ILLINOIS POLLUTION CONTROL BOARD
January 21, 1988

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.; and

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

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

This matter is before the Board on an August 31, 1987 petition for review. Petitioner, McLean County Disposal, Inc., seeks review of the decision of the McLean County Board denying site approval of petitioner's proposed regional pollution control facility.

Procedural History

On January 22, 1987 petitioner submitted its application for siting approval of a non-hazardous solid waste landfill to be located in McLean County, Illinois. Petitioner proposed construction of a 45.75 acre landfill located in the northerly portion of a 103-acre tract of land owned by petitioner. This tract is located adjacent to the unincorporated hamlet of Randolph, Illinois, and immediately south of McLean County Highway 36 (also known as Road 625 North). Petitioner submitted a $12,000 filing fee with the application.

On February 19, 1987 the county board's pollution control site hearing committee (hearing committee) rejected the application. This rejection was based upon a county resolution setting forth procedures for hearing regional pollution control facility siting requests. Section 33.04 of that resolution provides that "[n]o application for site approval shall be deemed to have been filed or accepted for filing unless all requirements of this resolution . . . shall have been met." The hearing committee found that the application was deficient in seventeen

areas and thus not complete. Petitioner subsequently submitted supplemental information. That information included the following disclaimer:

> "All of the foregoing information is being provided so as to meet the requirements of the County Ordinance [sic] and to specifically address objections raised in the County Board's Resolution of February 19. In providing this information, the applicant does not waive any objections that it has to the nature and content of the County Ordinance [sic] or to any actions taken by the County Board since January 22, 1987 or thereafter, all of which objections are specifically preserved." (County Record, Document #17, p. 8 (hereinafter Doc. #).)

On March 17, 1987 the hearing committee accepted the application and directed the county clerk to deem it filed as of that date.

The hearing committee held sixteen public hearings between June 16, 1987 and July 8, 1987. In addition to petitioner, Citizens Against the Randolph Landfill, Inc. (C.A.R.L.) was represented by counsel and participated in the hearings. Petitioner presented five witnesses, and C.A.R.L. called six witnesses. The sixteenth hearing was reserved for public comment. At that hearing twenty-eight members of the public spoke against the application, and fifteen people spoke in favor of the proposal. Individual county board members received numerous letters and petitions from the public, both before and after the hearings. These letters and petitions were entered into the county record.

On August 10, 1987 the McLean County staff presented its report to the hearing committee. This staff report is provided for by Section 33.85(N) of the county resolution, and was prepared by the director of the building, zoning, and staffing department, the director of the health department, the director of environmental health, a senior engineer with the county highway department, the director of the regional planning commission, a technical advisor, an assistant state's attorney, and the supervisor of assessments. On August 11, 1987 the hearing committee made its findings and recommendations to the full county board. The hearing committee found that petitioner had met criteria 1, 4 and 5 of Section 39.2(a) of the Environmental Protection Act (Act) (Ill. Rev. Stat. 1985, ch. 111½, par. 1039.2(a)), but found that petitioner had not met criteria 2, 3, and 6. Therefore, the hearing committee recommended that petitioner's application for site approval be denied. On August 18, 1987 the full county board adopted the

findings and recommendations of the hearing committee and denied the application by a vote of 17-2, with one abstention.

The Board hearing in this matter was held on October 29, 1987.

Statutory Framework

At the local level, the site location suitability approval process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider six criteria when reviewing an application.[1] The six criteria are:

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

2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

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;

4. the facility is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation or the site is floodproofed to meet the standards and requirements of the Illinois Department of the Transportation and is approved by that Department;

5. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents; and

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

Section 39.2(e) states that if no final action is taken by the local authorities within 180 days of the filing of the request for site approval, the applicant may deem the request approved.

Section 40.1 of the Act charges the Board with reviewing the decision of the local authorities. Specifically, the Board is mandated to determine whether the findings made below regarding the six criteria are against the manifest weight of the evidence,

[1]Section 39.2 of the Act has been amended since the time of the instant proceedings.

and whether the procedures used there were fundamentally fair. E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E. 2d 555 (2nd Dist. 1983), aff'd in part 107 Ill. 2d 33, 481 N.E. 2d 664 (1985); Waste Mgt. of Ill., Inc. v. McHenry County Board, _____ Ill. App. 3d _____, _____ N.E. 2d _____, No. 2-87-0029 (2nd Dist. September 11, 1987) (reaffirming application by the Board of the manifest weight of the evidence standard of review to each criterion).

