ILLINOIS POLLUTION CONTROL BOARD
March 14, 1986

McHENRY COUNTY LANDFILL, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 85-192
	)	
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,	)	
	)	
Respondent-Objectors.	)	

OPINION AND ORDER OF THE BOARD (by J. Marlin):

This matter comes before the Board upon a November 15, 1985 Petition to Review and Hearing to Contest the October 15, 1985 decision of the McHenry County Board (County) filed by McHenry County Landfill, Inc. (Landfill) which denied Landfill site location suitability approval for a new regional pollution control facility. The Board, on September 20, 1985 remanded PCB 85-56 (involving an earlier County denial of site location suitability for the landfill at issue here) to the County directing it to apply the proper standard of proof to Landfill's application for site suitability approval. The County denied Landfill's application for a second time on October 15, 1985, and it is this decision Landfill is appealing.

On November 21, 1985, Objector Arthur T. McIntosh & Co. (McIntosh) filed a cross-appeal in this proceeding with a Motion to Consolidate this proceeding with the Board's earlier proceeding of PCB 85-56. Objector Village of Huntley (Huntley) filed a Motion to Dismiss and Deny Petition for Review on November 21, 1985. The Motion to Consolidate and Motion to Dismiss were denied on December 5, 1985. On November 22, 1985, Objector Village of Lakewood (Lakewood) filed a response to Landfill's petition for review which adopts all the objections, motions, pleadings, cross-appeal and arguments of the other Objectors. Landfill filed a response to these motions on

December 2, 1985. On December 20, 1985, Objector McHenry County Defenders, Objector Huntley Fire Protection District and Objector Landfill Emergency Action Committee filed appearances and notices of cross-appeals. (To avoid confusion, the Respondent-Objectors will be collectively referred to as "Objectors" unless otherwise indicated.) On February 27, 1986, Landfill filed Briefs and a Motion to "deem approved" by operation of law Landfill's application for site location suitability approval. On March 3, 1986 Allan Hamilton requested leave to file a statement which is hereby granted pursuant to Section 32 of the Act.

THE FEBRUARY 27 MOTION

On February 27, 1986, Landfill filed a motion requesting the Board to enter an order declaring that the site location suitability approval of the proposed sanitary landfill has been deemed granted by operation of law, to order the Illinois Environmental Protection Agency (Agency) to process its permit application for that landfill, and to dismiss this proceeding as moot. Landfill argues that it is entitled to this relief due to defective notice of the Board's hearing in PCB 85-56 and due to the failure of the County to take final action within 120 days. On March 3, 1986, the County filed a motion to strike Landfill's motion in that it was not timely filed, that facts which are not part of the record are presented and that the motion causes undue surprise which cannot be cured given the statutory decision deadline. Other Objectors filed responses to Landfill's motion on March 3, 1986, also arguing untimeliness as well as waiver and estoppel, among other things.

In its motion Landfill points out that Section 40.1(a) of the Illinois Environmental Protection Act (Act) requires a 21-day notice of hearing before the Board. However, notice was published on July 5, 1985 for the July 25, 1985 hearing in PCB 85-56. Therefore, Landfill continues, only 20-day notice was published, and since the 21-day notice requirement is jurisdictional, the hearing was invalid and the siting request may be properly deemed approved since the Board failed to hold a proper hearing and render a final decision within the 120-day statutory time period.

The hearing in PCB 85-56 was scheduled by the hearing officer by order dated June 27, 1985, and was mailed on that date. The order was received by the Board on June 28, 1985, and a letter was sent to the Woodstock Daily Sentinel that same day requesting publication as soon as possible. Unfortunately, notice was not published until July 5, 1985, seven days after the request was mailed, and 20 days prior to hearing. Landfill never objected to that notice during the course of the PCB 85-56 proceeding. However, during the course of this proceeding Landfill filed a complaint for declaratory judgment in the circuit court seeking a judgment that its application had been

granted by operation of law and enjoining the Board from proceeding on the basis of defective notice. The court, however, dismissed the action for failure to exhaust administrative remedies. Landfill then presented these issues to the Board in its February 27, 1986, motion.

