ILLINOIS POLLUTION CONTROL BOARD
January 21, 1988

MCLEAN COUNTY DISPOSAL COMPANY, INC.,	)	
Petitioner,	)	
v.	)	PCB 87-133
COUNTY OF MCLEAN,	)	
Respondent.	)	

CONCURRING OPINION (by J. Marlin):

I agree that in this matter the legally correct decision is to conclude that site approval is granted by operation of law. However, I believe that additional comments are warranted.

This proceeding highlights to an extent greater than most the frustrating situations which the current landfill siting law is visiting upon all those involved with the process. From the beginning, this law has been subject to numerous conflicting interpretations. The Courts have regularly held that the law is to be interpreted quite strictly, and the Legislature has amended it precisely and narrowly in response to perceived problems. The result has been a multi-year co-evolutionary struggle between various factions. Each faction strives to find a new technical maneuver or interpretation to get around the innovation established by the other faction in a prior proceeding. The process has degenerated to the point where procedural technicalities and artful interpretations are used by both landfill opponents and proponents with the result that this Board finds it increasingly difficult to reach the merits.

The Board consequently finds itself unable to consider the merits of an increasingly large proportion of the landfills which reach it on appeal. The simple fact is that procedural and fundamental fairness issues need to be addressed before the merits. This often results in remands or dismissals. A dismissal or remand coming after the applicant and County have invested thousands of dollars and hundreds of hours in the process is guaranteed to increase the frustration level of the participants. In this case, the alternative to the majority finding was a remand -- which would still not reach the merits. Much of the problem stems from the holding that the landfill siting process at the local level is a quasi-judicial function. Local officials are legislators with little judicial experience and frequently run afoul of judicial fairness considerations, especially those prohibiting what they view as normal contact

with their constituents. The Board is prohibited from considering the evidence de novo and thus is unable to overlook or bypass procedural issues and go directly to the merits.

If the Board had accepted the minority position in this matter regarding the County Board's right to have rules which in effect "re-start the clock after an application is filed" a number of complications would occur. The filing triggers a number of steps in the landfill law. Using McLean County's process, would open a variety of new avenues for technical appeals of decisions. For example, in this case the applicant did not issue notice of the "new filing date" and submitted only a few pages of additional information instead of an entirely new and complete application. Both of these points could have been contested in an appeal brought by an opponent who did not like a county decision favoring the landfill. There are numerous other complications inherent in this process which could lead to further appeals. Another potential problem involves how a determination of incompleteness will mesh with the recently passed State law providing that a landfill at a rejected site may not have a second application submitted for at least two years.

The County does not need full-blown merit hearings to reach jurisdictional and completeness issues. The County could easily and properly handle an inadequate information situation by holding a hearing on completeness, jurisdiction, and fairness and then deciding by a vote of the entire County Board whether or not to reject the application. There is no need to go through an entire merit hearing process to conclude that an application will be rejected. However, the current law does require a hearing and a vote by the full County Board.

I do not necessarily agree with everything said on page eight of the majority opinion regarding the extent to which a county can establish rules governing the siting process. The counties obviously need the ability to control a hearing so that the process is fair, understandable, and orderly. However, it is equally obvious that the State will be ill served by 102 different complex county ordinances specifying in detail what each County Board considers to be an adequate application and procedure. Unfortunately, the landfill siting law gives limited guidance in this area and authorizes no entity to establish firm rules up front. The rules unfortunately are being established over time on appeal. Given this situation, and the strict interpretations of reviewing courts, counties would be well advised to keep their rules as close as possible to the language of the Act.

I do not agree with the majority statement on page nine regarding the findings of the County's technical adviser. At best, the documents provided to the Board, including the stipulation are unclear as to whether she believes a leachate collection system is necessary (Staff Report) or should be

included only if new Board regulations require it (Stipulation). Fortunately the Illinois Environmental Protection Agency will be able to consider this matter in detail during the permitting process.

I believe that the Board should have made a firm holding that tape recordings and transcripts of tape recordings are not to be considered an acceptable record for County Board members or this Board to review. In the City of Columbia, the Board allowed an appeal to proceed where the County Board had reviewed a written transcript of a tape recording of the hearing. The Board did caution, however, that this process had several undesirable features. In the instant proceeding, the County Board had only a pile of tapes and was not ever provided with a written transcript. It is difficult to conclude that anyone could adequately review sixteen days of hearings by listening to the tapes even if they had the required amount of time. Among other things, with a tape it is extemely difficult if not impossible for someone to scan a record for important points or break into a discussion of a particular point and then page back to see who is speaking without listening to an entire sequence. One cannot be sure who the speaker is at any given point -- speakers on a tape are probably not identified individually every time they open their mouths as they are in a transcript. Additionally it would be quite difficult to check a point after hearing it once. Winding tapes and resetting counters is much more complicated than going back to a given page. It would be extremely difficult to make any sense out of a pile of tapes covering sixteen hearings unless there was an incredibly detailed index. In addition, it would be difficult for members to share a tape recorder and tapes as they can a multi-volume transcript. The official typed transcript provided to this Board (but not the County Board) is about a foot thick. Tapes simply cannot substitute for a paper transcript when one is trying to reach a reasoned decision based on the complex testimony of competing witnesses.

Also, it is important to note that in Ash v. Iroquois County Board, PCB 87-29, (July 16, 1987), the Board quoted the following passage which is taken from Homefinders, Inc. v. City of Evanston, 65 Ill. 2d 115, (1976):

> The requirements of due process are met if the decision-making board considers the evidence contained in the report of proceedings before the hearing officer and bases its determinations thereon...We are in accord with the majority view and conclude that the requirements of procedural due process would be met under the Evanston Fair Housing Ordinance if those members who were not personnally present at the hearings based their determination of penalties on the

evidence contained in the transcript of such proceeding. 65 Ill. 2d 115 at 128-129. (emphasis added).

Ash, slip. op. at 10

In other words, when decision-makers do not attend hearings, due process requires that they consider the written transcript of those hearings before rendering a decision. Therefore, it could be argued that the decision by the McLean County Board was fundamentally unfair, since the County Board members who did not attend the hearings could only contemplate a pile of tapes -- not transcripts.

For these reasons, I concur.

John C. Marlin

John C. Marlin

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 26th day of January, 1988.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board