ILLINOIS POLLUTION CONTROL BOARD
October 18, 1989

CHRISTIAN COUNTY LANDFILL, INC., Petitioner,	)	
v.	)	PCB 89-92
CHRISTIAN COUNTY BOARD, Respondent.	)	

DISSENTING OPINION (by B. Forcade):

I dissent from the majority's action today. I believe the sweeping rejection of the Christian County Board's conditions is not warranted.

The Environmental Protection Act ("Act") allows local governments to approve or deny the siting of landfills such as the one under review here. If the county board decides to approve, it may impose conditions upon that approval. Section 39.2 (e) of the Act states in pertinent part:

> ***In granting approval for a site the county board or governing body of the municipality may impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section and as are not inconsistent with regulations promulgated by the Board. *** (Emphasis added).

In evaluating the distinction between decisions to grant or deny site approval and decisions to impose conditions, the courts have generally held the former to be adjudicatory in nature and the latter to be legislative in nature. Our Second District reached its conclusion after evaluating similar law in the Act regarding this Board's authority relating to variances:

> While the line between adjudication and rule making "may not always be a bright one", the basic distinction is one "between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." (United States v. Florida East Coast Railway Company, 410 U.S. 224, 245, 93 S.Ct. 810, 821, 35 L.Ed.2d 223, 239 (1973).) Under section 39.2 the Board's decision on the grant or denial of a permit turns on its resolution of disputed fact issues, whether the particular

> landfill, or expansion, for which the permit is sought meets the specific factual criteria set out in section 39.2 of the Act. The facts that the Board relies on are developed primarily by the immediate parties rather than acquired through the Board's own expertise.
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> Our supreme court has held that the decision whether to grant a variance from an environmental regulation is quasi-adjudicatory, although the imposition of conditions on the variance is rule making. (Monsanto v. Pollution Control Board, 67 Ill.2d 276, 289-90, 10 Ill.Dec. 231, 367 N.E.2d 684 (1977). See also Environmental Protection Agency v. PCB, 86 Ill.2d 390, 400, 56 Ill.Dec. 82, 427 N.E.2d 162 (1981); Willowbrook Dev. Corp. v. Pollution Cont. Bd., 92 Ill.App.3d 1074, 1081-82, 48 Ill.Dec. 354, 416 N.E.2d 385 (1981).) As the factual criteria involved in the County Board's decision under Section 39.2 are not substantially broader than those in the statutes involved in the above-cited cases, we adopt a similar rule here.
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> E&E Hauling, Inc. et al v. PCB and The Village of Hanover Park, 116 Ill.App.3d 451, 451 N.E.2d 566 (Second Dist., 1983).

In a similar proceeding the Third District also determined that the decision to approve or deny is adjudicative and the imposition of conditions is legislative:

> The characterization of these proceedings does not fit comfortably into any particular niche. They are adjudicatory in the sense that the County Board takes evidence on the disputed issue of whether the six statutory criteria are satisfied. However, they are legislative in the sense that imposition or deletion of conditions is "the promulgation of policy-type rules or standards" U.S. v. Florida East Coast Railway Company (1973), 410 U.S. 224, 245, 93 S.Ct. 810, 821, 35 L.Ed.2d 223, 239.
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> Town of Ottawa v. IPCB, 129 Ill.App.3d 121, 472 N.E.2d 150 (Third Dist., 1984).

The seminal case on the standard of review for adjudicatory and legislative decisionmaking is Monsanto Company v. Pollution Control Board 67 Ill. 2d 276, 367 N.E. 2d 684 (1977). There, our Supreme Court held that the imposition of conditions involves policy planning for future conduct and should be reviewed accordingly:

The setting of conditions, unlike the decision to grant a variance, is not quasi-judicial in nature, but rather is one manifestation of the power granted the Board to act as the policy-making body. Section 36 of the Act is a rather broad delegation to the Board of power to impose whatever conditions are necessary to effectuate as nearly as possible the policies of the Act when a variance from statewide standards is granted. It is, in a word, rule-making power, in the sense that its focus is on future conduct and its efficacy depends upon agency expertise. "Judicial judgment should not be substituted for administrative judgment on questions within the agency's statutory power of rule making." (Davis, Administrative Law, sec. 30.10, at 247 (1958).) The Board, unlike this court, is well equipped to determine the degree of danger which a pollutant will cause, and then to balance that public threat against an alleged individual hardship and reach a conclusion as to what limits should be placed upon a temporary variance. The power granted to the Board by section 36 is tantamount to the quasi-legislative power to make prospective regulations and orders. (See Illinois Central R.R. Co. v. Franklin County (1944), 387 Ill. 301, 56 N.E.2d 775.) When a regulation is promulgated by an agency pursuant to a grant of legislative power, a reviewing court should not substitute its judgment as to the content of the regulation, because the legislature has placed the power to create such regulations in the agency and not in the court. (Davis, Administrative Law sec. 5.03 (1958).) Since in setting interim discharge standards the Board is, in effect, making future policy pursuant to the legislative delegation of section 36(a), we must be just as circumspect about interfering with the Board's discretion in establishing variance conditions as we are in dealing with the enactment of regulations. In summary, then, the proper scope of review of conditions limiting a variance is the same as that applied, to board regulations in Illinois Coal Operators Association: whether the Board's action was arbitrary, unreasonable, or capricious. See Currie, Rulemaking Under the Illinois Pollution Law, 42 U.Chi.L.Rev. 457, 479 (1975).

