## ILLINDIS POLLUTION CONTROL BOARD April 21, 1988

WASTE MANAGEMENT OF ILLINOIS,	INC. )	
Petitioner,	)	
۷.	}	PCB 88-39
MCHENRY COUNTY BOARD,	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Anderson):

This action involves the appeal by Waste Management of Illinois, Inc. (WMI) of the County Board's denial of SB172 approval, which denial was based on a finding that criteria 2 & 3 only had not been satisfied. On March 11, 1988, the McHenry County Defenders (Defenders) filed a cross-appeal of the County's finding that criterion 1 had been satisfied.

On March 24, 1988, the Board issued an Order dismissing the Defenders' cross-appeal based on Section 40.1 of the Act, as interpreted by the Illinois Appellate Court (Second District) in McHenry County Landfill v. Pollution Control Board, 154 Ill. App. 3d 89 506 N.E.2d 372 (2d Dist. petition for leave to appeal denied, 511 N.E.2d 430 (1987). The Court found that Section 40.1 "does not allow cross-appeals by objectors in the case of a denial of an SB172 site location suitability approval." The Board's Order also forbids the Defenders from filing an <u>amicus</u> curiae brief on criterion #1 issues. Id. at 3.

On April 6, 1988, the Defenders moved the Board to certify for immediate interlocutory appeal pursuant to Supreme Court Rule 308(a), two specific questions of law flowing from the March 24 Order. WMI filed a response in opposition on April 13, 1988.

Supreme Court Rule 308(a) provides that a "certificate of importance" may be granted where an order "involves a question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." <u>Ill. Rev. Stat.</u>, ch. 110A, Section 308(a), 335. The Board has authority to issue such certificates, and has occasionally done so. <u>City of Rockford v. Winnebago County Board</u>, PCB 87-92, <u>Order</u>, p. 1 (November 25, 1987]; People of the State of Illinois <u>v. Santa Fe Park Enterprises</u>, PCB 76-84, <u>Order</u>, pp. 1-2 (December 29, 1983); <u>See</u>, <u>Getty Synthetic Fuel v. PCB</u>, 104 Ill. App. 3d 285 (1st Dist. 1982). In this case, the Board finds that neither of the 308(a) tests have been met, and so denies the motion.

The Defenders have failed to persuade the Board that the interpretation of Section 40.1 made by the Board in accordance with the Second District's decision in the <u>McHenry County</u> case involves a question as to which "there is substantial ground for difference of opinion". The statute by its terms does not permit cross-appeals. As WMI points out, it is well established that appeal rights are only those which are articulated in the statute. The Board may not extend or infer such rights. Given the availability of enforcement actions pursuant to Section 31, it has been further held that due process requirements are satisfied even if no right to appeal permit grants exists, a situation which is analogous to that presented here. Landfill Inc. v. PCB, 74 Ill.2d 541, 387 N.E.2d 258, 262-64 (1978); see also <u>E & E Hauling</u>, Inc. v. PCB, 107 Ill.2d 33, 481 N.E.2d 664,667 (1985) (citing Landfill, Inc.)

Since entry of the <u>McHenry County</u> decision in March, 1987, no other Court has addressed this issue, so that this matter does not present conflicting judicial interpretations in need of resolution.

The Defenders have similarly failed to persuade the Board that certification of its proposed questions will "materially advance the termination of the litigation". The Defenders assert that immediate resolution of its appeal status would promote

> "more efficient and orderly administrative proceedings and by avoiding piecemeal litigation. An expedited appeal could be completed prior to the PCB's 120-day statutory deadline for reviewing the County Board's If the Defenders succeed in that decision. "immediate appeal," the PCB could rule at one time on all relevant issues (including criterion #1) and avoid a second proceeding to review criterion #1 alone that would be necessary if the Appellate Court were to hear the Defenders' appeal later and then reverse the PCB's Order dismissing the Defenders' cross-appeal."

Decision in this matter is due on June 23, 1988, roughly 60 days from today, and the hearing is scheduled for tomorrow, April 22. Certification of issues for interlocutory appeal would seriously prejudice the Board's ability to render a timely decision in this matter, as the Board's timeclock is not automatically tolled during the pendancy of any appeal. Based on experience, the Board doubts the accuracy of the Defenders assertion that an interlocutory appeal can be heard within 60 days. The Board further doubts that WMI would be willing to waive the decision date to allow for an appeal which it opposes.

Additionally, the Board agrees with WMI's observation that review of the County's decision on criterion #1 will in no way advance the Board's deliberation on criterion 2 & 3.

Again, for all of the foregoing reasons, the Defenders' motion to certify is denied.

IT IS SO ORDERED.

B. Forcade concurred.

J. T. Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the <u>2/01</u> day of <u>\_\_\_\_\_\_</u>, 1988, by a vote of <u>\_\_\_\_\_</u>.

Dorothy M. Gunn, Clerk Illinois Pollution Control Board