Section 40.1(a) of the Act does require 21-day notice of a public hearing. Further, in Illinois Power Company v. Illinois Pollution Control Board, 484 N.E.2d 898 (4th Dist. 1985) the court held the statutory notice requirement to be a jurisdictional matter. The court also stated that the Board "cannot ignore the mandatory requirements of notice in an effort to evade the responsibility to complete a hearing within the required time." Furthermore, the court in Kane County Defenders, Inc. v. Pollution Control Board, 487 N.E.2d 743 (2nd Dist. 1985) extended the Illinois Power rationale which was based upon a determination under Section 40(a) of the Act to a proceeding under Section 39.2 of the Act. The court held that the failure of an applicant seeking approval of site location suitability "to publish appropriate newspaper notice ... rendered the county hearing invalid." Both of these cases are, however, distinguishable from this proceeding.

In Illinois Power the court's reversal of the Board's decision was based upon a construction of the word "shall" in Section 40(a) of the Act which states that "the Board shall give 21 day notice." Citing People v. Youngbey, 82 Ill. 2d 556, 562, 413 N.E.2d 416, 419 (1980) for the proposition that "the use of the word 'shall' is regarded as indicative of a mandatory intent," the court concludes that the notice provision of Section 40(a) is mandatory. However, the Supreme Court in Youngbey went on to state that "this is not an inflexible rule; the statute may be interpreted as permissive, depending upon the context of the provision and the intent of the drafters. Village of Park Forest v. Fagan (1976), 64 Ill. 2d 264, 268, 1 Ill. Dec. 42, 356 N.E.2d 42." (id. at 419-420). Only after a detailed analysis of the context of the provision and its legislative history did the Supreme Court conclude that the word "shall" was mandatory in that case.

Therefore, if the Illinois Power court was correct in its determination that the word "shall" is mandatory in Section 40(a), it must have reasoned that the context of the provision and the intent of the drafters indicate that it is to be so. It is difficult to determine what the reasoning was from the opinion. However, one indication of the reasoning used is that the court in Illinois Power noted that a permit issued by operation of law under Section 40(a) of the Act "simply protects the party seeking review from charges of operation without a permit." If that party otherwise violates the Act or Board regulations, an enforcement action can be brought. Since the initial permitting decision is based upon a determination of

whether the applicant has demonstrated that it will operate in compliance with the Act and Board regulations and enforcement actions can be brought against even a deemed-issued permittee if he does not so operate his facility, there is an identity of regulations that must be compiled with regardless of "deemed-issued" status. However, where, as is requested here, site location suitability approval is granted by operation of law, the local unit of government loses its ability to review site location suitability through no fault of its own, and furthermore, there will never be an opportunity to examine some of the issues which were to be considered by the governmental unit. For example, local governmental units are given the power to determine whether "the facility is necessary to accommodate the waste needs of the area it is intended to serve." (Section 39.2(a)(1) of the Act). However, there is no analogous provision on which an enforcement action could be brought: i.e. it is not a violation of the Act or Board regulations to operate a landfill which is not necessary to accommodate the waste needs of the area. It is difficult to believe that it was the intent of the drafters of Section 40.1(a) of the Act that a violation of that notice provision would forever preclude review of such important issues regarding landfill location. The very basis of the adoption of Section 39.2 of the Act was to grant local units of government some oversight of the landfill siting process. Landfill's request runs counter to that intent.

Furthermore, unlike the situation in Illinois Power, the notice requirements were fully complied with in this case albeit one day late. In Illinois Power, the Board failed to give notice at all to those who have requested notice of enforcement proceedings (though there are no such persons) or to appropriate members of the legislature, and never published newspaper notice, all as required by Section 40(a) of the Act. Thus, under the Illinois Power facts, all the court necessarily held is that the requirement of notice is mandatory, whereas the 21-day requirement could be read as directive of what constitutes satisfactory notice. Viewed in that light a 20-day notice is in substantial compliance with that directive language. Unlike the situation in the Illinois Power case, the Board in this instance did not "ignore the mandatory requirements of notice" nor did it attempt to "evade the responsibility to complete a hearing within the required time" as the court found under the Illinois Power facts. Instead, the Board requested the publication of notice at a time reasonably calculated to comply with the statutory mandate, and the lack of 21-day notice resulted from the inordinate time it took from mailing to publication.

