ILLINOIS POLLUTION CONTROL BOARD
January 21, 1993

PEOPLE OF THE STATE OF ILLINOIS AND THE COUNTY OF GRUNDY, ILLINOIS EX REL. GRUNDY COUNTY STATE'S ATTORNEY DAVID W. NEAL,	)	
Petitioner,	)	
v.	)	PCB 92-207 (Landfill Siting Review)
ENVIRONTECH, INC., AN ILLINOIS CORPORATION, AND THE CITY OF MORRIS, ILLINOIS	)	
Respondent,	)	

ORDER OF THE BOARD (by J. C. Marlin):

This matter is before the Board on two motions. On January 5, 1993, the City of Morris (City) filed a motion to dismiss with prejudice (C. Mot.) and on January 6, 1993, Environtech filed a motion to dismiss (E. Mot.). On January 14, 1993, the petitioner filed a response in opposition to both motions to dismiss (Resp.).

The motions to dismiss contained substantially the same arguments. Both respondents argued that David W. Neal, the Grundy County State's Attorney, lacks standing and that the petition is duplicitous and frivolous. The only major deviation in their motions is that the City in its motion, argued that the petition in this case was not timely filed.

The Board will first address the argument that the petition was filed late. The City, in its motion, states that it approved the siting on November 9, 1992 and that the petition for hearing to contest the siting of a regional pollution control facility, was filed on December 15, 1992. (C. Mot. at 1.) The City argues that Section 40.1(b) of the Illinois Environmental Protection Act (Act) requires that the petition for hearing must be filed within thirty-five days and that petitioner filed on the thirty-sixth day.[1] (Ill. Rev. Stat., ch. 111 1/2 par. 1041.1(b) and C. Mot. at 1.) In its response, the petitioner argues that the Board's

[1]The City's motion cites to Section 104(a) of the Act; the Board construes this to mean Section 40.1(b). Section 40.1(b) of the Act allows appeals of a decision by a governing body to grant siting approval to be filed within 35 days. Section 104(a) does not exist.

procedural rules state that if a document is received after the due date, the date of mailing is deemed the date of the filing. (Resp. at 13 paraphrasing 35 Ill. Adm. Code 101.102(d).) The petitioner also notes that the certificate of service attached to the petition states that it was mailed by first class mail on December 14, 1992, thirty-five days after the siting decision. (Resp. at 13.)

The Board's procedural rules provide that "mailed is filed" if the petition is accompanied by a certificate of service. The relevant sections of the Board's rules state:

> If received after any due date, the time of mailing shall be deemed the time of filing. Proof of mailing shall be made pursuant to Section 101.143. (35 Ill. Adm. Code 101.102(d).); and
>
> Service of filings is proved by: In case of service by First Class mail, by certificate of attorney...which states the date, time, and place of mailing, the complete address which appeared on the envelope, and the fact that proper postage was paid. (35 Ill. Adm. Code 101.143(a)(4).)

The Board finds that the petition was timely filed. Petitioner's certificate of service states that on December 14, 1992, Attorney Renee Cipriano served the petition by First Class mail, postage prepaid, to the attached service list.

The Board will next address the question of standing. Both respondents argue in their motions that the petitioner lacks standing to seek review. (E. Mot. at 1 and C. Mot. at 3 and 4.) Respondents base their argument on the fact that no representative of Grundy County was present at the siting approval hearing. (E. Mot. at 2 and C. Mot at 1.) Respondents point to Section 40.1(b) of the Act which provides that a third party may petition the Board for a review of a siting approval if the third party participated in the siting hearing conducted by the governing body. (E. Mot. at 2 and C. Mot. at 2.)

In response, petitioner points to several Illinois Supreme Court Cases which uphold the importance of the Illinois Attorney General's role in representing the people of the state. (Resp. at 3 citing, People v. ex rel. Scott v. Illinois Racing Board, 54 Ill. 2d 569, 301 N.E.2d 285 (1973); People v. Massarella, 72 Ill. 2d 532, 382 N.E.2d 262(1978); IEPA v. PCB, 69 Ill. 2d 394, 372 N.E.2d 50 (1977).) Petitioner argues, that the state's attorney is a constitutional officer whose rights and duties are analogous to those of the Attorney General. (Resp. at 5 citing, People v. Buffalo Confectionery Co., 78 Ill. 2d 447, 401 N.E.2d

546 (1980.).) Petitioner also argues that the State's Attorney of Grundy County is empowered to represent the rights and interest of the people in matters of public concern. (Resp. at 4 citing, Therefore, petitioner argues, because the procedures followed in the local siting approval were fundamentally unfair, petitioner must represent the interests of the people in this matter. (Resp. at 5.)

Petitioner also cites the case of Pioneer Processing v. IEPA, 102 Ill. 2d 119, 464 N.E.2d 238 (1984). (Resp. at 3.) In Pioneer the Attorney General sought an appellate review of a Board order without ever having been present at, or participating in, the Board proceedings below. The Supreme Court held in Pioneer, that not only did the Attorney General have standing, but that he had a duty to represent the interests of the people. (Pioneer, at 250.)

The precedent set by both the Illinois Supreme Court and the Board make it clear that the petitioner has standing as the State's Attorney of Grundy County to represent both the People of the State and the County in this matter. (See, Pioneer and Land and Lakes Company v. Village of Romeoville, (February 7, 1991) PCB 91-7.) If in fact the City failed to afford the citizens proper procedures in the siting process, it is only proper that the State's Attorney be allowed to represent the People in this matter. (See, Pioneer, at 464 N.E.2d 247.)

