ILLINOIS POLLUTION CONTROL BOARD
September 20, 1985

MCHENRY COUNTY LANDFILL, INC., an Illinois Corporation,	)	
Petitioner,	)	
v.	)	PCB 85-56
COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS,	)	
Respondent,	)	
and	)	
ARTHUR T. MCINTOSH & CO., VILLAGE OF LAKEWOOD, VILLAGE OF HUNTLEY, HUNTLEY FIRE PROTECTION DISTRICT, LANDFILL EMERGENCY ACTION COMMITTEE (LEAC) AND MCHENRY COUNTY DEFENDERS,	)	
Cross Petitioners-Objectors,	)	
v.	)	PCB 85-61 through PCB 85-66 (consolidated)
MCHENRY COUNTY LANDFILL, INC. AND, COUNTY BOARD OF MCHENRY COUNTY,	)	
Respondents.	)	

OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter is before the Board upon the April 23, 1985 appeal by McHenry County Landfill, Inc. (Landfill) from the March 20, 1985 decision of the County Board of McHenry County (County Board) denying site suitability approval for a new regional pollution control facility pursuant to Section 39.2 of the Illinois Environmental Protection Act (Act). On May 2, 1985, the Board ordered the County Board to prepare and file the record on appeal. The County Clerk of McHenry County filed the record on May 23, 1985.

On May 3, 1985, cross-appeals were filed by Village of Huntley, Landfill Emergency Action Committee, McHenry County Defenders, Arthur T. McIntosh & Co., Village of Lakewood, and

Huntley Fire Protection District (Objectors). To avoid administrative confusion, each of these cross-appeals were assigned separate docket numbers, PCB 85-61 thru PCB 85-66, respectively. On May 7, 1985, a motion to strike each of these cross-appeals was filed by Landfill. Landfill asserted that the various Objectors had no standing to pursue a cross-appeal since they do not become "parties" at the County hearing level under the statutory scheme laid out in SB-172. On May 30, 1985, the Board found that denial of these cross-appeals would "frustrate SB-172's policy of reviewability of all local decision. Formal party status at the county level does not lie at the heart of SB-172 procedures; participation at the County's hearing is the determinant for subsequent appeal rights." Consequently, the Board ordered that the cross-appeals should proceed and be consolidated with PCB 85-56 for hearing and decision.

On July 25, 1985, a hearing was held before the Board at which additional exhibits were received into evidence and a decision was made on a briefing schedule. Briefs of Landfill, McHenry County, and Objectors were filed between August 9th and September 3, 1985.

Under Section 39.2(a) of the Act, local authorities are to consider six criteria when reviewing an application for site suitability approval for a new regional pollution control facility. Upon considering these criteria, the local authorities either grant or deny site approval. This decision is reviewable by the Board pursuant to Section 40.1(a) or Section 40.1(b) depending on whether the local authorities deny or grant site approval. In reviewing the decision of the local authorities, the Board considers the six criteria set out in Section 39.2(a) and the fundamental fairness of the procedures used at the hearing conducted by the local authorities under subsection (d) of Section 39.2 of the Act.

Several issues regarding fundamental fairness have been raised by parties including:

1. Application of improper standard of proof or burden of persuasion;

2. Use of improper standards without notice;

3. Improper limitations on production of evidence and consideration of motions; and

4. Open Meetings Act violations.

First, Landfill alleges that the County Board applied the improper standard of proof to Landfill's application for site suitability approval for a new regional pollution control facility. The County Board in its Order of March 20, 1985 states that "the Petitioner is required to show that the record supports all six criteria by the manifest weight of the evidence." (Order

p. 4) Further, Objector Landfill Emergency Action Committee stated in its closing argument that "the burden is on the petitioner here to show by the manifest weight of the evidence..."*. (R. 3022). McHenry County contends that the County Board's order "merely indicated that ... the petitioner must create a record where all six criteria may be upheld upon review by the Board applying the manifest weight standard." (McHenry County Brief pp 7-8). However, other than the County's bald assertion, no evidence was presented to demonstrate that the preponderance of the evidence standard was in fact used by the County in deliberating this application. Rather, the Board finds that the clear language in the County Board's Order indicates otherwise.