The Kane County case, above, is even more easily distinguishable. While that case adopted the reasoning of Illinois Power in the landfill siting arena, it involved Section 39.2 of the Act rather than Section 40.1 which is at issue here and centered on a notice requirement applicable to the Elgin

Sanitary District (ESD), the landfill applicant, rather than the Board. In that case ESD served timely notice of the intent to file an application for site suitability approval upon the necessary property owners, but failed to publish notice until one day prior to the filing of the application (rather than the required 14 days) and failed to include in that notice the date the request would be filed as required by statute. Instead it published that notice nine days after the request was filed. The Kane County court found the Illinois Power reasoning to apply "even more strongly in the present case" in that "the County hearing, which presents the only opportunity for public comment on the proposed site, is the most critical stage of the landfill site review process." It found further support for that view "in the statutory notice requirements themselves, which are more demanding at the County phase of the process."

As in Illinois Power, the facts in Kane County demonstrated an almost total disregard of the notice provisions. No notice of the date of filing was given until after filing occurred and publication of the original notice occurred one day before filing rather than 14. Thus, unlike the facts of this case, there was no substantial compliance with the notice requirements. Furthermore, the consequences of a failure to comply with the notice requirements are much different. As a result of the Kane County decision, ESD must reapply for site approval: the full landfill site suitability review process will still take place. Further, had ESD realized the defect in notice, it could simply have withdrawn its request, republished notice and refiled. However, if the Board were to decide that Landfill can now deem its application approved, the local review process would be circumvented, and even if the defective notice had been discovered immediately, it would have been difficult or impossible for the hearing to be rescheduled and renoticed in sufficient time to reach an informed decision within the statutory decision period. Finally, this proceeding does not involve "the most critical stage of the landfill site review process" nor are the notice requirements nearly as demanding as those of the County stage. For these reasons, the Board finds that the twenty day notice of hearing was adequate.

Landfill further argues that Ill. Rev. Stat. 1983, ch. 100, par. 3 requires notice to be published "for three successive weeks since Section 40.1(a) of the Act fails to specify the number of notices intended." Since a single notice was published in this case, Landfill contends that the notice was inadequate. Paragraph three states:

> Whenever notice is required by law, or order of court, and the number of publications is not specified, it shall be intended that the same be published for three successive weeks.

The Illinois Supreme Court addressed this issue in Crocher v. Abel, 348 Ill. 269, 180 N.E. 852 (1932), where the Court was faced with an annexation statute requiring that Petitioner give at least fifteen days notice of hearing on a petition. Notice was published only once, which was argued to be insufficient since the number of publications was unspecified and publication must be for three successive weeks. The Court held that the notice was in compliance with the statute. Similarly, in Central Illinois Public Service Co. v. City of Taylorville, 307 Ill. 311, 138 N.E. 623, where the statute required the publication of notice "at least twenty days prior to such election," the court held that the publication of one notice at least twenty days prior to the election was sufficient. Again, in People v. Weinberg, 327 Ill. 158, N.E. 407; where the statute required the publication of notice "at least twenty days prior to such meeting," publication of one notice was deemed sufficient compliance with the statute. Furthermore, Landfill's assertion that one should look outside the subject statute for procedural guidance, runs counter to the General Assembly's expressed intent in Section 39.2(g) of the Act which states that:

> The siting approval, procedures, criteria and appeal procedures provided for in this Act for new regional control facilities shall be the exclusive siting procedures and rules and appeal procedures for such facilities.

The General Assembly did not intend for procedures contained in another act to apply to local siting approval cases. For these reasons the Board finds that the requirement for publication for three successive weeks is inapplicable, and that the single notice is in compliance with the statute.

