ILLINOIS POLLUTION CONTROL BOARD
January 21, 1988

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

DISSENTING OPINION (by J.D. Dumelle, R. Flemal and B. Forcade):

The majority holds that a county board lacks the power to manage its docket. In sum, the majority holds that the reason a county board lacks the power to manage its docket is that the Environmental Protection Act, which mandates the county board's serving as an administrative agency in these cases, has been narrowly construed in other contexts. Concerned Boone Citizens v. M.I.G. Investments, Inc., 144 Ill. App. 3d 334, 494 N.E.2d 180 [2nd Dist. 1986], County of Lake v. PCB, 120 Ill. App. 3d 89, 457 N.E.2d 1309 [2nd Dist. 1983].

Petitioner originally submitted its application on January 22, 1987. On February 19, 1987 the County Board's Pollution Control Site Hearing Committee notified Petitioner that the application failed to adhere to county informational requirements; the committee discovered seventeen (17) pro forma deficiencies. This notification of pro forma deficiencies was not an evaluation of the substance of Petitioner's application; rather, it simply addressed Petitioner's failure to adhere to the County's procedural rules, to wit:

1) Failure to provide maps of other, known water wells within one and one-half miles of the proposed site in violation of county procedural rule Section 33.28(B);

2) Failure to provide adequate and accurate maps related to nearby land uses and homes located within one and one-half miles of the site in violation of application filing county procedural rule section 33.28;

3) Failure to provided complete plans and specifications for building structures in violation of county application filing

procedural rule Section 33.39. The rejection concerning this criteria stated that the application was unclear whether approval was also being sought for a recycling center and incineration center; therefore, the county required more information to flesh out the Petitioner's Application.

4) Failure of traffic study maps, road weight maps and building maps to match the legal descriptions of the site and surrounding areas.

The four above-noted deficiencies are only four (4) of the seventeen (17) deficiencies identified by the County Board's Pollution Control Site Hearing Committee -- but these do serve to highlight the fact that the application was incomplete when initially tendered on January 22, 1987. It should be noted that the duly enacted county ordinance states no application for site approval shall be deemed filed until all filing and data requirements are followed. The county ordinance, at section 33.04, states as follows:

> "33.04. No application for site approval shall be deemed to have been filed or accepted for filing unless all of the requirements of this resolution applicable thereto have been met and the county clerk shall not give a receipt or other indication of filing until such time as it is determined that the application complies with the requirements of this section...." McLean County Revised Code, Section 33.04.

Shortly after notification of the deficiencies, Petitioner submitted further data and documentation (apparently without objection). On March 17, 1987, after Petitioner complied with the county ordinance by tendering all required information, the application was deemed 'filed' as of that date. Upon receipt of a complete application package, the application became 'filed', hearings were held and a final decision was rendered within the 180-day time limit established by law. On August 18, 1987 the full county board denied petitioner's siting application for substantive reasons.

In sum, the majority holds that because the appellate courts have struck down certain county boards' attempts to impose filing fees when the Act did not explicitly provide for such,[1] county boards now lack the authority to impose any reasonable filing procedures and requirements when the result of such may cause a

[1] It should be noted that the Act has subsequently been amended to allow counties to set filing fees.

final decision to be entered in excess of 180 days from the date that the application is initially tendered to the county board. Apparently, it does not matter that the county board's filing requirements were obviously directed toward fulfilling the ultimate purpose of the act: A full and fair hearing on the merits.

Section 39.2(a) of the Act establishes the criteria to be considered at a landfill siting hearing. Subsequently, it provides as follows: "The siting approval, procedures, criteria and appeal procedures provided for in this Act... shall be the exclusive... procedures and rules." In 1986, the Second District Appellate Court, narrowly interpreting this Section, held as follows regarding the imposition of a filing fee:

> "Section 39.2 does not specifically grant power to assess fees... (and) the imposition of a [filing] fee is not a reasonable and necessary condition in order to accomplish the purpose of Section 39.2." Concerned Boone Citizens, supra"

While it may be true that the imposition of filing fees is not closely enough related to the purpose of the Act to survive a narrow interpretation, surely a filing requirement which seeks to provide the county board with the complete facts and relevant information is sufficiently related.

Without saying more, it is obvious that the intent of the General Assembly [in directing county boards to sit in review of an application for siting of landfills] is to achieve a full and fair adjudication on the merits of the proposal. This is why the Act establishes the criteria by which an application is to be judged, to wit: Local safety, incompatibility with nearby areas, impacts on local traffic flows... etc.

The county board passed an ordinance which required applicants for a landfill to submit certain information with its application; this included data relative to nearby water wells, neighboring land uses, and road weight maps, in addition to other data. County Ordinance Procedural Rule Section 33.28. These data are required in order to fully review the application in accordance with the criteria established in the Act, and to establish the proposal's safety, compatibility and impacts on the area. 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 1651, 497 N.E.2d 509 [2nd Dist. 1986]. In this case the county required data which would substantially aid it in fulfilling the obligations imposed by the Act. The county board procedural rules are proper, reasonable and directly related to the very purpose of the Act, which is a full and complete hearing on the

merits. The majority apparently believes that the ultimate purpose of the Act is that "final action" occur. This, apparently regardless of whether this final action is a summary dismissal or a full and complete hearing. We disagree!