Petitioner raises three issues: (1) whether the county's failure to take final action on the application within 180 days after it was submitted constitutes a default; (2) whether the county's procedures were fundamentally unfair and (3) whether the county's decision that the application did not satisfy criteria 2, 3, and 6 was against the manifest weight of the evidence. Because the Board finds that the county failed to take final action within 180 days, as required by Section 39.2(e), the second and third contentions will not be discussed.

180-Day Default

As noted above, petitioner submitted its application and the required filing fee on January 22, 1987. On February 19, 1987, the application was rejected by the hearing committee, pursuant to the terms of the county resolution. Petitioner then filed supplemental information, but stated that it did not waive any objections to the nature and content of the county resolution or to actions taken by the county board. The hearing committee accepted the application on March 17, 1987 and deemed it filed as of that day. The full county board made its decision rejecting the application on August 18, 1987.

Petitioner argues that since it submitted the application on January 22, the date for final action by the county board was July 23. Since the county board did not make its decision until August 18, petitioner contends that the action was untimely and thus the siting request should be deemed approved by default. Petitioner admits that the county did not deem the application filed until March 17, but argues that the county has no authority to extend a running limitation period by accepting or rejecting an application for filing. Petitioner points out that Section 39.2(e) of the Act specifically provides for final action by the local authority within 180 days of the filing of an application, and that Section 39.2(d) requires at least one public hearing. Petitioner contends that the statute makes no provision for deciding that a document is filed on any date other than the date it is submitted, and does not allow a county or municipality to make any final determination on an application without holding a public hearing.

In response, the county argues that it has authority to determine what constitutes a "request" for siting approval. The

county states that a county board may exercise powers which are necessarily implied from those powers expressly granted by the legislature. McDonald v. County Board of Kendall County, 146 Ill. App. 3d 1051, 497 N.E. 2d 509 (2d Dist. 1986), appeal denied 113 Ill. 2d 576, 505 N.E. 2d 453 (1986). The county notes that section 39.2 provides for public hearings, the imposition of conditions upon siting approval, and filing fees, but does not further define such terms. Thus, the county asserts that it impliedly has the power to develop procedures for hearings, create conditions, and set the amount of filing fees. Likewise, the county argues that it impliedly has the power to determine what a "request" for siting approval must include.

The Board agrees with petitioner that a county or municipality does not have the authority to extend the 180-day deadline without a waiver by the applicant. Section 39.2 establishes the exclusive procedures to be used by localities when reviewing siting applications. That section, through the 180-day deadline placed upon final action by a locality, shows the legislature's intent to move the regional pollution control facility siting process at a quick pace. Such intent is also shown in section 40.1, which allows the Board only 120 days to take final action on a siting appeal. The legislature, in providing that a site may be deemed approved if either of those deadlines is missed, reinforced its desire for quick resolution of siting applications by setting a somewhat harsh penalty for violation of the deadlines. Given such a clear expression that time is of the essence, the Board cannot find that the county board impliedly has the power to extend the 180-day deadline by determining when an application is deemed filed. To do so would violate the language of the statute.

The appellate courts have strictly construed the requirements of Section 39.2. For example, the courts have strictly construed the notice requirements of Section 39.2. Browning-Ferris Industries of Illinois v. Pollution Control Board, No. 5-86-0292 (5th Dist., November 18, 1987); Concerned Boone Citizens v. M.I.G. Investments, Inc., 144 Ill. App. 3d 334, 494 N.E. 2d 180 (2d Dist. 1986); Kane County Defenders, Inc. v. Pollution Control Board, 139 Ill. App. 3d 588, 487 N.E. 2d 743 (2d Dist. 1985). Likewise, the courts have held that the power to assess filing or inspection fees cannot be implied into Section 39.2. Concerned Boone Citizens, supra; County of Lake v. Pollution Control Board, 120 Ill. App. 3d 89, 457 N.E. 2d 1309 (2d Dist. 1983). The Board sees little difference between an implied power to assess fees and an implied power to effectively extend the 180-day deadline by determining what constitutes a "request" for siting approval. Given the courts' strict interpretations of Section 39.2, the Board must reject the county's argument.

The Board is aware that the finding that a locality may not unilaterally extend the decision deadline could work hardship on the locality in cases where an application is deficient and the applicant refuses to waive the 180-day deadline. However, the locality could solve such a potential problem by holding the mandatory public hearing and following the other applicable procedures of Section 39.2, and subsequently denying site approval on grounds of insufficient information. The Board also notes that Senate Bill 749, which is to become effective July 1, 1988, deals with this problem by amending Section 39.2(e). The amendment provides:

> At any time prior to completion by the applicant of the presentation of the applicant's factual evidence and an opportunity for cross-questioning by the county board or governing body of the municipality and any participants, the applicant may file not more than one amended application upon payment of additional fees pursuant to Section 39.2(k) of the Act. Provided, however, that the time limitation for final action set forth in Section 39.2(e) of the Act shall be extended for an additional period of 90 days. (emphasis added.)