Landfill's final argument in its February 27, 1986 motion is that the County failed to take final action within its statutory time period for decision, and that approval may, therefore, be deemed granted by operation of law. Landfill claims that neither of the County's actions on March 20, 1985 or October 15, 1985 were final actions as contemplated by Section 39.2(e) of the Act in that it has failed to provide the Board with a proper subject for review. In support of this contention it cites the Board's September 20, 1985 Opinion in PCB 85-56 which stated that "McHenry County applied the incorrect standard of proof for site approval, [and] the Board has no proper subject for review before it." Further, upon remand the County adopted a new order on October 15, 1985, stating:

> We affirmatively state that we in fact did use the preponderance standard in our original findings and order and acknowledge that our counsel's statement in that regard in our brief to the PCB was a correct statement of the standard we actually applied.

> The original order of March 20, 1985 be and is hereby reaffirmed and is attached hereto and made a part hereof.

In that original order, the County had stated that "the petitioner is required to show that the record supports all six criteria by the manifest weight of the evidence." From this Landfill argues that the County's October 15, 1985, action was null and void since it is contrary to the remand order and again is based on the manifest weight of the evidence, and again provides no proper subject for review.

The Board rejects these arguments and finds that the March 20 and the October 15 County orders were final actions taken within the statutory time period of 120 days. In the March 20 order the County in fact denied site location suitability approval, although upon review of that action the Board determined that it had done so improperly.

The acceptance of Landfill's reasoning would place the Board in an untenable position. Under the reasoning of Board of Education of Minooka v. Ingels (1979), 75 Ill. App. 3d 335, 394 N.E.2d 69, the Board necessarily remanded the initial County decision such that an adequate record for review could be developed. However, upon remand to develop that record Landfill argues that the County's statutory decision period was violated and that approval was granted by operation of law, thus precluding the development of an adequate record. Furthermore, even if the Board were to have found Minooka inapposite because of the statutory decision period and, therefore, decided the issues itself, it would have necessarily substituted its judgment for that of the County which would be an improper usurpation of the County's site location suitability approval authority, a function not delegated to the Board by the Act. (See Landfill, Inc. v. IPCB (1978), 387 N.E.2d 258, 264). Thus, the Board finds that the County's March 20, 1985 was a final action. Furthermore, its October 15, 1985 action was not simply an affirmation of the improper March 20 order. While it did reaffirm the findings, the October 15 order clearly indicated that those findings were based upon the proper standard of proof (regardless of the County's contention concerning the March 20 findings). Therefore, the Board finds that the County did not fail to take final action within the statutory decision period.

For these reasons, Landfill's February 27, 1986 motion is hereby denied.

FUNDAMENTAL FAIRNESS

In reviewing the decision of a local unit of government regarding site location suitability pursuant to Section 40.1 of the Act, the Board must consider the fundamental fairness of the procedures used in reaching that decision. Several issues regarding fundamental fairness have been raised by parties including:

1. Application of improper standard of proof or burden of persuasion;

2. Use of improper standards without notice;

3. Improper limitations on production of evidence and consideration of motions; and

4. Open Meetings Act violations.

However, each of these issues were raised and argued in PCB 85-56 and no new facts or arguments have been raised regarding fundamental fairness in this proceeding. Since these issues were fully considered and decided in the Board's September 20, 1985 Order in PCB 85-56, the Board will not discuss them again except to note that it has found the procedures used to be fundamentally fair.

CRITERIA ANALYSIS

Under Section 39.2(a) of the Act, local authorities are to consider six criteria when reviewing an application for site suitability approval for a new regional pollution control facility. The six criteria are:

1. the facility is necessary to accommodate the waste needs of the area it is intended to serve;

2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

3. the facility is located so as to minimize incompatibility with the character of the surrounding area and minimize the effect on the value of the surrounding property;

4. the facility is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation, or the site is flood-proofed to meet the standards and requirements of the Illinois Department of Transportation and is approved by that Department;

5. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents; and

6. the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows.