The next issue is whether a county board can reject an application, where that application fails to comply with its procedural rules. The power to reject a purported filing for failure to comply with the regulations has been decided:

> There is a sound use, and indeed requirement of an Agency "rejection" of a party's filing... it is appropriate where the filing is so deficient on its face that the Agency may properly return it to the filing party without even awaiting a responsive filing by any other party... Both, when the governing statute explicitly provides for rejection and when it does not." Municipal Light Boards, etc., Mass v. FPC, 450 f2d 1341, [D.C. Cir. 1971].

In this case, although the county board is ordinarily a legislative body, it is acting pursuant to a statute which mandates the County Board to act as an administrative body in a quasi-adjudicatory setting. The analogy to administrative law is clearly appropriate.

The county board has the authority and indeed the responsibility to reject Petitioner's purported filing when that filing fails to comply with filing requirements, and fails to contain the data necessary to allow the county board to perform its essential function.

The majority's argument is that a county board may not reject a purported filing because doing so may result in the rendering of a decision in excess of 180 days from the date of initial tender to the Board. This is indefensible. The majority has mistakenly focused on the result -- not the authority to do the act. An administrative agency clearly has the authority to manage its docket by rejecting clearly insufficient purported filings. Municipal Light, supra.

The majority has focused on the fact that Section 39.2 states that it shall be the exclusive procedures and rules in local landfill hearings. Notwithstanding the explicit language of the Act, this cannot be because the Act does not contain provisions which would enable a hearing to occur or proceed. The Act fails to contain provisions defining or creating hearing officers, the order of proceedings, the hours and location of proceedings and who may or must testify. All of these are left to the county board -- notwithstanding the express provision of

the Act. The Act does not establish the amount of the filing fee [which is now allowed], or the contents of the application package itself. Similarly the Act fails to describe the organization of the county board, its rules of order, its constituency, what constitutes a quorum, a valid vote, and what evidentiary standards will be employed. All of these are defined by other provisions of Illinois law or are left for the county boards to determine -- notwithstanding the express provisions of the Act. Somehow, the majority has no difficulty with county boards adopting regulations relative to the above matters -- but the county board may not set forth informational filing requirements if the enforcement of such might cause a decision later than 180 days from the date that the application was initially tendered.

It should be noted that this Board routinely and unilaterally extends decision deadlines. For 18 years this Board, has treated Amended Variance Petitions as re-starting the statutory time clock. This, even when the Amended Petition filed was in response to this Board's notice of insufficient filing and threat of dismissal.

The process works as follows: A Petition For Variance is filed on January 1st. The Board must render its decision within 120 days -- else the variance is deemed granted by operation of law. However, if the Petition is deficient [fails to include necessary data required by 35 Ill. Adm Code 104.121] this Board will require the submission of an Amended Petition containing the required data. If that Amended Petition is filed on February 15th, then this Board will render a hearing within 120 days of February 15th. If this Amended Petition is deemed insufficient, the 120 time deadline will not be invoked until a complete Variance Petition is presented.

The majority, by blindly requiring the county boards to issue a final decision within 180 days of initial tender, has adopted a "do as I say -- not as I do" approach to the siting of local landfills.

The importance of the above analogy is that it demonstrates the practicality and logic of reviewing an application for completeness before scheduling hearings on a fatally defective Petition. The logic is inescapable -- yet the majority refuses to recognize this as it relates to county board's review of applications for landfills.

Indeed this Board's regulations regarding permit applications are almost identical to the county ordinance which the majority says cannot be enforced

> "An application shall not be deemed to be filed until the applicant has submitted all

> information... Required... " 35 Ill. Adm. Code Section 201.158.

McLean County Revised Code Section 33.04 states as follows:

> "No application... shall be deemed... filed unless all... requirements... have been met and the county clerk shall not give a receipt or other indication of filing until such time as it is determined that the application complies... "

Although it is true that the Pollution Control Board may adopt its own substantive and procedural rules -- it is also true that a county board may adopt rules which are necessarily implied and which are directly related to its essential function. This Pollution Control Board adopts procedural rules because it is expressly authorized to do so. County boards may adopt rules because the Act is incomplete and a hearing could not be held without the adoption of supplemental rules. County authority to adopt proper rules, is necessarily implied.

The majority states that actions by a county committee do not constitute final county action. Without addressing the issue of the propriety of delegating ministerial functions to a committee [for instance reviewing an application to ensure that it complies with duly enacted county ordinances] -- this case revolves not around the county committee, but on the county ordinance itself. It was the county ordinance which required complete information; and it was the county ordinance which held that no application was deemed filed until it was complete. Clearly, it was final county action adopting the procedural rules, which require complete applications.