Next the Board will address the issue of whether or not the public comment filed by Mr. Neal is sufficient to satisfy the participation requirement in Section 40.1(b) of the Act. Respondents argue that the public comment should not count as participation within the meaning of Section 40.1(b) of the Act. (E. Mot. at 2 and C. Mot. at 1 and 2.) In support of their argument, respondents cite Valessares v. County Board of Kane County, (July 16, 1987) PCB 87-36. (E. Mot. at 2.) Additionally, respondents argue that the statute limits the potential petitioners to people who either attended the hearing or whose authorized representative attended. (E. Mot. at 4 citing, E&E Hauling v. PCB, 107 Ill.2d. 33, 41 (1985).

In response, the petitioner argues that the public comment he filed should be construed as participation under the Act. (Resp. at 6.) Petitioner contends that since "mere" attendance at a hearing is sufficient to confer standing that actively voicing an opinion in the public comment period should also confer standing. (Resp. at 7.)

The petitioner also argues that respondents reliance on the failure of the petitioner to attend the public hearing is inappropriate. (Resp. at 9.) Petitioner contends that because of the "consistent assurances" that the terms of the Grundy County Solid Waste Plan (Plan) would be addressed at hearing, petitioner

was "lulled into a sense of comfort" and did not see a reason to attend the hearing. (Resp. at 9 and Exh. A.)

Section 40.1(b) of the Act requires that a person seeking to appeal as a third party be one "who participated in the public hearing conducted by the county board or governing body of the municipality." However, the Act does not define what is meant by "participated".

In Zeman v. Village of Summit, (December 17, 1992), PCB 92-174, PCB 92-177 consolidated, the respondent argued that one of the petitioners did not have standing to appeal because she did not participate in the siting hearing. (Id. at 4.) There was no dispute that the petitioner was physically in attendance however, she argued that the procedure of the hearing prevented her from actively participating. (Id. at 4 and 5.) The Board in Zeman, reaffirmed its prior decisions and found that "mere" attendance is sufficient to satisfy the requirement of participation. (Id. at See also, Board of Trustees of Casner Township et al. and John Prior v. County of Jefferson (April 4, 1985) PCB 84-175, 84-176 consolidated; Valessares et al. v. The County Board of Kane County et al. (July 16, 1987) PCB 87-36.)

Based on the totality of the circumstances in this matter, including the precedent in Pioneer, and the petitioner's assertions that the office of the State's Attorney was not represented at hearing due to the "consistent assurances" of respondent, the Board finds that this matter should proceed to hearing. The Board is not presented today with the question of whether the simple filling of a public comment by someone other than the People amounts to "participation in the public hearing". The Board makes no holding on the issue. In this case, however, the State's Attorney's filing of a public comment makes clear that the People are not a "stranger to the proceeding", and the State's Attorney may pursue the interests of the People at hearing.

Finally, respondents argue that petitioner's claim is frivolous and duplicitous because it is based on a failure to comply with the Plan which was not in effect at the time of the siting approval. (E. Mot. at 2 and 4 and C. Mot at 2.) In response, Petitioner argues that claims before the Board are frivolous only if they seek relief which the Board cannot grant. (Resp. at 11.) Petitioner cites several cases in support of its argument. In addition, petitioner argues that the fact that the Plan was not adopted is not the sole reason for review of the siting decision. (Resp. at 12.) Petitioner argues that under Section 40.1(b) of the Act, it has a right to present testimony regarding the fundamental fairness of the proceedings.

Petitioner also argues that the petition is not duplicitous. Petitioner cites Valessares v. County Board of Kane County, (July

16, 1987), PCB 87-36, for the proposition that a petition is duplicitous if the same controversy is pending in another forum. (Resp. at 12.) Petitioner argues that because this controversy is not pending elsewhere, the petition is not duplicitous. (Resp. at 12.)

Section 31(b) of the Act and 35 Ill. Adm. Code 103.240 allow the Board to dismiss a complaint if the Board determines that it is duplicitous or frivolous. In its resolution of June 9, 1989, the Board stated that an action is duplicitous if it is substantially similar to one brought in another forum. (In re Duplicitous or Frivolous Determination (June 9, 1989), RES 89-21.) In the same resolution, the Board stated that a complaint is frivolous if it fails to state a cause of action upon which relief can be granted.[2] (Id. See Also, Yolanda Price v.South Shore Villa Condominiums and Quality Management Service Inc (November 19, 1992), PCB 92-119.)

The Board finds that this case is neither duplicitous nor frivolous. There is no evidence of any action pending in another forum which is substantially similar to the instant case. Therefore, the case is not duplicitous. Additionally, under Section 40.1(b) of the Act, the Board may review the fundamental fairness of the siting proceedings. Therefore, the case is not frivolous since the Board may provide relief to the petitioner.

For the reasons stated in the above order, Environtech and The City of Morris' motions to dismiss are denied. This case must proceed to hearing on February 9, 1993, as scheduled.

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 21st day of January, 1993, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

[2]Although duplicitous and frivolous determinations are limited to enforcement actions, the Board addresses the issues raised here because they deal with the general jurisdiction of the Board.