The proposed site for Landfill's new regional pollution control facility is located on the eastern side of Route 47 approximately 1 3/4 miles north of the Village of Huntley. The site comprises approximately 113 acres of farmland and is bounded on the south by the South Branch of the Kishwaukee Creek and on the east by a tributary to the South Branch of the Kishwaukee Creek.

In reviewing the decision of the County, the Board utilizes the "manifest weight of the evidence" standard. Manifest weight of the evidence is that which is the clearly evident, plain and indisputable weight of the evidence, and in order for a finding to be contrary to the manifest weight of evidence, the opposite conclusion must be clearly apparent, Drogos v. Village of Bensenville, 100 Ill. App. 3d 48 (1981): City of Palos Heights v. Packel, 121 Ill. App. 2d 63 (1970). The Board cannot reverse the findings and conclusions of the County simply because the Board would have weighed the evidence differently. The County decided that Landfill had satisfied Criteria Nos. 1, 3 and 5 and had not satisfied Criteria Nos. 2, 4 and 6. For the following reasons, the Board affirms the County's decision on Criteria Nos. 1, 2, 3, 5, 6 and reverses the County's decision on Criteria No. 4.

Criterion No. 1

Landfill presented the testimony of Mr. James Andrews, who prepared Landfill's application for siting approval. He testified that the life expectancy of the existing landfill servicing McHenry County was 4 to 5 years based on the remaining space available and the amount currently being received by the existing landfill. (R. 43). This contradicted an earlier opinion of Mr. Andrews in which he stated that the life expectancy of the existing landfill was 13 to 15 years. However, this earlier opinion was based on certain projected changes in operation and a waste receipt of approximately 700 cubic yards per day. This waste volume has since increased to 1300 to 1500 cubic yards per day. (R. 249). Also, one of the projected changes in operation, the installation of a high density baler, had not occurred. Based on these changed conditions and the observations by Mr. Andrews of the available space remaining at the existing landfill, Mr. Andrews concluded that the life expectancy of the existing landfill is 4 to 5 years rather than 13 to 15 years.

Objectors presented the testimony of several witnesses, one of whom was Mr. Gerald DeMers who was the project engineer and principle author of the McHenry County Total Waste Management Study which estimated the life expectancy of the existing landfill to be approximately six years. (R. 1911). Also, McHenry County presented a report by the Northeastern Illinois Planning Commission which estimated that the region had an average of 8.2 years remaining landfill life. (County Ex. 13). Mr. DeMers also testified that the lead time for establishing new landfills can exceed five years and that 80 to 85 percent of the waste generated in McHenry County is currently being disposed of in the county's existing site (R. 1976, 1982). Other witnesses of the Objectors testified that there will be no need for a new landfill until 1992-1994 and that the existing facility has six years of remaining air space (R. 2683, 2895).

Based on the manifest weight standard, the Board affirms the County's decision that Criterion No. 1 had been satisfied. The County could have reasonably concluded that for approximately 4 to 8 years the waste needs of McHenry County can be satisfied by the existing landfill. Furthermore, the County could have reasonably concluded that the lead time needed to bring a new landfill to operational status can exceed five years. The Second District Appellate Court has defined the term "necessary" to mean that the applicant does not have to show that a proposed facility is necessary in absolute terms, but only that the proposed facility is "expedient" or "reasonably convenient" vis-a-vis the area's waste needs. E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E.2d 555 (1983), citing Foster & Kleiser v. Zoning Board of Appeals, 38 Ill. App 3d 50, 347 N.E.2d 493 (1976) and Illinois Bell Telephone Co. v. Fox, 402 Ill. 617, 85 N.E.2d 43 (1949). The Third District Appellate Court has further defined "necessary" to mean that the applicant must show that the proposed facility is reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capabilities, along with other relevant factors. Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, 122 Ill. App. 3d 639, 461 N.E.2d. 542 (1984). The Second District later found that "expedient" connoted an element of urgency, and that "reasonable convenience" also requires a petitioner to show more than convenience. Waste Management of Illinois, Inc. v. The Pollution Control Board, 123 Ill. App. 3d 1015, 463 N.E.2d 969 (1984). Regardless, using the reasoning of both appellate courts, the Board finds that the County could reasonably conclude that the proposed landfill was necessary to accommodate the waste needs of the area it is intended to serve. The County is, therefore, affirmed in that determination.

