ILLINOIS POLLUTION CONTROL BOARD
December 2, 1982

BROWNING FERRIS INDUSTRIES OF ILLINOIS, INC., Petitioner,	)	
v.	)	PCB 82-101
LAKE COUNTY BOARD OF SUPERVISORS, Respondent,	)	
and	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Intervenor - Petitioner.	)	

MURRAY R. CONZELMAN (CONZELMAN, SHULTZ, SNARSKI & MULLEN), AND FRED C. PRILLAMAN (MOHAN, ALEWELT & PRILLAMAN) APPEARED ON BEHALF OF PETITIONER;

GERALD P. CALLAGHAN AND GARY NEDDENRIEP, ASSISTANT STATE'S ATTORNEYS, APPEARED ON BEHALF OF RESPONDENT;

WILLIAM E. BLAKNEY APPEARED ON BEHALF OF THE INTERVENOR.

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

This matter comes before the Board on the August 16, 1982 appeal filed by Browning Ferris Industries of Illinois (BFI). Pursuant to Section 40.1 of the Environmental Protection Act (Act) BFI is challenging certain special conditions contained in the July 13, 1982 grant by the Lake County Board of Supervisors (Lake County) of Section 39.2 site location approval for the proposed acceptance of special wastes by an existing landfill located in unincorporated Lake County (Lake County Rec. p. 1315-1327).

PROCEDURAL HISTORY

The subject site, referred to in the record as BFI Site #2, has been in operation since January 7, 1982. It consists of about 74 acres located about 2000 feet east of the northeast corner of 9th Street and Green Bay Road near Winthrop Harbor. BFI Site #2 is immediately adjacent to BFI Site #1, a 74 acre site currently permitted for the disposal of special and hazardous wastes. BFI

repeatedly stated that it was not seeking County siting approval for disposal of hazardous wastes in Site #2, but, rather, non-hazardous special wastes [See Sec. 3(x) of the Act].

The County held four public hearings concerning BFI's April 12, 1982 application (LC Rec. 1-347). These hearings were held on May 26, June 2, 7 and 17, 1982 (LC Rec. 811-1314), pursuant to notice (the adequacy of which is not at issue), in accordance with procedural rules adopted by County resolution of April 13, 1982 (LC Rec. 361-371).

Pursuant to these rules, hearings were conducted by the Lake County Regional Pollution Control Hearing Committee (Committee), and were attended by Committee (and County Board) members Jim LaBelle, Stanley Pekol, Glen Miller, Sam Payne and Jim Fields. Assistant State's Attorneys Gary Neddenriep and Gerald P. Callaghan served as legal advisors/hearing officers for the Committee.

BFI initially presented six witnesses at hearing. James Andrews, David Beck and Roberta Jennings of Andrews Engineering Inc., which is the consulting and design firm retained by BFI, gave testimony concerning the geology of the area, site design, and projected and recommended site operation. George Edema, Sr. of BFI explained the history and nature of the company and clarified several matters in BFI's application. Herbert F. Harrison, a real estate appraiser and land use consultant retained by BFI, gave his opinion concerning the effect of site location approval on surrounding properties.

The City of Zion presented two witnesses in opposition to BFI; a "Zion development" is located across 9th Street from Site #2 (LC Rec. 1177). The first witness, Raymond Stanzcak, had been employed at BFI Site #1 from about November, 1980 until his termination March, 1981. He spoke concerning perceived deficiencies in operational and manifest discrepancy testing procedures during the period of his employment. City Council Member Marjorie Semmholtz gave her views concerning the problems of landfill disposal methods and the effects of BFI Site #2 on the adjoining portion of Zion. Michael Isom of the Village of Winthrop Harbor and Mr. Klammer (sic) of Benton Township each registered the opposition of his respective governmental unit.

Pursuant to the County's aforementioned April 13, 1982 Resolution (LC Rec. 361 et seq.), various County departments were authorized to review the BFI application, to make recommendations and reports, and to testify at hearing. Testimony was presented by Dr. Thomas K. Nedved of the County's Department of Public Health, by Chuck Zieler and Dave Moulton of the Department of Building and Zoning, and by Lane Kendig and Jeanne Becker of the Department of Planning, Zoning and Environmental Quality. Their testimony concerned in part staff reports apparently available at hearing, but which were not formally entered as exhibits (LC Rec. 650-685).

BFI presented one rebuttal witness, Marv Powles (incorrectly referred to in the transcript as Mark Poulce--see BFI Reply Brief at 12). Mr. Powles, who had been Mr. Stanzcak's supervisor, testified concerning the events covered by Stanzcak's testimony.

In its July 13, 1982 Resolution conditionally approving the site, the County made an unequivocal finding that 4 of the 6 criteria of §39.2 had been satisfied. Special conditions were attached to the approval relating to the criteria that a) "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected", and b) "the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents" (§39.2 of the Act).

