right to appeal an administrative decision, and affording that right is the exclusive prerogative of the legislature. (Board of Education v. Gates (1974), 22 Ill. App. 3d 16, 20.) Section 41(a) of the Act (Ill. Rev. Stat. 1985, ch. 111 $\frac{1}{2}$, par. 1041(a)) permits appeals only by those who have been denied a hearing, variance, or permit by the PCB - clearly not applicable to the objectors - or persons who are parties to a PCB hearing or are adversely affected by a final order or determination of the PCB.

The PCB found that Landfill had met its burden in establishing four of the statutory criteria for site approval, but had failed to establish the remaining two. It then affirmed the county board's denial of Landfill's site approval request. The objectors oppose the landfill, and thus cannot have been directly adversely affected by that decision. (See Dolnick v. Redmond (1972), 4 Ill. App. 3d 1037, 1040 (noting that the adverse effect must be direct to confer standing to appeal).) The objectors thus have no standing to appeal unless they were properly parties to the PCB hearing.

These two sections of McHenry County seem to imply that third parties may have a right to appeal a decision of this Board to an appellate court under Section 41(a) of the Act if this Board grants site approval by overturning a County Board denial. At present however, the law in this area would have to be described as uncertain.


Bill S. Forcade

I, Dorothy M. Gunn, hereby certify that the above Concurring Opinion was submitted on the 26th day of May, 1987.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board