ILLINOIS POLLUTION CONTROL BOARD
November 19, 1987

CITY OF ROCKFORD, a Municipal Corporation,	)	
Petitioner,	)	
v.	)	PCB 87-92
WINNEBAGO COUNTY BOARD,	)	
Respondent.	)	

DISSENTING OPINION (by J. Theodore Meyer):

I dissent from the majority opinion adopted in this matter.

The City of Rockford, the petitioner in the instant case, is the second largest city in Illinois, and is one of the few cities in the nation which is actively trying to solve its solid waste problem. Rockford has been trying intermittently to site a municipal landfill at this location since the early 1970s. As the majority states, the city purchased the site in 1970, with the final transfer of the deed in 1977. (Majority opinion, p. 10.) The site was the subject of litigation, and in 1972, the Illinois Supreme Court held that Winnebago County could not use a zoning ordinance to prohibit development of a landfill if a permit was obtained by the Illinois Environmental Protection Agency (Agency). O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E.2d 432 (1972). The city obtained an Agency permit to develop a landfill on the site in 1972, but the permit was allowed to lapse. Now Rockford is again attempting to site a landfill on this parcel, which they have owned for seventeen years. I would point out that the large majority of the 151 homes in the area were built after the city purchased this land, and that the O'Connor litigation was well-publicized in the Rockford area.

Historically, the disposal of solid waste has been a local governmental function. In 1970, the legislature enacted the Environmental Protection Act (Act), Ill. Rev. Stat. 1985, ch. 111½, par. 1001 et seq., and provided for state involvement in the solid waste disposal process. The Act provides that no sanitary landfill is to be operated without a permit from the Agency. Ill. Rev. Stat. 1985, ch. 111½, pars. 1020, 1021, 1039. The O'Connor decision, supra, subsequently held that the Act clearly expressed a legislative intent that landfill operations be conducted only upon the issuance of an Agency

permit. In 1976, the court held that a non-home rule municipality could not use a local "environmental protection ordinance", which included the requirement of compliance with zoning ordinances, to regulate the siting and operation of landfills. Carlson v. Village of Worth, 62 Ill. 2d 406, 343 N.E.2d 493 (1976). Thus, local governments were pre-empted from any participation in the landfill siting process.

This pre-emption of local authority generated much protest. In response to the public outcry over this issue, the Illinois General Assembly enacted Senate Bill 172. This bill created Section 39.2 of the Act, which allows local units of government to review the site suitability of a new "regional pollution control facility" based on only six criteria set forth in that section. I was a member of the Illinois House of Representatives and was intimately involved in the creation of Section 39.2 as Chairman of the House Energy and Environment Committee and a member of the Conference Committee. The essence of Section 39.2 is the six criteria, which are to be used statewide in considering site applications. This provision for uniform criteria was intended to further the Act's purpose of establishing a "unified, statewide program . . . to restore, protect, and enhance the quality of the environment . . .". Ill. Rev. Stat. 1985, ch. 111½, par. 1002.

Instead of working as a uniform program, however, the courts and this Board have interpreted Section 39.2 in such a manner that the criteria are applied in any manner a locality feels is relevant. For example, the courts have held that local governments may consider technical aspects of landfill design when considering criterion two. See, e.g., Waste Management of Illinois, Inc. v. Pollution Control Board, No. 87-0029 (2d Dist., September 11, 1987); McHenry County Landfill, Inc. v. Illinois Environmental Protection Agency, 154 Ill. App. 3d 89, 506 N.E.2d 372 (2d Dist. 1987). This has resulted in each locality applying engineering and technical information in its own way: a development which is beyond both the expertise of localities and the intent of the Act.

The forgotten third party in landfill siting is the Illinois Environmental Protection Agency. In Waste Management, supra, the appellate court discusses the roles of local government and the Board, but does not even mention the Agency in its analysis. The courts entrusted landfill siting and permitting solely to the Agency between O'Connor and the enactment of Section 39.2, but now do not even consider the Agency when deciding landfill siting appeals. I must point out that the Board does not issue permits. That is the function of the Agency.

Illinois is facing a very serious waste disposal problem. A recent Agency report states that the average life of remaining landfill space in the state is only 5.3 years. This problem must

be dealt with quickly if we are to avoid a true crisis. There is now a trend towards incineration rather than land disposal, but this does not solve the problems associated with Section 39.2. Those who object to proposed landfills near their home or business will object on the same grounds when the proposed facility is an incinerator. See Waste Management of Illinois, Inc. v. Lake County, PCB 87-75. Additionally, incinerator ash must be landfilled, and there are various unanswered questions about incinerator emissions. It is now almost impossible for a unit of local government to approve the siting of a new regional pollution control facility, regardless of the practical consequences. Given these political realities, it is imperative that the six criteria be applied in a uniform manner.

There is no question in my mind that the county board's decision in this case was irrevocably tainted by ex parte contacts. E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2d Dist. 1983), aff'd in part 107 Ill 2d 33, 481 N.E.2d 664 (1985). It is foolish and silly to remand the case to the same county board which made a fundamentally unfair decision six and a half months ago and expect the result to be any different this time. A remand does not cure the fact that the county board decision was a result of a fundamentally unfair process. (Majority opinion p. 29.) Additionally, I object to a remand without specific instructions on what is to occur at the local level. The majority does not specify if an entire new series of hearings must be held, or whether a new decision is to be based upon the same record, or what procedures are to be used on remand.

In sum, this case points out the failure of the legislature, this Board, the courts, and local government to effectively deal with the pressing problem of solid waste disposal. The landfill siting and permitting process worked well when entrusted to the Agency between 1972 and 1981, but public pressure on state government was intense. The local site approval process, as set forth in Section 39.2, has relieved the pressure from the state and placed it on local government. The response of local government has simply been to refuse to allow almost any new regional pollution control facilities. We must remedy this situation before our solid waste disposal problem becomes a true nightmare.

For these reasons, I dissent from the majority opinion. I would reverse the county board's decision on procedural grounds.

J. Theodore Meyer
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 14th day of December, 1987.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board