This holding was specifically reaffirmed by the Supreme Court four years later in Environmental Protection Agency v. Pollution Control Board 86 Ill. 2d 390, 427 N.E. 2d 162 (1981). Since the "arbitrary and capricious" standard is never mentioned in the majority opinion, I believe the majority has applied the incorrect standard of review.

Based on the foregoing authority I would find that the conditions imposed by the Christian County Board must be affirmed unless they are clearly arbitrary, unreasonable, or capricious. Further, such conditions may be imposed to accomplish the purposes of Section 39.2, which means that local authorities can impose "technical" conditions on siting approval. County of Lake v. Pollution Control Board, 120 Ill. App. 3d 89, 457 N.E. 2d 1309 (2nd District, 1983). And, there is no requirement that the county detail the relationship between the criteria and the conditions which support them. E&E Hauling, Supra. With this background it is appropriate to look at the conditions stricken by the majority.

The first condition I would like to review is condition E. That condition relates to granting disposal priority to waste from Christian County. The language of the condition, and the reasons the Committee recommended its inclusion are as follows:

> That Christian County refuse haulers be given priority at the proposed site for their refuse if any daily limit is reached provided the applicable fee for disposal is paid. Christian County refuse haulers shall be defined as any refuse hauler carrying refuse from or produced in Christian County.
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> The Committee recommends this condition to the Christian County Board after considering the following factors: First, Christian County is providing a regional site for the disposal of regional waste. Second, the Committee finds that the facility is necessary to accommodate the waste needs of Christian County primarily. Third, the Committee has received no evidence to show that a larger flow of truck traffic caused by out of county trash haulers would not increase the danger to Christian County drivers using Illinois Route 104 and other Christian County roads.

The condition is claimed to relate to two components of Section 39.2, namely, criterion 1 (the need criterion) and criterion 6 (the traffic criterion). Those criteria provide as follows:

> 1. The facility is necessary to accommodate the waste needs of the area it is intended to serve; and

6. The traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic.

It is obvious that the condition relates to "the waste needs of the area intended to be served", and "the traffic patterns to and from the facility." The question then becomes whether the condition is clearly arbitrary or capricious. To make this determination it is necessary to review prior Board holdings, especially on the need criterion, Criterion #1.

The Board has long had difficulty with the need criterion, i.e., what is the "area intended to be served" and who gets to define it. If the applicant alone can determine what the area will be, and the applicant includes some portion of Chicago in that area, then need will almost certainly be shown in all cases. A factual situation similar to this arose in FACT v. Village of Fairview, PCB 89-33, June 22, 1989. There the applicant defined the area intended to be served as the area around Fairview, and the area around Chicago, approximately 150 miles to the northeast. In evaluating whether such a distant and discontinuous area could be included in the area intended to be served, this Board held that the local government body has the right to determine whether the proposed service area is acceptable or unacceptable:

> The Board also rejects FACT's claim that allowing Gallatin to include northeastern Illinois in the proposed service area would effectively abolish the need criterion. FACT alleges that a landfill applicant could always propose accepting a small amount of waste from large urban and industrial areas and thus always establish a need for the proposed facility. FACT's argument misapprehends the intent and the language of the statute. Criterion one is whether "the facility is necessary to accommodate the waste needs of the area it is intended to serve." Section 39.2(a)(1) of the Act. Gallatin has defined the area the facility is intended to serve as Fulton County and five adjoining counties, plus six counties in northeastern Illinois. (R. Vol. III at 6). By finding that criterion one has been satisfied, the Village Board has accepted Gallatin's proposed service area. The landfill siting process in Illinois gives local governments the authority to decide certain issues in that process, including (at least by implication) the area intended to be served. The statute does not say "local area", or make any implication that the geographical area of service is limited. The

> Village Board has the power to determine if a proposed service area is acceptable or unacceptable, and the Village Board made an affirmative decision on the issue. This Board will not disturb that decision.

The Board has repeatedly upheld local government denials on the need criterion where local governments could have reasonably chosen a different area or where the applicant chosen area might be described as gerrymandering. A.R.F. v. Lake County Board, PCB 89-15, May 29, 1989; Waste Management v. Lake County Board, PCB 88-190, April 6, 1989; Roger Tate et al. v. Macon County Board, PCB 88-126, December 15, 1988; Waste Management v. Lake County Board, PCB 87-75, December 17, 1987; A.R.F. v. Lake County Board, PCB 87-51, October 1, 1987; and Industrial Salvage v. County Board of Marion, PCB 83-173, February 22, 1984.