Hearings conducted pursuant to Subsection (d) of Section 39.2 of the Act are civil in nature. The burden of proof in a civil proceeding is a preponderance of the evidence. Industrial Salvage Inc. v. County Board of Marion, PCB 83-173 (August 2, 1984, pp 3-4) citing Arrington v. Walter E. Heller International Corp., 30 Ill. App. 3d 631, 333 N.E. 2d 50 (1975). A proposition is proved by a preponderance of the evidence when it is more probably true than not. Industrial Salvage, Inc., supra, citing Estate of Ragen, 79 Ill. App. 3d 8 (1979). The evidence in the record indicates that Landfill's application for site suitability approval was judged by the manifest weight of the evidence. (Order, p. 4). The proper standard of proof on which to judge Landfill's application should have been a preponderance of the evidence rather than the manifest weight of the evidence. In other words, in making its decision the County Board should determine whether a preponderance of the evidence supports Landfill's application for site suitability approval for the six criteria set out in Section 39.2(a) of the Act.

Second, Landfill alleges that the "siting request was judged by unlawful standards" in that the County Board applied "standards which were inconsistent with state regulations." (Pet. Brief, Aug. 9, 1985, pp. 39-40). The allegedly improper standards are said to have been applied regarding soil permeability and testing, the need for a leachate collection system, and post-closure care. Landfill apparently believes that if an applicant can prove compliance with all Board standards regarding the design and operation of the facility the County Board must find that the second criteria under Section 39.2 of the Act to have been met. To do otherwise, Landfill contends, would contravene the need for "uniform statewide environmental standards," citing County of Cook v. John Sexton Contractors Co., 75 Ill 2d 494, 389 N.E. 2d 553 (1979). However, to the extent

*Also, at the Feb 25, 1985 proceeding before the McHenry County Siting Committee, the findings of the Committee state that "the petitioner is required to show that the record supports all six criteria by the manifest weight of the evidence." (Com. hearing p. 12).

that there are standards regarding the issues raised by Landfill, these are minimum standards and simply meeting those standards may not be sufficient in any particular case. Without addressing the propriety of the "standards" used by the County Board in assessing the second criterion (which goes to the merits rather than the fundamental fairness of the proceeding), the Board cannot conclude that the standards used by the County Board rendered the proceeding fundamentally unfair. The standard to be met is that explicitly stated by the criterion: i.e. "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." (Section 39.2(a)(2) of the Act). If the preponderance of the evidence supports such a finding, the criterion is satisfied and the County Board should so conclude. If Landfill believes the County Board used improper standards in reaching its conclusion, then Landfill has the opportunity to demonstrate the invalidity of that conclusion to the Board.

Third, the Board finds that the County Board's refusal to allow certain evidence to be presented did not render the proceeding fundamentally unfair. Even if the Board were to conclude that the limitation on admissible evidence was improper, that defect was largely cured through the County Board's questioning later in the hearing process during which the desired testimony was presented.

At the County hearing, Landfill attempted to present evidence regarding certain recommendations of its consulting hydrogeologist, Dr. Rauf Piskin, regarding design and operating recommendations more restrictive than those contained in the application. The Hearing Officer struck that part of testimony on the basis that evidence must be based on the application as originally submitted in order to avoid infringing upon notice requirements. (R. 1510-1512). Landfill contends that such a limitation rendered the proceeding fundamentally unfair.

Landfill argues that the "notice requirements provided absolutely no basis for the Hearing Officer's ruling" in that "none of the design and operating criteria recommended by Dr. Piskin would have resulted in any changes to the statutory notice." (Pet. Brief, p. 50). Similarly, Landfill contends that the Hearing Officer's refusal to allow it to present testimony "regarding its willingness to agree to certain conditions" was also unfair. (Pet. Brief, pp. 52-53).

