ILLINOIS POLLUTION CONTROL BOARD
May 30, 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)

ORDER OF THE BOARD (by J. Anderson):

On May 3, 1985 six "Notices of Cross-Appeal" were filed by various persons, municipalities and other entities ("the Objectors") each bearing the docket number PCB 85-56. As noted by the Board in its Order of May 16, 1985, to avoid administrative confusion, each of these filings was renumbered, and a separate docket number has been assigned to each as reflected in the caption of this Order.

A motion to strike each of these "cross-appeals" was filed on May 7, 1985 by McHenry County Landfill, Inc. (the "Landfill"). A motion to amend this filing was made May 23, 1985, the sole amendment being inclusion in the motion of the McHenry County Defenders petition; the motion is granted.

In this case, McHenry County denied the Landfill's application, finding that three of the criteria of 39.2 of the Act had not been satisfied. The Landfill has appealed the denial on these criteria, while various Objectors to the landfill who had participated at the County's hearing now seek to challenge the County's determination that three of the criteria had been satisfied.

The Board procedural rules do not explicitly provide for cross-appeals in any action. SB 172 (P.A. 82-682) does not, by its terms, provide for cross-appeals. While this attempt at a cross-appeal is a matter of first impression before the Board, the Board has addressed the question of the rights of landfill opponents who intervene in an applicant's appeal of a denial in Waste Management of Illinois v. County Board of Will County, et al., PCB 82-141, April 7, 1983. In that case the Board observed that:

> "Section 40.1(a) of the Act provides that only an applicant may appeal county denial of approval, in contrast to Section 40.1(b) which provides that grant of approval may be appealed by a third party. What the intervenors have in essence attempted to do is to cross-appeal those elements of the County's decision which amount to a grant.
>
> It can be argued that to permit this sort of action furthers the intention of P.A. 82-682, since if the Board were to overrule the County's findings on the criteria which serve as the basis for denial, the approval would be granted without Board review of the remaining criteria. However, as the maxim states, an intervenor must "take the case as he finds it," and the issues on appeal at the time these intervenors entered into this action concerned only criteria #1 and #2. Absent additional specific legislative authorization for a cross-appeal of the additional criteria, or of a legislative mandate that the Board review a County decision as to all criteria once any person has challenged a decision on one of them, the Board cannot provide for expansion of statutory appeal rights, Landfill, Inc. v. PCB, 74 Ill.2d 541, 387 N.E.2d 258 (1978)." (p.5)

The Landfill asserts that the various Objectors have no standing to pursue a cross-appeal, since under the scheme of SB 172 they do not become "parties" at the County hearing level, the applicant being the only party. The Landfill contrasts this with

the legislative proviso in 39.3(d) of the Act, which allows any person who may be adversely affected by an Agency determination concerning a hazardous waste facility permit application to be admitted as a party-intervenor at the Agency's Administrative Procedures Act contested case-type hearing on the permit. The Landfill further asserts that, even if the County could have made the Objectors party-intervenors, upon petition, that the Objectors here made no such petition to the County. It is the Landfill's position, then, that the Objectors here can gain party status only upon a successful petition to the Board for leave to intervene.

The Objectors do not directly address the Landfill's arguments concerning their lack of party status at the County level. The essence of the Objectors' position is that it would be fundamentally unfair for the Board to fail to entertain cross-appeals in this type of action, because the County's findings that three criteria had been met would be rendered "absolute, final and unappealable," which would not be the case had the County found that all six criteria had been satisfied. They state that "[t]o deny the right of cross-appeal is arbitrary and unreasonable because it wholly fails to provide a mechanism by which the citizenry may have redress of grievances" [Notices, 5(d)].

In a case more recent than Waste Management, supra, -- Board of Trustees of Casner Township et al., v. County of Jefferson and Southern Illinois Landfill, PCB 84-175, 176, April 4, 1985 -- the Board was faced with the question whether, absent a specific legislative directive to do so, the Board had jurisdiction of Objectors' appeals of a site location suitability approval "deemed approved" pursuant to Section 39.2(e) as a result of a County Board's deadlock rendering the County incapable of action within the 120 day decision deadline. The Board found, in its Order of January 10, 1985, that:

> "Absent a compelling demonstration that the statutory language requires or the General Assembly intended that "deemed approved" requests be treated as different from active approvals, the Board cannot extinguish the third party's statutory right to appeal in Section 40.1(b). *** if Board jurisdiction to review third party appeals were disallowed in these cases, the symmetry of the SB 172 system would be destroyed. Not only does this create the spectre of manipulation of the process and third party's rights by the local body, it would also produce a situation in which the site suitability which was of fundamental concern to the General Assembly could never by reviewed or assured. This would certainly be an absurd consequency in light of the elaborate public participation and review processes SB 172 created to ensure complete review of these questions." (p. 6-7)

The Board finds that denial of cross-appeals concerning those portions of the application "approved" by the County as meeting particular criteria would similarly frustrate SB 172's policy of reviewability of all local decisions, upon petition by applicants and Objectors alike. Formal party status at the County level does not lie at the heart of SB 172 procedures; participation at the County's hearing is the determinant for subsequent appeal rights. Therefore, the Board finds that these cross-appeals should proceed. To the extent that this holding is contradictory to the dicta contained in the last sentence quoted from the Waste Management decision quoted at p.2 herein, that dicta is overruled.

The cross appeals are hereby consolidated with PCB 85-56 for hearing and decision.

Finally, the cross-appeals also contain various motions. The motion to strike "Petitioners' proposed Resolution/Findings" from the County's Record (filed May 25, 1985) is denied. The motion contains various unsupported factual assertions which cannot properly be considered unless ventilated in the record in this action at the Board's hearing. The motion may be renewed at such later time.

The motion to strike and dismiss Section III of the Landfill's petition as vague is also denied. While the petition does not contain, for example, names of Objectors and County Board Members who allegedly participated in ex parte contacts, application may be made to the Hearing Officer for discovery concerning matters relating to fundamental fairness which do not appear in the County's Record.

The May 23, 1985, motion for subpoena made by objector McIntosh and the Landfill's May 29, reply are referred to the Hearing Officer for disposition; all other discovery motions should also be addressed to the Hearing Officer and not the Board. The Board notes, however, that any discovery process in these matters cannot be prolonged, as decision in this matter is due on August 13, 1985.

IT IS SO ORDERED.

J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Order was adopted on the 30th day of May, 1985 by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board