ILLINOIS POLLUTION CONTROL BOARD
May 25, 1989

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

THOMAS J. IMMEL (IMMEL, ZELLE, OGREN, McCLAIN, GERMERAAD & COSTELLO), APPEARED ON BEHALF OF McLEAN COUNTY DISPOSAL, INC.;

ERIC T. RUUD, ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF McLEAN COUNTY.

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

This matter is before the Board on remand from the Fourth District Appellate Court. The Fourth District issued its opinion in this matter on December 28, 1988. That opinion affirmed in part and reversed in part the Board's January 21, 1988 Opinion and Order in this proceeding. The court remanded the case with instructions. The Appellate Court issued its mandate on March 1, 1989.

The Board's January 21, 1988 Opinion and Order sets forth the detailed procedural history of this matter. A summary of the more relevant highlights is useful here. The McLean County Board ("McLean County") denied McLean County Disposal Company's ("MCDC") Section 39.2 application for landfill siting approval on August 18, 1987. McLean County found that MCDC had failed in its burden of proof as to three of the Section 39.2 statutory siting criteria contained in the Environmental Protection Act ("Act"):

> [Criterion No.] 2. The facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
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> [Criterion No.] 3. The facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property; [and]

> [Criterion No.] 6. The traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows;
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> Ill. Rev. Stat. ch. 111 1/2, par. 1039.2(a).

MCDC filed a Section 40.1 petition for Board review of this decision on August 31, 1987. MCDC asserted that the McLean County determinations on the three statutory criteria were against the manifest weight of the evidence; that McLean County defaulted by not rendering its decision within 180 days, as prescribed by Section 39.2; and that the decision was the result of a fundamentally unfair procedure.

By its January 21, 1988 Opinion and Order, the Board determined that McLean County had defaulted on the statutory 180-day deadline for decision. The Board felt that the time for decision began to run from the original date of filing. McLean County Disposal Co. v. County of McLean, PCB 87-133, slip op. at 5 (Jan. 27, 1988). The Board noted, but did not decide the fundamental fairness issue involving the lack of a written transcript. Nor did the Board address the merits of the application with regard to the three substantive criteria. Id. at 9-10.

The Fourth District Appellate Court reversed the Board on the 180-day default issue. The court held that MCDC had waived its right to an earlier McLean County decision by participating in the McLean County proceedings after the statutory time for public hearings had passed. Citizens Against the Randolph Landfill v. County of McLean, slip op. at 17-18 (4th Dist. Dec. 28, 1988). (The court also held that the 35-day period for MCDC to appeal the January 21, 1988 Opinion and Order began to run from the Board's March 10, 1988 Order denying reconsideration, Id. at 8, and affirmed the Board's March 10, 1988 denial of the Citizens Against the Randolph Landfill's petition to intervene. Id. at 12.) The court did not expressly address the fundamental fairness issue raised by MCDC before the Board. The court remanded the proceeding to the Board with directions. Id. at 19.

Fundamental Fairness -- The Lack of Transcripts

The Board's January 21, 1988 Opinion and Order includes the vital facts relating to this issue. The Board noted that McLean County had a certified shorthand reporter at all hearings, and the reporter did transcribe the proceedings. But, the reporter did not prepare the written transcripts until after MCDC filed its appeal with this Board. Instead, audio tapes of the proceedings were available to the County Board members. McLean County Disposal at 9. The January 21, 1988 Opinion and Order of this Board framed the issue as "whether audio tapes are equivalent to written transcripts for purposes of Ash v. Iroquois County Board, PCB 87-29 (July 16, 1987)," appeal dismissed over

objections, (3d Dist. Sep. 14, 1987). McLean County Disposal, slip op. at 9 (Jan. 21, 1988).*

In the Ash case, the written transcripts of the County Board proceedings were unavailable to the individual County Board members until late on the evening before the morning vote on the application for siting approval. The Board found that "there was no time or reasonable opportunity for the board members to adequately consider the record prior to decision," Ash, slip op. at 11, and held that this decision derived "in a fundamentally unfair manner for this reason." Id. at 12.

MCDC would have the Board apply Ash to declare McLean County's procedures fundamentally unfair because no written transcript was available for review prior to McLean County's decision on its siting application. MCDC argues that only a small minority of the County Board members were familiar with the county record. MCDC goes on to assert:

> The closer question presented in this case is what happens when the County Board elects not to listen to the tapes or review the evidence that is available, but simply votes against the facility for unspecified reasons. Clearly the question does not go to an invasion of the fact finder's thought processes. Rather the question is whether there were any thought processes at all. In this case, as the record seems to reflect, at least a majority of the County Board did not participate in a thought process which utilized the evidence generated at the public hearings.
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> MCDC Brief at 4 (emphasis in original).

McLean County interprets Ash to require that each County Board member must have an opportunity to review the record before voting. It asserts that the availability of the tape recordings of its proceedings satisfies this requirement. McLean County Response at 2-3.

