

ILLINOIS POLLUTION CONTROL BOARD
February 17, 1994

RODNEY B. NELSON, III, M.D.,)
)
Petitioner,)
)
v.) PCB 94-51
) (Landfill Siting Review)
)
KANE COUNTY, KANE COUNTY)
BOARD, and WASTE MANAGEMENT)
OF ILLINOIS, INCORPORATED,)
)
Respondents.)

CITY OF GENEVA,)
)
Petitioner,)
)
v.) PCB 94-58
) (Landfill Siting Review)
) (Consolidated)
)
WASTE MANAGEMENT OF ILLINOIS,)
INC. and COUNTY BOARD, COUNTY)
OF KANE, STATE OF ILLINOIS,)
)
Respondents.)

ORDER OF THE BOARD (by C. A. Manning):

This matter comes before the Board on two third party petitions for review filed pursuant to Section 40.1(b) of the Environmental Protection Act (Act) (415 ILCS 5/40.1(b) (1992)), of the January 11, 1994 decision of the County of Kane (County) granting site location suitability approval for expansion of a new regional pollution control facility known as Settler's Hill Recycling and Solid Waste Disposal Facility operated by Waste Management of Illinois, Inc. (WMI). Pursuant to Section 40.1(b) of the Act, any petitions for review of this decision must be filed within 35 days, i.e. on or before February 15, 1994.

THE PETITIONS

PCB 94-51, Nelson

The first petition for review (PCB 94-51) was filed by Rodney B. Nelson, III, M.D. on February 1, 1994. However, the proof of service required by 35 Ill. Adm. Code 101.143 was not

filed until February 4, 1994. On February 15, 1994, Dr. Nelson filed a "first addendum" to the petition, which was not accompanied by a proof of service.

The Board finds the petition timely filed pursuant to Section 40.1(b). However, the filing of the "first amendment" restarts the Board's 120-day decision timeclock as specified in Section 40.1(a). However, since the filing is not complete until the proof of service is received, the decision timeclock will restart with the filing of the proof of service.

The Nelson petition challenges the fundamental fairness of the County's proceedings, and also asserts that its decision was against the manifest weight of the evidence. The petition recites that Dr. Nelson resides within 5 blocks of the proposed expansion. Dr. Nelson further asserts that he has standing to pursue this action on the basis that he "submitted written comments during the public hearing phase of siting" (Pet. at 9).

PCB 94-58, Geneva

The second petition for review was filed by the City of Geneva (Geneva) on February 9, 1994. The petition challenges the fundamental fairness of the County's proceedings, and also asserts that its decision was against the manifest weight of the evidence. The petition further alleges that the proceedings failed to comply with Section 39(c) of the Act, in that the City has concurrent siting jurisdiction over the proposed Settler's Hill expansion by virtue of the fact that a portion of the Settler's Hill facility lies within the corporate limits of the City of Geneva. The petition states that the City of Geneva, through its Mayor, William T. Otilie, and its attorneys Charles A. Radovich and Lee R. Cunningham, attended the public hearing conducted by Kane County, participated in the hearing process, produced witnesses, entered exhibits, and submitted written objections as part of the public hearing.

Standing and Consolidation

Within the meaning of Section 40.1(b) of the Act, it appears that the Geneva petition is not duplicitous or frivolous, that the City participated at the County hearing and is located so as to be affected by the facility. The Geneva petition is accordingly accepted for hearing.

The Board cannot, however, conclusively determine at this point whether Dr. Nelson has standing to pursue his action. Without access to the County record, the Board cannot determine whether written comments were submitted at or after the public hearing, a fact which may be crucial. See Valessares et al. v.

Kane County Board et al., PCB 87-36 (July 16, 1987) (esp. p. 3-5).¹ However, to avoid any delay which could jeopardize the Board's timely decision of this case, the Board will accept this petition for hearing. The parties may, however, make any appropriate challenge to standing within 14 days of the date of this order, i.e. on or before March 1, 1994.

As the Board's usual practice with multiple petitions challenging a single local siting decision, the Board on its own motion consolidates these actions into one case.

The consolidated case will be decided on the due date of the case earliest due. In this instance, the due date is calculated as June 9, 1994, based on the February 9 filing of the Geneva petition. The Board's closest regularly scheduled meeting preceding this date is June 2, 1994.

Record Before the County Board

P.A. 82-682, also known as SB-172, as codified in 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 County of Kane 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 SB-172, the Board believes that the County of Kane 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 County of Kane 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 County of Kane hearing and three copies of any other documents in the

¹ The Clerk is directed to serve the parties with a copy of the PCB 87-36 opinion along with the instant order.

record shall be filed with the Board, and a copy of the certificate shall be served upon the petitioners. The Clerk of the County of Kane is given 21 days from the date of this Order to "prepare, bind and certify the record on appeal" (Ill. Supreme Court, 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.

Waiver of Decision Deadline

Section 40.1(a) provides that if there is no final action by the Board within 120 days, "petitioner" 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 a) the right to a decision within the applicable statutory time frame (now 120 days), and b) 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.

Transcription Costs

The issue of who has the burden of providing transcription in Board site location suitability appeals has been addressed in Town of Ottawa, et al. v. IPCB, et al., 129 Ill. App. 3rd, 472 N.E.2d 150 (Third District, 1984). 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.

Hearing Procedures

The hearing must be scheduled and completed in a timely manner, consistent with Board practices and the applicable statutory decision deadline or the waiver provisions of 35 Ill.

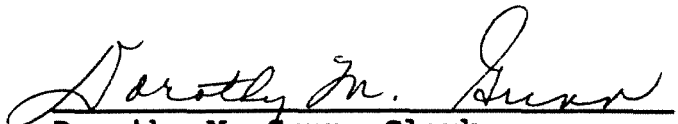
Adm. Code 101.105. The Chief Hearing Officer shall assign a hearing officer to conduct hearings. The Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

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 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, pursuant to Section 40.1 (b) of the Act, the statutory decision deadline is June 9, 1994; therefore, the decision due date is June 2, 1994.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after attempting to do so, the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the above schedule. The hearing officer and the parties are encouraged to expedite this proceeding to the extent 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 17th day of February, 1994, by a vote of 6-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board