ILLINOIS POLLUTION CONTROL BOARD
August 13, 1992

STEPHEN A. SMITH, d/b/a ABC SANITARY HAULING, JOHN APPL, d/b/a APPL SANITARY SERVICE, LAWRENCE W. BOLLER II, d/b/a AREA GARBAGE SERVICE, CHARLES H. MILLER, d/b/a C.H. MILLER SANITARY, CHRIS JOHNSON, d/b/a CHRIS'S SERVICE CO., EDDIE L. COOK, SR., d/b/a COOK'S SANITARY HAULING, DON CORY, d/b/a CORY SANITARY HAULING, RONALD E. HAYDEN, d/b/a HAYDEN SANITARY SERVICE, GORDON FICKLIN, d/b/a ILLINI SANITARY SERVICE, CHRIS YAGER, d/b/a KLEAN-WAY DISPOSAL, GEORGE McLAUGHLIN, d/b/a McLAUGHLIN SANITARY, CHERYL MANUEL, d/b/a ROLLAWAY WASTE, RONALD W. MANUEL, d/b/a RON MANUEL SANITARY, RUSSELL SHAFFER, d/b/a SHAFFER SANITARY CO., WILLIAM C. UDEN, d/b/a UDEN & SONS SANITARY HAULING, and WILLIS SANITARY HAULING, INC.,	PCB 92-55 (Landfill Siting Review)
Petitioners,	
v.	
CITY OF CHAMPAIGN, ILLINOIS INTERGOVERNMENTAL SOLID WASTE DISPOSAL ASSOCIATION, and XL DISPOSAL CORPORATION,	
Respondents.	

CONCURRING OPINION (by B. Forcade):

I respectfully concur. I agree with most of the opinion, but dissent from the portion of the opinion that overturns the primary holding of Board of Trustees of Casner Township, Jefferson County Illinois; Citizens Against Woodlawn Area Landfills; Cynthia Carpenter; Ernest Carpenter; Hatie Hall; Byron Kirkland; Patricia Kirkland; Peg O'Daniell; Ronald O'Daniell; Dennis Shroyer; and Patricia Shroyer v. County of Jefferson and Southern Illinois Landfill Inc., PCB 84-175 and 84-176 (Cons.) (January 10, 1985 and April 4, 1985; hereinafter "Casner").

In Casner, the Board held that failure of a local government body to make a timely site approval decision would constitute approval which makes the record on the individual criteria under Section 39.2 of the Act subject to review by this Board under Section 40.1. Today the majority overrules Casner, holding that only the jurisdiction and fundamental fairness of a decision below may be reviewed in a default situation. I find this unacceptable for three reasons.

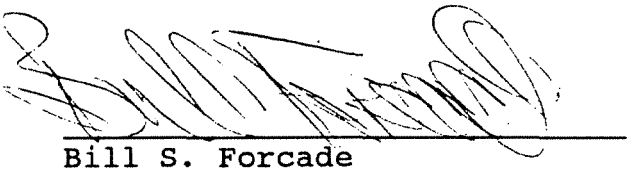
My initial concern is that the majority creates for the first time an unreviewable site location decision by the local government body. The statute provides for third party review of site approvals. Further, it provides that inaction shall be deemed approval. I find the statutory construction that removes Board review of the criteria to be strained and unacceptable. The statute precludes approval except where all Section 39.2 criteria have been met. There is nothing magic about local government approval language. This Board has and does review local government decisions that say nothing more than the site location is approved as having met all criteria. If the local government fails to make that decision in a timely manner, the statute makes it for them. The decision deadline was placed in the statute to ensure timely action and timely review, not to exclude appellate review. Several criteria under Section 39.2, such as #1, #3, #6, and #8, play no part in subsequent facility permitting review by the Agency. If they are not reviewed here, they cease to exist.

Second, I find the majority holding to be legally insupportable. If this decision is unreviewable, all of it is unreviewable. Section 40.1 of the Act provides that third parties may appeal to this Board for review where, "the [local government] grants approval under Section 39.2 of this Act..." The majority seems to be holding that the local government has granted approval for purposes of our review regarding jurisdiction and fundamental fairness, but not granted approval for purposes of reviewing the criteria. If the local government did not grant approval, then this Board lacks jurisdiction to hear any aspect of an appeal. If it did grant approval, then we have jurisdiction to review all aspects, including the criteria.

Third, I find the majority holding to be illogical and unworkable. Assume for a moment that some local government failed to conduct a fundamentally fair proceeding below. Assume that they refused to allow cross examination of witnesses, refused to allow testimony of landfill opponents, that one of the decision makers had an individual pecuniary interest in the landfill, or some other significant problem that has been found to exist in prior proceedings before this Board. What is the solution where fundamental fairness does not exist, but, as is the case here, the local decision maker refuses to render a decision within the deadline? Is this Board expected to remand the proceeding back to the local government so they can default

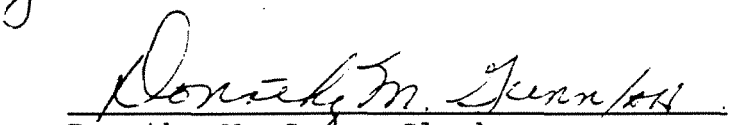
in a fundamentally fair manner? In its most absurd manifestation, an applicant could produce no evidence at all pertaining to any of the criteria, but prevail in an unreviewable manner should the local government default.

I would find the decision below was a statutory approval and review it in the normal manner: has the petitioner demonstrated that approval on all Section 39.2 criteria was against the manifest weight of the evidence in the record below. Here most of that decision is easy. Petitioners devote less than one page of double spaced text to token arguments regarding criteria 2-9. I would find their case against approval on those criteria fails to make a prima facie showing. On criterion #1, need, their arguments are more extensive and persuasive. It is a very close argument, but on balance I would find that approval on criterion #1 is not against the manifest weight of the evidence below. Accordingly, I would affirm. Since I do not support the majority rationale for affirming, I concur.



Bill S. Forcade
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above concurring opinion was filed on the 21st day of August, 1992.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board