Landfill's argument regarding the lack of impact on the notice requirements does not go far enough. The function of notice and the required time period between notice and hearing is first to inform the affected public that a landfill site suitability approval process has been initiated and, second, to allow time for the public to review the application to determine whether, or in what manner, further participation is warranted. The Hearing Officer concluded that the evidence attempted to be presented "in a defacto way or expressly" constituted an

amendment of the application. (R. 1510-1511). The Board does not disagree with that determination. If such an amendment were allowed during the course of the proceeding, a member of the public who may have decided not to participate because the application seemed acceptable would not have had the opportunity to review the amended application. Further, even if he participated and did become aware of the amendment, he might not have the necessary time to adequately respond to any changes. The same may be true of the County or any other participants. This could be cured, however, by allowing such evidence to be presented at a later hearing contingent upon the applicant serving sufficient notice upon those required to be notified of the original application and hearing date and executing a waiver for the period of time necessary to schedule and hold the additional hearing. Such procedures would be preferable to a limitation on testimony.*

Landfill impliedly argues that in this case, where the "amendment" is more restrictive than the original application, such an analysis must fail. However, simply because Landfill believes the changes to be more restrictive, does not mean it is so. Determinations of what is more or less restrictive can be the subject of heated debate even among experts in the field of landfill design and operation, and certainly a member of the County Board or the public could disagree with Landfill's judgment of what is more restrictive. For example (and without implying any substantive finding on this issue), an amendment to have several times as many boring samples taken of the liner material may to some appear "more restrictive." However, others may believe that an increase in the number of such samples will not result in any significant improvement in the soil analysis while it could create additional discontinuites in the liner material which would increase the potential for leakage of leachate. Thus, they may believe the amendment to be less "restrictive."

As the County states, its primary concern "is to let the [County] Board members and the public know what specifically is being proposed so that comments can be written, investigations conducted, testimony offered and a decision made based on the same set of facts that everyone has notice." (County Brief, pp. 9-10). That goal is not only fundamentally fair, but also laudable. However, there are also competing interests involved. The County does have the power to impose conditions upon site location approval (in effect to make its own amendment to the application although it is not mandated to consider such conditions) and the ruling here tends to frustrate the use of that power as pointed out by one of the County Board members

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* The Board notes that the County ordinance was not used as the basis of the ruling at the County Board hearing and, in fact, had not been adopted at the time of hearing. The question of the propriety of the ordinance is, therefore, not before the Board.

(Pet. Ex. 4, pp. 22-23). Also, an overly strict construction of what constitutes an attempted amendment and evidence pertaining solely to such amendment could be abused to the point where an applicant's attempt to obtain a final decision in a timely fashion could be frustrated, although that does not appear to be the case here, especially since the County Board was allowed to ask Dr. Piskin about his recommendations, thereby ameliorating any harm which Landfill may have suffered due to the County's denial of its offer of evidence. This questioning appears to have elicited most, if not all, of the testimony Dr. Piskin had attempted to present earlier. (R. 1136-1146).

To summarize, the Board finds that the County Board's refusal to allow testimony was not fundamentally unfair, but cautions that such refusals should be carefully considered. Only rarely will the Board find the acceptance of evidence to be reversible error whereas the refusal will be closely scrutinized. Testimony which is accepted can be disregarded, and the Board favors a liberal construction of admissible evidence. Certainly, unfair surprise which time does not allow to be corrected should be avoided where it could have a substantial impact on the integrity of the proceeding, but the County Board should be cautious in finding that such surprise exists.*

On consideration of motions, the Board finds that the County Board's decision to close the record and consider the comments where one cross-petitioner offered another "motion" did not render the proceeding fundamentally unfair. Eventually, the record must close and a decision must be reached. Given the time constraints of the Act, the eighty-four hours of testimony and the volume of comments in this case, the County Board properly exercised its discretion to keep the record closed and to make a recommendation. This decision did not constitute fundamental unfairness to cross-petitioner.