The intent of the General Assembly could not have been to force the county board and the Petitioner to engage in a meaningless and impotent administrative exercise, one whose outcome is predetermined by the unfortunate and inadvertent failure to include certain required data in the application package. But this is exactly what the majority requires by demanding that the county board hold a special meeting and public hearing simply to summarily dismiss an application.

The purpose of this Board is the prevention of environmental pollution and protection of the public health. Accordingly this Board is required, by statute, to determine, define and implement environmental standards. Ill Rev Stat. 1986 ch. 111 1/2 Section 1005(a). The decision of the majority has preempted this function.

By holding that Petitioner's application is deemed granted by operation of law the majority has prevented this Board from

reviewing the merits of the proposed landfill. As a result of the majority's decision, McLean County must now accept a landfill which has not been demonstrated to be safe. It has not been shown to be safe to this Board or to the duly elected representatives of the people of McLean County: The McLean County Board.

The majority attempts to mollify this indignity and danger by noting that the Illinois Environmental Protection Agency (IEPA) is still required to review the proposal. But this only serves to highlight the injustice that has been done. The IEPA will do what it must necessarily do with every landfill proposal that comes before it: It will review the plans according to out-dated regulations [adopted as long ago as 1973] to ensure engineering integrity congruent with those regulations. The Illinois Environmental Protection Agency (IEPA) is not charged with the duty to review the application and circumstances to ensure that a landfill is truly needed Section 39.2(a)(1). The IEPA does not review an application to ensure that a proposed landfill site will minimize incompatibility with the surrounding area Section 39.2(a)(3). The IEPA does not review an application to ensure that impact(s) upon nearby roadway uses and traffic patterns will be minimized Section 39.2(a)(6). It is the county board that is charged with all these duties. It is also the county board which is charged with the duty to ensure that the plan of operation will protect the facility and the surrounding area from fire, spills and other occupational accidents Section 39.2(a)(5). The county board, consisting of duly elected representatives of the people of McLean County is charged with these and other duties pursuant to Ill Rev Stat. 1986 ch. 111 1/2 Section 1039.2. Likewise this technically qualified board (the Pollution Control Board) is charged with the duty to review the county board's decisions according to the statutory criteria and to ensure that these decisions are not contrary to the manifest weight of the evidence. Ill Rev Stat. 1986 ch. 11 1/2 Section 1040.1. This statutory scheme has been preempted.

The majority's decision wrongly sidesteps the statutorily mandated scheme and orders that the permit be deemed granted by operation of law. The unfortunate reason for this unhappy result is the County Board Site Hearing Committee, in attempting to aid the Petitioner in tendering a completed package, and acting pursuant to a duly enacted county ordinance, notified Petitioner an incomplete application package was tendered. It was then fully explained to Petitioner which additional documents were needed.

The majority's decision simplisticly exalts form over substance. The very purpose of this board is to review the substance of permit applications, the county board decision and to ensure that the environment is protected. The majority's decision abrogates that duty.

It is the majority's position that a special county board meeting is required to notify an applicant that it has failed to follow duly enacted filing requirements. This, notwithstanding the Municipal Light opinion regarding proper rejection of a proffered filing. For some unknown reason precious time and county resources must be mustered for the county board to engage in a meaningless exercise to notify an applicant that pursuant to an earlier enacted county ordinance it has failed to follow the filing procedures.

Not only does the majority's view exalt form over substance, but it also injects a needless amount of acrimony and friction into an already difficult situation. Instead of attempting to help an applicant by facilitating and ushering an applicant to a fair, final adjudication, counties are being told that they should refrain from helping an applicant so they can later ambush the application at a special county board meeting for minor procedural deficiencies. It should be noted that after July 1, 1988, applicants will be prohibited from refiling for two years following a rejection. Not only is the majority's decision improper but it is surely not the General Assembly's intent.

It is important to note that both sides were operating in good faith. The County Ordinance and the Petitioner were merely trying to usher a completed application package to the ultimate decision-maker. This they were successful in doing. Obviously, the legislature intended that there would be such a considered decision by an informed adjudicatory body.

Holding that the permit should now issue by operation of law (for failure of the County Board to render a final decision within 180 days of January 22, 1987) is incongruous with the conduct of the parties and would unfairly punish the county and the people of McLean County for seeking to aid applicants, and obtain a full hearing on the merits. It would be unreasonable to expect the county to prepare (and pay for) an entire hearing schedule upon receipt of a fatally defective application package. Surely the Act does not mandate a full county hearing process for every piece of paper which merely identifies itself as an application -- yet this is exactly what the majority would require. Conversely, it would be improper for a County Board to allow or encourage an applicant to needlessly expend resources when the application package is lacking important information and cannot be granted.

For the above-noted reasons, we respectfully dissent.

Jacob D. Dumelle
Chairman

Ronald Flemal
Board Member

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 8th day of February, 1988.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board