As to whether it is sufficient to provide County Board members an opportunity to review the record before voting, the Board agrees with McLean County; the Board recently stated, with regard to the fundamental fairness issue and the duty of county board members to gain familiarity with the record, as follows:

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* On May 23, 1989, the Board was notified that its judgment in the Ash cases was affirmed by the Third District Appellate Court (Case No. 3-88-0376, February 9, 1989).

> The Board believes that a fundamentally fair process and a decision rendered exclusively on the county's record would require each voting county board member to have gained some degree of familiarity with that record in some way. However, [the petitioner's] argument raises another important issue. This is an issue with which the United States Supreme Court has had difficulty .... That issue defines the extent to which this Board can inquire into the [county board] members' decisionmaking mental processes by allowing their interrogation as to how and the extent to which each became familiar with the record. The Board adopts the Supreme Court's position: each voting [county board] member had an individual duty to somehow familiarize himself or herself with the county record prior to rendering a vote on the issues involved; however, this Board cannot inquire as to how and the extent to which each fulfilled that obligation.
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> City of Rockford v. Winnebago County Board, PCB 88-107, slip op. at 4 (Nov. 17, 1988) (citing United States v. Morgan, 313 U.S. 409, 422 (1941)).

Therefore, as a general rule, this Board will not inquire as to whether board members who have not attended public hearings conducted under Section 39.2 of the Act actually listened to tape recordings or actually read written transcripts of those hearings. This is an impermissible inquiry. See United States v. Morgan, 313 U.S. 409 (1941); Morgan v. United States, 304 U.S. 1 (1938); Morgan v. United States, 298 U.S. 468 (1936). It is enough that the record is available to the County Board members. See Waste Management of Illinois, Inc. v. Pollution Control Board, 463 N.E. 2d 969, 974, 123 Ill. App. 3d 1075, 79 Ill. Dec. 415 (1987), (citing Homefinders, Inc. v. City of Evanston, 357 N.E. 2d 785, 791, 65 Ill.2d 115, 2 Ill. Dec. 565) (1976). The issue then reduces to whether the County Board members could have fulfilled their individual obligations to review the record by using such tapes.

That issue, in turn, devolves into two component issues:

1. Whether the audio tapes in this case were qualitatively sufficient to give individual County Board members familiarity with the record.

2. Whether audio tapes can comprise an adequate record for purposes of review by a unit of local government consistent with Sections 39.2 and 40.1 of the Act.

With respect to the first component issue, the Board finds that the record does not disclose whether the audio tapes employed in the County Board proceedings are qualitatively adequate to give individual County Board members familiarity with the hearing record. The Board notes that the hearing record before the County Board in this proceeding is not the hearing record before this Board. The hearing record before the County Board consisted of audio tapes. The record before this Board consists of written transcriptions prepared contemporaneously and certified as true and accurate by certified shorthand reporters. We do not know whether these two versions of the same proceeding are essentially identical. Were the audio tape recordings of the County proceedings complete? Were they audible? Is it possible to determine from the audio tapes which of the participants is speaking? Did background noises or technical problems preclude comprehension? The County does not tell us; the transcribed record currently before us cannot tell us.

We cannot overlook the fact that a majority of the County Board did not attend the public hearings. For these individuals, the only means of ascertaining the content of the hearing record was recourse to the audio tapes. It thus is critical to any determination of fundamental fairness that the audio tapes be sufficient, in conjunction with other elements of the record, to familiarize County Board members with what transpires at the hearing.

Nor can we overlook the fact that, at hearings before the County Board, MCDC had no means of knowing that the County intended to rely solely upon the audio tape recordings as the means of familiarizing individual County Board members with the content of the record. This being so, it cannot be said that MCDC, by failing to object to such reliance at hearing, has waived that objection on appeal.

With respect to the second component issue, and although the Board does not believe that reliance on a taped record of any proceeding is a good practice for any tribunal, it cannot conclude that it is impossible in all cases to gain a clear, complete, and accurate impression of a hearing record by their use. Although the Board has found no Illinois case directly on point, it has found a New Jersey case which upholds reliance upon the availability of an audio taped "record". See Wildlife Preserves, Inc. v. Borough of Lincoln Park, 377 A.2d 706, 151 N.J. Super. 533 (1977).

Nevertheless, taped records provide problems for original decisionmakers. The Board's January 21, 1988 Opinion and Order and Concurring Opinion both highlight a number of these potential problems. McLean County Disposal, PCB 87-133, at 9; Concurring Opinion at 3. The Board will not reiterate them here, but they

all relate to the difficulty of gaining a complete, audible, and accurate account of the hearing by use of such tapes for review. The Board has also noted that audio tapes may cause problems in identifying the speakers and their respective positions. See Moore v. Wayne County Board, PCB 86-197, Slip. Op. at 5 (June 2, 1988).