Lastly, Landfill alleges that the McHenry County Siting Committee (Committee) conducted a "meeting" on February 18, 1985, in violation of the Open Meetings Act (Ill. Rev. Stat. 1983, ch. 102, par. 41 et seq.). (Pet. Brief pp. 53-57). This "meeting" was conducted after the Committee held its first public meeting on the same day. After this public meeting, the Chairman and the Committee's two attorneys adjourned to the Supervisor of Assessor's office in the McHenry County Courthouse. At this "meeting," the Chairman summoned, one at a time, five of the six Committee members (who were gathered outside of the Assessor's office) to discuss the merits of Landfill's application for a new regional pollution control facility with the Chairman and the attorneys. At the Pollution Control Board hearing on July 25,

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* In most, if not all cases, even this element of suprise could be avoided by the applicant's waiver of the statutory decision date for a period of time sufficient to cure that surprise.

1985, the parties stipulated that the four Committee members gathered outside of the Assessor's office did not discuss public business.* (Board hearing, pp. 41-42). Consequently, regardless of whether the Open Meetings Act applies, the Board concludes no "meeting" was conducted by the Chairman and the Committee's attorneys which could have violated that Act.

The Open Meetings Act defines a "meeting" as "any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business." (Ill. Rev. Stat. 1983, ch. 102, par. 41.02). Seven people constitute the McHenry County Siting Committee. At the Pollution Control Board hearing on July 25, 1985, the parties stipulated that a quorum of the Committee was five out of seven (Board hearing, p. 39). A majority of a quorum of the Committee would be three. The "meeting" conducted by the Chairman and the Committee's attorneys never exceeded two. Consequently, the Board is of the opinion that no "meeting" occurred as defined in the Open Meetings Act since no majority of a quorum of the Committee was present at one time to discuss public business. In addition, the Board finds that while the structure of the "meeting" of the Chairman and the Committee's attorneys with five members of the Committee, one at a time, is unfortunate in that it may have had the appearance of improper deliberations, the "meeting" is not within the intent of the Open Meetings Act. One of the purposes of the Open Meetings Act is to prevent a caucus of a controlling number of members of a public board from deliberating in private. However, it is not the purpose of the Open Meetings Act to bar all discussions of public business in private among those who have the responsibility to decide public matters. Lastly, the Board notes that one of the goals of the landfill siting process is to ensure maximum public participation through proceedings open to the public. The McHenry County Siting Committee is urged to do everything within its authority to ensure that this goal is achieved.

Since it is the Board's opinion that McHenry County applied the incorrect standard of proof to Landfill's application for site approval, the Board has no proper subject for review before it. Consequently, the Board does not reach a decision on the merits of any other issues, and remands this case to the County Board, directing it to apply the proper standard of proof to Landfill's application for site suitability approval consistent

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*It should be noted that five Committee members were gathered outside of the Assessor's office but that at any one time four were outside and one was inside discussing the merits of petitioner's application with the Chairman and the Committee's attorney. Also the Board does not construe the gathering of the four Committee members outside of the Assessor's office to be "held for the purpose of discussing public business" since their "purpose" was to await one-on-one discussion of the proceeding rather than to discuss it among all those waiting.

with Industrial Salvage, Inc. v. County Board of Marion, PCB 83-173 (August 2, 1984, pp 3-4). Nothing in this opinion should be construed to imply that the Board requires a new hearing. The Board only requires a new vote to be taken after applying the correct standard of proof. However, the McHenry County Board may take whatever actions it deems appropriate consistent with this opinion.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

Upon review of the McHenry County Board's decision denying site suitability approval to McHenry County Landfill, Inc. for a new regional pollution control facility, the Board hereby remands the case to the McHenry County Board directing it to apply the preponderance of the evidence standard of proof to McHenry County Landfill, Inc.'s application for site suitability approval for a new regional pollution control facility.

IT IS SO ORDERED.

Board Members J. Theodore Meyer and J. Marlin dissented.

Board Member J. Anderson concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 20th day of September, 1985 by vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board