Criterion No. 2

Extensive testimony was presented by both sides regarding this criterion. Landfill presented the testimony of Mr. Andrews, Mr. Van Silver and Dr. Rauf Piskin who concluded that Criterion No. 2 had been satisfied. In contrast, the Objectors presented the testimony of Dr. Pratap Singh, Dr. Yaron Sternberg and Dr. Musa Qutub who concluded that Criterion No. 2 had not been satisfied.

In attempting to reconcile the conflicting testimony, the Board notes that both Mr. Andrews and Dr. Piskin testified that portions of the design and operation of the proposed landfill were not the best that could have been presented. (R. 210-211, 242-243, 1136-1146). Although Dr. Piskin asserted that the design satisfied Criterion No. 2, he recommended various changes regarding design and operating procedures more restrictive than those contained in the application and Mr. Andrews concurred with these recommendations. (R. 211).

Additional testimony was presented by witnesses for the Objectors who testified that additional information was needed on the subsurface soil conditions at the proposed site before an evaluation could be made. (R. 2036-2039 & 2487). This would be done by taking additional soil borings and constructing additional monitoring wells. Also, testimony was presented on the flooding potential of the proposed site. Landowners in the vicinity of the proposed site testified that the site has the potential to flood. (RI. 6-11, 80-82)*. Other citizens voiced a general concern that the proposed site could flood. (RI. 115-116, 131-133 & 221-225). This testimony was buttressed by the independent calculations of Mr. Robert Layer who concluded that the proposed site has the potential to flood.

There was testimony presented on the permeability of the soils, the composition of the soils and the existence of subsurface groundwater which challenged the adequacy of the evaluation of the soil conditions of the proposed site. Moreover, extensive testimony was presented at the hearings which indicated the potential of the site to flood. Based on the manifest weight standard, the Board affirms the County's decision that Criterion No. 2 had not been satisfied.

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* On January 30, 1985, there was a hearing at which citizens could voice their concerns over the proposed landfill. This hearing was distinct from the other hearings held in this proceeding and will be cited as "RI." to avoid confusion.

Criterion No. 3

Landfill presented the testimony of Mr. Thomas Peters who prepared an appraisal report on the impacts the proposed landfill would have in a 9-square mile area (study area) surrounding the proposed site. Mr. Peters' testified that the study area was primarily agricultural in character; that the agricultural zoning in the study area has the lowest density and lowest average valuation of all county zoning classifications; that most of the properties in the study area with farmsteads have improvements reflecting a substantial amount of deferred maintenance and deterioration; that the study area is located near, but just beyond, a potentially prominent growth neighborhood in McHenry County; and that there is little potential for most of the study area to receive sewer and water services from municipalities. Based on these and other factors, Mr. Peters testified that Criterion No. 3 had been satisfied. (R. 1179-1196).

Objectors presented the testimony of several witnesses who criticized Mr. Peters' report. The major criticisms were that the study area excluded the impact on residential homes located to the north and east of the proposed site and that a landfill is incompatible with any other use of property (R. 1757, 1792). Additional testimony was presented regarding the growth trend in McHenry County which indicated increased residential development (R. 1560-1566). Testimony was also presented that the landfill would reduce property values in the study area (R. 2951).

Mr. Peters testified that the study area encompassed by his appraisal report was originally designed to include the area within a one-mile radius of the landfill. Mr. Peters, upon approval by Landfill, enlarged the study area so that township sections would not be split in half or in quarters. Using this process, the study area was enlarged 1/2 of a mile to the south and west, 7/50 of a mile to the north and no extension to the east. Two residential subdivisions to the north, Colleen's Cote and Andover Acres, and one residential subdivision to the east, Turnberry, were excluded using this technique. Mr. Peters testified that the sanitary landfill would have no effect on the values of property located outside the study area due to their distance from the landfill (R. 1193).