Even this amendment does not give the county the power to require an amended application or a waiver. Only the applicant can amend the application, and thus extend the decision deadline.

The Board also notes that the fact that Section 39.2(e) has been amended is a strong argument that the legislature recognized a problem in the statute. After the appellate court held that a county did not have the implied power to charge a filing fee, Concerned Boone Citizens, supra, the legislature added Section 39.2(k), which specifically allows a locality to charge a reasonable fee to cover the reasonable and necessary costs incurred in the siting review process. Ill. Rev. Stat. 1986 Supp., ch. 111½, par. 1039.2(k). Likewise, it is reasonable to believe that the amendment to Section 39.2(e), which provides for an automatic 90-day extension of the decision deadline upon the filing of an amended application, is a response to a perceived problem: that the locality has no power to extend the 180-day decision deadline.

Section 39.2(b) provides further support for the Board's decision. That subsection requires an applicant to give notice of its intent to file a request for site approval no later than 14 days prior to making the request. The notice must include, inter alia, "the date when the request for site approval will be submitted to the county board." Ill. Rev. Stat. 1985, ch. 111½, par. 1039.2(b). This provision alerts the public to when the application will be available for inspection. The statute also requires that public hearing on the request is to be held "no sooner than 90 days but no later than 120 days from receipt of

the request for site approval". Ill. Rev. Stat. 1985, ch. 111½, par. 1039.2(d). This allows the public to review the application prior to the public hearings so that any objections may be presented at hearing. By determining when an application is "filed", the hearing committee of the county board violated these two provisions. It is apparent that the hearing committee rendered petitioner's notice ineffective (for purposes of informing the public) by altering the date on which the 90-120 day period for public inspection began to run. Such a result is contrary to the purpose of the statute. Additionally, the application was apparently not re-noticed when petitioner filed its supplementary material and the application was subsequently accepted for filing. Thus the public was not notified of the new material contained in the application. Again, the hearing committee's actions infringed upon the provisions for public inspection. In sum, it is important to recognize that the time periods for notice, hearing, and decision start with the filing of the application. The Board believes that under Section 39.2, it is the action of an applicant in submitting a request that controls when an application is filed, not the action of a county committee or county board.

Furthermore, the hearing committee's initial rejection of the application cannot be considered "final action" within the meaning of Section 39.2(e). The application was reviewed and rejected only by the hearing committee, not by the full county board. Section 39.2(e) specifically requires final action by "the county board or governing body of the municipality". Ill. Rev. Stat. 1985, ch. 111½, par. 1039.2(e). There was no public hearing held before the rejection, as is mandated by Section 39.2(d). Since the February 19 rejection of the application was not final action on that application, the supplementary material filed by petitioner cannot be considered a new application. It should be noted that the letter to petitioner informing it of the hearing committee's rejection specifically states that the application was "deficient" and that "[a]fter you submit supplementary material required by the resolution, it will be presented to the county staff for review and then forwarded to the committee . . .". Doc. #12. The Board feels that this letter does not indicate that the rejection was considered final action even by the hearing committee. It must be emphasized that only the county board is empowered to take final action upon a siting application. The courts have given strict interpretation to the provisions of Section 39.2. Thus, the phrase "the county board or governing body of the municipality" must be read to mean just that -- not a committee.

Additionally, the Act cannot be read to have allowed petitioner to appeal from the hearing commmittee's rejection of the application. Section 39.2(g) states, inter alia, that the appeal procedures provided for in the Act for new regional pollution control facilities are to be the exclusive appeal

procedures for such facilities. Section 40.1 provides that an applicant may petition for a hearing before this Board to contest a negative decision of the county board or governing body of the municipality. There is no provision in the Act which allows for an appeal of a less than final action of a county board committee. Thus, petitioner could not have appealed from the hearing committee's rejection of the application.

