ILLINOIS POLLUTION CONTROL BOARD
September 20, 1985

MCHENRY COUNTY LANDFILL, INC., an Illinois Corporation Petitioner, v. COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS, Respondent. and ARTHUR T. McINTOSH & CO., VILLAGE OF LAKEWOOD, VILLAGE OF HUNTLEY, HUNTLEY FIRE PROTECTION DISTRICT, LANDFILL EMERGENCY ACTION COMMITTEE (LEAC) AND MCHENRY COUNTY DEFENDERS, Cross Petitioners-Objectors, v. MCHENRY COUNTY LANDFILL, INC. AND, COUNTY BOARD OF MCHENRY COUNTY, Respondents.	)	PCB 85-56 PCB 85-61 through PCB 85-66 (consolidated)

CONCURRING OPINION (by J. Anderson):

I concur because I believe remand was the proper action of the Board based on the "magnifest weight" issue.

However, I strongly disagree with the Board's failure on remand to instruct the County Board (County) to disregard its hearing officer's ruling striking part of the testimony presented at the County hearing. I realize that, in this particular case, the ruling had little practical effect since the substance of the stricken testimony had gotten into the record by other means.

Nevertheless, I believe the ruling itself, and the underlying reasons are contrary to the SB 172 provisions in the Environmental Protection Act (Act), has a chilling effect on informed participation in the public hearing by the applicant and citizens alike, and sets a terrible precedent. I believe that the Board majority's rationale in this matter is erroneous.

The underlying problem is the County's decision to refuse to allow any subsequent changes to the application as submitted, unless the applicant re-applied and thus, started the SB 172 process all over. The County hearing officer's statements at hearing clearly reflected the County's intent. This intent was also expressed in the County's amendment to its siting ordinance prohibiting any amendments. This amendment was adopted shortly after the hearings (Pet. ex. 7, Sec. 4(a)(iii)), and, thus, presumably was being processed during the hearings.

I do not believe the Act authorizes such outright and absolute constraints and, indeed, I believe the Act prohibits such an exercise of authority by a County (or municipality). And I certainly do not believe such outright and absolute constraints are required in the name of fundamental fairness. Indeed, it can serve to frustrate fundamental fairness. I believe, had the Board addressed this issue directly, it would not have backed into upholding the Hearing Officer, who himself was placed in an untenable situation. I wish to emphasize, here, that any comments are not intended to imply that anyone was acting in bad faith.

Until amended in 1984, Section 39.2(c) of the Act provided in pertinent part for the filing of an application and right of the public to have its comments considered if received within 30 days after the filing of the application. As amended by P. A. 83-1522, effective July 1, 1985, Section 39.2(c) requires that any prior submittals to the Agency be included in the application, and gives the public a right to have its comments considered within 30 days after the last public hearing. There are no further directives concerning the nature of the application or public comment rights.

Section 39.2(g) provides in pertinent part that "The siting approval, procedures, criteria, and appeal procedures provided in this Act" for such facilities shall be "the exclusive siting procedures and rules and appeal procedures" for such facilities.

Section 39.2(d) in pertinent part requires at least one noticed hearing 90 to 120 days after the applicant's filing, which hearing shall "develop a record sufficient to form the basis of appeal of the decision in accordance with Section 40.1 of this Act."

Section 40.1 in pertinent part requires the County Board to appear as a respondent in an appeal proceeding before the Board, and provides that the burden of proof is on the petitioner.

Section 40.1 also forbids the introduction of "new or additional evidence" at the Board hearing, and requires the Board to consider fundamental fairness.

While the statute specifically precludes the introduction of "new evidence" before this Board, there is no such provision regarding the County (or municipal) hearing. The Act confers no authority on local government to constrain outright, and absolutely, the applicant's right to present or accept at hearing material supplementing, altering, or clarifying material contained in the application.

The Board majority did express concern about the practice of striking testimony, but then upheld the hearing officer's ruling anyway, apparently because the ruling didn't achieve the intended result. Dr. Piskin's information got in the record anyway, because the County Board members (but nobody else) were allowed to ask questions to which Dr. Piskin could respond. To uphold a hearing officer's ruling on this basis is not reasonable. If the Board were really concerned about undue surprise, it should have stricken the whole body of testimony concerning alterations to the application, not some of it.

By not doing so, the Board majority in effect approved a hearing process whereby there is a hierarchy of participants who can present or elicit testimony, with the County Board members on top. That's what happened in this proceeding, since the County Board as decisionmaker and condition-setter could hardly be prevented by the hearing officer from asking the applicant or anyone else about desired changes.

The Board majority also rejects the applicant's argument that it should be allowed at least to amend the application at hearing if the amendment upgrades it, i.e., makes it more restrictive. The Board majority's reasoning, that what is perceived as more restrictive by the applicant might actually do more harm than good, is all the more reason why such changes should be presented and challenged at hearing. To not be allowed to present them at all, doesn't make sense.

Dr. Marlin, in his dissent, has well expressed my concerns concerning the potential effects on public participation.

The statute says there is to be a public hearing, but public discourse gets pushed into the background when these proceedings threaten to take on all the aspects of a contested case format, with "parties", "evidentiary" restrictions, and now a hierarchy of participants and stricken records. It results in an overall chilling effect on the free exchange that I believe is necessary in order to assure that the positions of the various and competing interests are developed at hearing. Maintaining order and fairness in a quasi-judicial setting does not require that mediation be prohibited, as long as it is on the record. I see no reason why the applicant should not present or accept changes

in response to public concerns or in resolution of disagreements involving scientific/technical testimony.

There are many ways to accommodate undue surprise without forcing the process to start all over wholesale, as the Board majority acknowledged. To allow a system that, in essence, forces the applicant not only to avoid presenting supplemental information, but indeed to resist commenting favorably on everything anyone has put forward that might even remotely suggest an amendment, in order to protect his position, skews the process even more when site location suitability subsequently is approved, rather than denied. In a very practical sense, changes put forward or accepted by the applicant in sworn testimony prior to County Board decision may improve the program and provides greater public assurance that the package presented to the County Board will better reflect their concerns if the County Board approves.

The need for this kind of interaction with the public becomes especially apparent when the County or municipality owns the site and thus is both applicant and decisionmaker.

Anyone who has held local elective office or participated in public hearings, as I have, knows that the role of all participants in the SB 172 process is an unfamiliar, indeed unique one. The County Board members cannot interact ex parte with their constituents or the applicant, they must consider extra territorial service areas, and the decision must be weighed on the basis of a formal record. Thus, the public hearing takes on special importance, and should be free of any procedural constraints that unnecessarily inhibit full interaction and progress towards a timely decision.

Joan G. Anderson

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I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 15 day of November, 1985.

Dorothy M. Gunn/ss.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board