Objectors presented testimony that differed from Mr. Peters testimony. Two real estate brokers testified that the study area of Mr. Peters' appraisal report excludes the impact of the proposed landfill on the residential subdivisions located to the north and to the east of the proposed site. (R. 1566-1571, 1742-1743, 2316-2320 and 2931-2933). Some Turnberry residents testified that they can see the proposed landfill (R. 2933). Landfill proposed to plant trees along Rt. 47 (R. 519). However, this will not affect the view from the Turnberry subdivision located to the east of the site. In resolving this conflicting

testimony, the County could have reasonably concluded that the impact this proposed landfill will have on the character and value of the surrounding area was sufficiently minimized in response to Criterion 3. Thus, based on the manifest weight standard, the Board affirms the County's decision that Criterion No. 3 had been satisfied.

Criterion No. 4

Mr. Andrew Rathsack testified for Landfill on the 100-year flood plain determination. Landfill requested a determination from the Illinois Department of Transportation (DOT) that the proposed site was not within a 100-year flood plain. DOT sent Landfill a letter dated November 20, 1984 which states in relevant part:

> Inasmuch as the site is located within a rural area and on a stream with a drainage area of less than ten square miles, an Illinois Department of Transportation, Division of Water Resources permit will not be required for the landfill.
>
> With regard to Section 39.2 of the Illinois Environmental Protection Act, this letter constitutes Illinois Department of Transportation approval upon your receipt of all appropriate Illinois Environmental Protection Agency approvals. (Exhibit 3 of Supplement 2 of Landfill's application).

Landfill sent another letter to DOT requesting clarification of this letter. DOT responded in a letter dated January 21, 1985 which essentially restated DOT's position in the November 20 letter.

The Board has been faced with this issue before. Recently, the Board in Board of Trustees of Casner Township v. County of Jefferson, PCB 84-175, April 4, 1985 construed that a letter identical to the November 20 letter constituted DOT approval pursuant to Criterion No. 4. The Board reluctantly, and for the reasons previously articulated in Casner Township and elaborated upon here, reaches the same finding in the instant matter.

Initially, the Board notes that Criterion No. 4 is clearly different from the remaining five criteria, each of which requires that the County weigh evidence as to whether that criterion has been satisfied by the applicant. Criterion No. 4, conversely, delegates an authority to DOT. As this Board previously held in Casner Township, Criterion No. 4 does not, by its terms, require or allow a County to "second guess" or to evaluate DOT determinations. Similarly, this Board must also accept a DOT determination and is not allowed to "second

guess." The immediate issue is, therefore, whether the DOT letter constitutes approval of DOT according to Criterion No. 4, and not whether such determination does or does not have merit.

A plain reading of the DOT letter would seem to be that DOT defers in its determination to the Agency. The Agency does in fact approve landfill siting, including issues related to placement of the facility with respect to the floodplain and site floodproofing. However, the Agency makes its determinations part of the permitting process, an event which occurs only when and if the County (or its Section 39.2 equivalent) grants approval. This constitutes a "catch-22" situation. Namely, the County must have a DOT determination before reaching its decision, yet such determination (i.e., the Agency's surrogate determination) cannot be made until after the County renders its decision. Thus, under the seemingly plain reading the County is required to make a determination on information which it can not receive. This is an impossible situation, and requires that some reading other than that which is seemingly plain is demanded of the DOT letter.

The issue therefore reduces to whether there is an alternate reading of the DOT letter which resolves the above impossible situation. Assuming arguendo that the DOT letter does not represent DOT approval according to the conditions of Criterion No. 4, then every County which receives only the standard DOT letter would have to disapprove all applications for failure to meet Criterion No. 4. This clearly is an untenable outcome in that it overrides any judgments made by the County on the other five criteria. It is further untenable in that it automatically frustrates both the goal of local siting review and the ability to develop any new pollution control facility,. Neither of these conditions can be reasonably considered to be consistent with the implied intent of Section 39.2.

