ILLINOIS POLLUTION CONTROL BOARD
December 15, 1988

ROGER TATE, LYNETTE TATE, BARBARA KELLEY AND JOSEPH KELLEY,	)	
Petitioners,	)	
v.	)	PCB 88-126
MACON COUNTY BOARD AND MACON COUNTY LANDFILL, CORPORATION,	)	
Respondents.	)	

DISSENTING OPINION (by J. Dumelle; B. Forcade; and M. Nardulli):

We dissent from the majority and would have reversed Macon County's grant of site approval for the landfill. These proceedings were fundamentally unfair to the opponents of the landfill. In addition, the applicant did not carry its burden on Criteria Nos. 2 and 3.

Adequacy of Request

The regional pollution control site location suitability process begins at the county board when the applicant files a "request" for site approval. The issue of how much information the "request" must contain has been before this Board since 1984. Town of St. Charles, et al., v. Kane County Board, et al., PCB 83-228, 83-229, 83-230 (March 21, 1988). Fundamental fairness, the current statutory language, and present statutory amendments all demand that the "request" under review here be deemed inadequate.

Fundamental Fairness

In any legal proceeding it is basically fundamental that parties know of evidence to be presented in advance in order that preparation can be made to (a) cross-examine and (b) present opposing views.

The applicant filed a 3-page "request" on January 14, 1988. It was not accompanied by technical reports. (Ex. C-68. Note that the County's index shows a filing date of January 14, 1988 but the date stamp appears to be January 4, 1988.) On April 21, 1988 at hearing the attorney for the objectors asked for these materials in advance but was denied access to them (R. 149-163).

These technical reports should have been filed with the "request" on January 14, 1988. Had they been, then the objectors would have had more than three full months to study them and to have their own experts prepared. This was not done and thus rendered the proceeding fundamentally unfair.

Present Statutory Language

In addition to the fundamental unfairness of a "request" having only 3 pages, the present statutory language requires more information. Two terms of relevance are used in Section 39.2 of the Environmental Protection Act. The first is "request" and the second is "written notice of such request." Several factors lead to the conclusion that the General Assembly intended the "request" to be at least similar to a permit application, i.e., it must contain sufficient information to support an affirmative county board finding:

1. Section 39.2 requires the "notice of request to be filed with many people and published; only one copy of the "request" need be filed at one location. This implies that the "request" must be a substantially larger amount of information than is contained in the "notice of request."

2. The "notice of request" must include: (a) name and address of applicant; (b) location of the proposed site; (c) nature and size of the development; (d) nature of the activity proposed; (e) probable life of the proposed activity; (f) date the "request" will be submitted; and (g) description of the right of persons to comment. Therefore, the "request" must include substantially more information than that listed above.

3. The copy of the "request" must be available for copying at the actual cost of reproduction. It seems unlikely the General Assembly would worry about exorbitant copy costs if they intended a 3 page "request" to satisfy the statute.

These factors alone lead to the conclusion that the "request" must contain significantly more information than is contained in the "notice of request." Here, the 3 page "request" filed by Macon County Landfill, Inc., contains significantly less information.

In addition, Section 39.2 (c) requires the applicant to file "all documents submitted as of that date to the Agency in connection with its application", to the county board. Today, the majority has held that language to exclude documents already on file with the Agency pertaining to existing facilities. We disagree.

In its request to the county board, the applicant states the patently obvious, "The applicant has not yet made formal application to the Illinois Environmental Protection Agency because of the additional expense involved with such application and because the agency will not issue a permit, even if the application is otherwise technically sound, until the decision on site approval has been made by the Macon County Board." (Ex. C 68-69, Paragraph 4). In short, no prudent applicant submits information to the Agency until after siting approval has been secured. Thus, the majority interpretation reduces the statutory obligation to file Agency submitted data with the county board, to a practical nullity. We would interpret that language to require submission of all Agency filed information regarding the facility. In this way the General Assembly's language would be given effect. This interpretation is especially appropriate in light of recent amendments to the Act.

Recent Statutory Amendments

In Public Act's 85-882 and 85-945, the General Assembly amended the landfill siting process as it pertains to information submittals. Those amendments to Section 39.2(a) and (c) make it clear that the initial submission to the county board must contain enough factual information to demonstrate compliance with the relevant statutory criteria and that it must include all information submitted to the Agency pertaining to the proposed facility (new language underlined):

> a. The county board of the county or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, shall approve <u>or disapprove the request for local siting approval</u> for <u>each</u> new regional pollution control facility <u>which is subject to such review. An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if the proposed facility meets</u> the following criteria: ...
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> * * *

> c. An applicant shall file a copy of its request, with the county board of the county or the governing body of the municipality in which the proposed site is located. The request shall include (1) the substance of the applicant's proposal and (2) all documents, if any, submitted as of that date to the Agency pertaining to the proposed facility, except trade secrets as determined under Section 7.1 of this Act. All such documents or other materials on file with the county board or governing body of the municipality shall be made available for public inspection at the office of the county board or the governing body of the municipality and may be copied upon payment of the actual cost of reproduction. ...

Subsequent statutory amendments may be used to determine the General Assembly's intentions regarding disputed interpretations of existing language. Container Corporation of America v. IEPA, PCB 87-183, August 18, 1988. Here, the subsequent amendment makes it clear to us that the General Assembly always intended that the initial submission to the county board contain enough information to demonstrate compliance with the statutory criteria, and that the submission contain all information submitted to the Agency pertaining to the proposed facility. The submission by Macon County Landfill, Inc., clearly was deficient on both counts.

Criterion No. 2

This criterion refers to the safety of the site and to the design proposed to make it safe. No design was presented (R. 79 in May 18, 1988 hearing). Furthermore, on May 19, 1988 the objectors' witnesses showed that continuous core sampling had never been done (R. 19 and 51), that deep borings had not been done (R. 27) and that cation exchange tests had not been done (R. 30). On June 2, 1988 a witness testified as to a large pool of water ("... 120 feet long, and 40 to 50 feet wide ... It's quite deep.") that had appeared on May 28, 1988 (R. 9-18).

Since the applicant has not entered design plans into the record nothing exists to counter the objectors technical witnesses. Even under a manifest weight legal test which applies to this Board's review of the record before the county board, the applicant must be judged as not meeting its burden. There simply is no record that the County could have reviewed in order to judge this site as safely designed.

Criterion No. 3

This criterion refers to the minimization of incompatibility of the site to the public. On May 18, 1988 it was shown that no plans were filed on the vertical expansion phase (R. 79) and that there were no plans to screen the higher height requested. No visual screens such as trees or berms were presented (R. 86 of May 18, 1988). One witness lives "25 feet" from the site (R. 58 of May 19, 1988 hearing). Certainly she should have some screening to mitigate the visual impact of the new landfill.

As in Criterion No. 2 the absence of any plans to minimize incompatibility means that the applicant did not carry its burden and that the County approval of the site must be reversed.

Conclusion

Because of the fundamentally unfair nature of these proceedings and the deficient record by the applicant on Criteria Nos. 2 and 3, we would have reversed the County approval of this site.

Jacob D. Dumelle, P.E.
Board Member

Bill S. Forcade
Board Member

Michael L. Nardulli
Board Member.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 22nd day of December, 1988.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board