It is apparent that the General Assembly was cognizant of these potential problems when it enacted the so-called "SB172" provisions which controls the instant siting proceeding. Those provisions include Sections 39.2 and 40.1 of the Act, which govern the creation of a record by the affected county or municipality and mandates the consideration of that record by this Board in the course of making its orders and determinations on appeal. Section 39.2(d) in relevant part states:

> At least one public hearing is to be held by the county board ... no sooner than 90 days but no later than 120 days from receipt of the request for site approval. ... The public hearing shall develop a record sufficient to form the basis of appeal of the decision in accordance with Section 40.1 of this Act. (Emphasis added).

Section 40.1(a) specifically prescribes the form of the record before this Board as follows:

> "In making its orders and determinations under this Section, the Board shall include in its consideration the written decision and reasons for the decision of the county board ..., the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board ..." (emphasis added);

The Board construes the foregoing as at the very least evincing a very strong bias on behalf of the General Assembly in favor of transcribed hearing records as the basis for decision. It is likely that the General Assembly did not anticipate that a county or municipality might, as McLean County here attempts to do, employ a dual record process under which the written transcription is reserved solely for use by this Board on appeal, while the County Board members use some other form of record as the basis for informing their consideration.

As has been noted previously, the hearing record now before this Board is not the record previously before the County Board. The record before this Board does not, cannot, disclose the content or quality of the audio tape record before the County

Board. McLean County essentially urges this Board to accept carte blanche the tape recordings which were made available to the County Board members. This we decline to do.

Further, we hold that tape recordings are inherently unacceptable as the sole means by which a member of a County Board or governing body of a municipality may acquaint himself or herself with the content of a public hearing under Section 39.2 of the Act. This conclusion is compelled by the nature of the inherent problems and limitations attending tape recordings, considered together with the practical impossibility of remedying such deficiencies as may occur.

Written transcripts may also contain defects, to be sure. Unlike audio tape recordings, however, written transcripts can be corrected upon motion of either party. Moreover, the nature of the potential flaws and defects of audio tape records include gaps ranging from several minutes to hours, human error (as when the operator engages the "play" control rather than "record") and accidental over-recording of a tape track. The list of such potential audio tape record defects is not limited to these few examples. The distinguishing features which they have in common are that such defects are not readily discernable as they occur and are not readily capable of remedying after the fact. In view of these and other inherent problems with tape recordings, including some which are not defects per se (including the virtual impossibility of indexing and of efficiently researching a specific portion or subject of testimony within a lengthy audio tape record), and the expressed clear preference of the Act for written transcription, we conclude that audio tape records are not acceptable for purposes of Section 39.2 of the Act as the sole means of ascertaining the content of the hearing record.

More than mere form is at stake here. This is not merely about the use of audio tape recordings rather than some other medium. Our concern is, as noted, with the very nature of the record required by Sections 39.2 and 40.1 of the Act, and whether this Board can re-review a hearing record (i.e., the transcribed hearing record provided to this Board) which was not capable of being reviewed by the County Board in the first instance. Our concern, moreover, transcends the "transcribed record" requirement of 40.1(a) to include the "fundamental fairness" requirement as well. A "record" contained in an audio tape recording which is incomplete, inaudible, or otherwise incomprehensible is certainly no more "available" to decision makers than is a record embodied solely in a court reporter machine's paper tape. Just as this Board cannot accept the latter, it cannot accept the former. We do not know the quality and content of the audio tapes before the County Board. We have been provided no assurance, in the nature of a certification, affidavit or otherwise, that the audio tape "record" is true and accurate. We therefore cannot assume their quality and content

to be satisfactory as a basis for consideration of the record, particularly in light of the manifest intent of Sections 39.2 and 40.1 of the Act.

The Board's conclusion is bolstered by the facts of this case. The transcribed hearing record provided to this Board on appeal occupies sixteen volumes (2,190 pages), reflecting the sixteen days of hearing held between June 16 and July 8, 1987. As in every local siting proceeding under the Act, the substantive issues considered in this case are complex and technical. The common law record which is to be assimilated with the hearing record consists of 623 documents. The application, not including many supplementary maps, study reports, engineering drawings and other documents, is 47 pages long. It is abundantly clear that this proceeding cannot be adequately reviewed through the use of audio tapes.

Even were we to decide otherwise, (i.e., that audio tapes could be considered an adequate "hearing record" for consideration by the County Board), the outcome in this proceeding would essentially be the same. As noted above, the "record" before the Board is not the "record" before the County Board. It is axiomatic that this Board can only review on appeal that record which has been available for consideration in proceedings below. Thus, even if audio tapes were to be allowed, the transcripts provided to this Board of necessity would be required to be based on the audio tapes and suitable in form for Board review (e.g., properly indexed and certified).

For the foregoing reasons, this matter is remanded to the McLean County Board for reconsideration. This remand shall be satisfied by consideration of the written transcript delivered previously to this Board by McLean County.

IT IS SO ORDERED.

J. D. Dumelle and B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 25th day of May, 1989, by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board