Alternatively, there is the consideration that the DOT letter does represent DOT approval. This situation allows the County to reach an approval or disapproval decision based on a weighing of the evidence submitted under the remaining criteria. Further, the County can give its own evaluation to such site specific floodplain evidence as may be presented to it as one of the facets considered relevant to Criterion No. 2. This circumstance can reasonably be considered to be consistent with the implied intent of Section 39.2. Therefore, although it is not pleased with the necessity of doing so, the Board finds that the only tenable reading of the DOT letter is that the DOT letter does represent DOT approval pursuant to Criterion No. 4.

For the above reasons, the Board, based on the manifest weight standard, reverses the County's decision that Criterion No. 4 had not been satisfied.

Criterion No. 5

Mr. James Andrews, testified on the various aspects of the accident prevention plan, the fire prevention plan, injury procedure and the responsibilities of the emergency coordinators (R. 103-110). Objectors contend in their cross-appeals that the County erred in its decision on Criterion No. 5 arguing that Landfill's failure to consult the local fire district which will assist the on-site operators in implementing the various prevention plans rendered Landfill's plans inoperable. The testimony presented by Landfill shows that the fire prevention plan relies primarily on on-site equipment and procedures. Also, the accident prevention plan, injury procedure and emergency coordinator responsibilities mostly rely on on-site procedures to minimize the danger to the surrounding area. The Board does not agree that Landfill's prevention plans are inoperable and, based on the manifest weight standard, affirms the County's decision that Criterion No. 5 had been satisfied.

Criterion No. 6

Mr. Brian Johnson was the only witness who testified on this criterion. Mr. Johnson testified that an average of 80 to 85 trucks per day will visit the site, 85 to 90 percent of which will come from the north (R. 1423). Mr. Johnson proposed various access improvements to minimize the impact of site-generated traffic on the existing traffic patterns. These improvements include a left-turn lane for the southbound lane of Route 47, an 8-foot paved shoulder with a curb and gutter for the northbound lane of Route 47 prior to entering the site for use as a deceleration lane and an acceleration area for trucks leaving the proposed site heading north. (R. 1424-25, 1431 & 1486-1489). The left-turn lane will enable the remainder of the southbound traffic to be directed around the trucks waiting to turn into the proposed site. The 8-foot paved shoulder will be used by trucks from the south for deceleration prior to turning into the proposed site. An additional right-turn lane was considered but was not included in the improvements because Mr. Johnson felt that the amount of truck traffic from the south did not justify an additional lane. The acceleration area for trucks traveling from the proposed site north on Route 47 consists of part roadway and part shoulder and is designed so that a truck leaving the proposed site would accelerate in this area prior to merging with the northbound traffic.

Route 47 is a rolling highway with a 55 mile-per-hour speed limit (50 mph for trucks) and is a major arterial route servicing McHenry County. (R. 1421-1422). Approximately 10 percent to 12 percent of the vehicles on Route 47 are trucks, a relatively high percentage of traffic. (R. 1421). Route 47 is also used in the summer and winter by people traveling to Lake Geneva, WI. (R. 1476). Landfill proposes to construct the various improvements

to Route 47 to mitigate the impact of site-generated traffic on existing traffic flows. While Landfill proposed these improvements to minimize the effect on existing traffic patterns, the County's determination that these efforts were insufficient was reasonable. Moreover, the vast majority of the truck traffic leaving the site will utilize the acceleration area, thereby imposing an additional hazard to existing traffic flows as the trucks merge with the northbound traffic. Thus, based on the manifest weight standard, the Board affirms the County's decision that Criterion No. 6 had not been satisfied.

ORDER

The October 15, 1985 decision of the McHenry County Board denying site-suitability approval to McHenry County Landfill, Inc. for a new regional pollution control facility is hereby affirmed.

IT IS SO ORDERED.

Board Members J. Dumelle, B. Forcade and J. Anderson concurred.

Board Member J. T. Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 14th day of March, 1986 by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board