Although the Board bases its decision on the county's inability to extend the 180-day deadline, the instant county resolution seems to require information beyond the six criteria to be considered under Section 39.2 as it existed at the relevant time. For example, the resolution requires extensive information on the background of the applicant, including balance sheets, profit and loss statements, any lawsuits or administrative proceedings in the past five years, and the employment histories of all partners, officers, directors, and shareholders. The Board notes that Senate Bill 749 amends Section 39.2(a) to provide that a locality may consider the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent corporation) when considering criteria 2 and 5. However, that amendment is not effective until July 1, 1988, and does not provide for consideration of the applicant's balance sheets, profit and loss statements, or employment history. Again, the fact that Section 39.2(a) has been amended in such a manner can be assumed to be a legislative response to a problem: that a locality may not consider an applicant's past history.

It is true, as the county states, that the statute does not define the term "request". The Board believes, however, that given the strict interpretation of Section 39.2, the omission of such a definition does not give a locality the implied power to impose whatever requirements it desires. Senate Bill 749, effective July 1, 1988, provides some guidance in the matter by amending Section 39.2(c) to state that a request shall include the substance of the applicant's proposal. The amendment retains the existing requirement that the request include any documents submitted to the Agency pertaining to the proposed facility. A provision that the request include the "substance" of the proposal does not seem to include the specificity of detail that the instant county resolution requires.

In sum, the Board finds that the county was not authorized to extend the 180-day deadline by determining whether the application has sufficient information under the terms of a county resolution. Under the terms of Section 39.2 as it existed at the time of these proceedings, only the applicant may extend the time for final action. As is made clear by petitioner's specific reservation of objections in the supplemental filing, petitioner did not waive the deadline. Therefore, the date for final action by the county board was July 23. Since final action

was not taken until August 18, the site is approved by operation of law.

Although it may seem that this result is harsh, the Board points out that the proposed landfill must still pass the Illinois Environmental Protection Agency (Agency) permitting process. Site approval is only the first of a three step process. The legislature has provided that after site approval is obtained, the applicant must apply to the Agency for a permit. Ill. Rev. Stat. 1985, ch. 111½, par. 1039. The Agency's technical staff then conducts a complete and thorough review of the application and considers the environmental impact of the proposed facility before deciding whether to issue a development permit. If a development permit is granted, the applicant must then obtain an operating permit after development of the site is completed. In sum, the fact that site approval is granted does not mean that the proposed landfill will become a reality. The Board also notes that the county's own technical advisor found that geologically and hydrogeologically, the proposed site is located and proposed to be operated so that the public health, safety, and welfare will be protected. Doc. #619, p. 2.

The Board wishes to note that this case also raised the issue of whether audio tapes are equivalent to written transcripts for purposes of Ash v. Iroquois County Board, PCB 87-29, July 16, 1987. In Ash, the Board held that transcripts of the public hearings must be reasonably available to county board members who do not attend all of the hearings. In this case, the county did have a court reporter present at all hearings, but did not have the reporter transcribe her notes until after petitioner had filed its appeal with the Board. Instead of transcripts being available, the county board members had access to audio tapes of the hearings. These tapes were apparently made by a member of the county staff.

While the Board does not explicitly decide this issue, it must point out that serious questions are raised by this practice. For instance, it is not known whether the participants are clearly and consistently identified on the tape so that a listener might know who was speaking. It is also not known if witnesses were asked to stop speaking while a tape was changed, or if witnesses can be clearly heard on the tape. In other words, it is difficult to determine whether the tape recordings are as complete and accurate as written transcripts. See City of Columbia v. County of St. Clair, PCB 85-177, 85-220, 85-223 (Cons.), April 3, 1986. Additionally, since the tapes available to the county board members and the written transcripts filed with the Board were not from the same source, there is a question of whether the county created a record sufficient to form the basis of appeal, as required by Section 39.2(d).

This practice of using tapes also raises the question of whether a record of the proceedings was "reasonably available" to the county board members. If there was just one copy made of the sixteen days of tapes, it would be almost impossible for all members to have access to such a large number of tapes. There is also the possibility that the tapes could be damaged, destroyed, or lost. If this were to happen close to the decision deadline, there would be no way for the county board members to make an informed decision. Such a situation would be analogous to the events in Ash, where this Board held that transcripts of the public hearings were not reasonably available where photocopied sets of the transcripts were not available until immediately before the county board meeting at which the application was voted upon. It is also likely that the difficulty of locating particular testimony on a specific topic would render the information unavailable for all practical purposes. All of these problems could be solved if certified copies of a written transcript were made available to the county board members.

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

ORDER

The decision of the McLean County Board denying site location suitability approval is hereby vacated as being untimely. Site approval is granted by operation of law.

IT IS SO ORDERED.

Messrs. J. Dumelle, R. Flemal and B. Forcade dissented and J. Marlin concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 21st day of January, 1988, by a vote of 4-3.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board