In this case, Christian County could have denied the application because the area intended to be served was too large. The Christian County Board could have determined that the appropriate area was only Christian County. Based on the existing precedent of decisions by this Board, such a decision would have been affirmed. If Christian County could have denied a landfill that would accept out of county waste, then it seems neither arbitrary or capricious to grant approval with a condition that local waste be given priority.

I also reject any argument that such limitations violate constitutional concepts. No one has presented facts to show a burden on interstate commerce, and the constitution does not address intrastate commerce.

In summary, I cannot find that the contested condition is unrelated to factors under Section 39.2, or that the condition is clearly arbitrary or capricious. I will not substitute my judgment for that of the County Board. Therefore, I would affirm the condition.

The second condition I would review is condition G. That condition and the reasons the committee recommended it are as follows:

> That the Sheriff of Christian County, or the Christian County Health and Sanitary Officer or any designated body authorized by the Christian County Board shall have the right to inspect the premises or do testing of or at the proposed site as is deemed necessary to protect the citizens of Christian County.
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> The committee recommends this condition to the County Board to ensure that there are adequate powers necessary to assure the citizens of Christian County that criteria ii and v are

> being complied with by the Christian County Landfill, Inc.

Again, this condition seems clearly related to criteria under Section 39.2, leaving only the question of whether it is clearly arbitrary or capricious. Based on an analysis of what conditions a county board can adopt and what methods it may use to enforce those conditions, I conclude that an inspection condition is not arbitrary or capricious.

Local governments have an "unequivocal statutory directive to consider the public health ramifications" of proposed landfills. City of East Peoria v. PCB, 117 Ill.App.3d 673, 452 N.E. 2d 1378 (Third District, 1983). Further, local governments can impose "technical conditions" on siting approval to accomplish the purposes of Section 39.2 , County of Lake v. PCB , 120 Ill.App.3d 89, 457 N.E. 2d 1309, (Second District, 1983). Once those technical conditions are imposed, the Act implies a power to enforce them. In addressing the ability of counties to enforce conditions the Second District stated:

> ...The power to impose conditions under section 39.2(e) implies a power to enforce them. (Ill. Rev. Stat., 1982 Supp., ch. 111½, par. 1039.2(e).) The County Board can enforce its conditions in an action before the PCB as provided in sections 31(b) and 33(a). The broad language in those sections states that:
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> > Any person may file with the Board a complaint... against any person allegedly violating this Act.... (Ill. Rev. Stat., 1982 Supp., ch. 111½, par. 1031(b).). also
> >
> > [T]he Board shall issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances. (Ill. Rev. Stat. 1981, ch. 111½, par. 1033(a).)
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> Siting approval conditions are imposed by virtue of the authority of the Act. A violation of a condition properly imposed under this authority is a violation of the Act. The County Board then is left with the "private remedies" (Ill. Rev. Stat. 1981, ch. 111½, par. 1002(b)), afforded under these sections.
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> County of Lake, Supra.

If the Act authorizes local governments to impose technical conditions, and authorizes local governments to enforce those conditions and prevent their violation, then I believe the Act must also, of necessity imply a right to determine by inspection whether its conditions are being violated. Otherwise the right to impose and enforce conditions would be meaningless.

The ability of local governments to impose an "inspection condition" has long been controversial at this Board. The rationale for allowing inspection was persuasively stated in a dissenting opinion in 1982:

> Before "recommendations" can be made, the County must have information. The majority, in striking Condition "E" denies to the County the inspection of special waste manifests and also the right to test wastes for verification. Yet in Board discussion no one objected to County inspection of the special waste manifests. Condition "E", as a minimum, could have been amended to at least allow inspection of the manifests.
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> Let us review a key criterion in the Act. It reads as follows:
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> > 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)] (emphasis added).
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> The operation of a special wastes landfill can imperil public health. Certain organic solvents such as acetone, toluene and xylene are known to make clay layers more permeable and thus easier for leachate passage to water supply aquifers. Inspection of manifest documents to verify the important liquid: solid ratio is a method of insuring the public health and safety. This power was denied by the rejection of Condition "E".
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> Beyond inspection of manifests comes the verification of substances disposed. How is mislabelling to be detected? It can only be found by chemical testing. The remainder of Condition "E" would have allowed Lake County to take samples for its own testing. What is the harm in doing this? The procedure would keep the site operator and the hauler on their toes. The IEPA, strapped for funds, cannot do more than a token effort in this regard.

> I would have allowed Condition "E" in full so long as disposal operations were not seriously slowed by sample taking. Lake County should be allowed to protect its citizens and its aquifers from the disposal of improper types or quantities of special wastes.
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> Browning-Ferris Industries v. County of Lake, PCB 82-101, Dissenting Opinion of Jacob D. Dumelle, December 2, 1982.

Based on this evaluation, I cannot find that the inspection condition under review here is arbitrary or capricious. I would affirm the condition.

While these are not the only conditions reviewed by the majority, they are indicative of the different approach I take to review of conditions. Accordingly, I dissent. Until the courts more clearly define the role of this Board in review of County Board conditions, I am especially reluctant to overturn such conditions.

Bill S. Forcade, Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 26th day of October, 1989.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board