The challenged special conditions are, and provide for (in summary):

C Right of unannounced site inspections and investigations by the Lake County Department of Public Health (LCDPH)

E LCDPH Inspection of special waste manifests and manifest discrepancy testing

G LCDPH right to discuss and recommend nuisance control remedies

H LCDPH right to discuss and require additional measures to control vectors, dust, odors, blowing and erosion problems

I LCDPH right to a) receive copies of quarterly monitoring well reports, and b) to discuss and require additional reports and wells

K a) BFI to have on-site chemist of specified educational background and experience to conduct specified manifest discrepancy testing b) LCDPH right to discuss and require additional on-site and off-site testing

M BFI to reduce pollution loads in stormwater run-off by 50%

N a) BFI to notify LCDPH before pumping of water off-site, b) LCDPH right to test water for pollutants before pumping.

P BFI to obtain state permits for any diversion of stormwater from Lake Michigan watershed

O a) BFI to maintain daily logs on specified liquids to solid ratio, with logs to be submitted to LCDPH monthly and excursions from 10 gallons of liquid to 1 cubic yard of solids to be reported daily, b) LCDPH right, after inspection, to close site to further liquids.

S BFI to run and report quarterly results to LCDPH of tests of all private drinking wells within 500 ft. of site (if owners approve)

T a) BFI to "sound gas vents" for liquid levels on excavated trenches quarterly for life of site plus 3 years, b) weekly monitoring required if level reaches 10 ft. and c) measures to lower liquid level required by County if levels rise.

V BFI to pay LCDPH a yearly inspection fee: $1000, to be adjusted yearly to cover LCDPH actual costs.

W BFI to provide proof of financial responsibility by means of bond, escrow agreement or insurance policy for life of site plus 20 years in the amount of $3 million.

X a) Illinois Environmental Protection Agency (Agency) to include all county conditions in any Agency permits to BFI, b) Agency to enforce such conditions

Provisio, unnumbered ¶, p. 8 - BFI to pay all publication, court reporter and transcription costs of county board's hearings.

In accordance with the Board's Order of August 18, 1982, Lake County filed its 1331 page record with the Board on September 8, 1982. On October 5, 1982 the Agency moved the Hearing Officer for leave to intervene, which motion was granted by his Order of October 6, 1982. Hearing was held on October 20, 1982 in Waukegan, Illinois, at which all parties and some members of the public were present. At this short (30 page transcript) hearing, Hearing Officer rulings were sought and obtained on the correctness of inclusion of certain items in the County's record, all other arguments being reserved for briefing pursuant to schedule. On November 1 and 24, 1982, respectively, the Agency filed a brief and reply brief challenging Special Condition X. BFI's opening brief was filed November 3, 1982, Lake County's brief on November 17, 1982, and BFI's reply on November 29, 1982.

THRESHOLD ISSUES

Review of BFI Motion to Strike

Two items presented at hearing were the subject of a BFI motion to strike denied by the Board's Hearing Officer at the October 20, 1982 hearing. BFI seeks review of these rulings. The motion was granted as to a third group of items, which the Board will address sua sponte.

The first item is a letter dated June 3, 1982 from the Agency to Fred Prillaman with attached copies of several Agency Inspection and Observation Reports (LC Rec. 718-817). This item consists of two years of reports on adjacent BFI Site #1.

Request for this information was made by Committee Member LaBelle on June 2, 1982, who stated that he "would like those reports submitted for the record" (LC Rec. 982-983). The records were tendered by BFI's counsel on June 7, 1982, who noted that in so doing he was "not filing this as an exhibit on behalf of the applicant" (LC Rec. 1143). On June 17, this position was reaffirmed (LC Rec. 1297).

BFI objects to the County's inclusion of these documents in the record on the grounds that a) they were never formally marked as anybody's exhibit and were not admitted as evidence, and b) that they constitute hearsay. The County's position is that a) it has no objection to sponsoring these exhibits at this time, but that since BFI did not object to inclusion of these documents "in the record" it has waived any objection and b) that the Agency reports fall within the business records exception to the hearsay rule, City of Highland Park v. Pollution Control Board, 66 Ill. App. 3d 143, 383 N.E.2d 692 (1978), or within a public records exception to that rule. BFI responds that a) as the records were never formally offered, no objection need have been made, and b) that Highland Park was premised on the Board's adoption of a procedural rule (codified as 35 Ill. Adm. Code 103.208) virtually identical to Supreme Court Rule 236(a).

Assuming that this were a County enforcement action (present legal authority for which is non-existent), seeking to resolve whether BFI had violated the Act or the Board's rules, BFI's argument concerning the County's failure to formally offer and then admit the records into evidence would have some merit. [However, the lack of objection to Marv Powles' discussion of these reports on cross-examination undercuts the argument (LC Rec. 1279 et seq.)]. Where a party's "guilt" or "innocence" hangs in the balance, adherence to formal rules of evidence is necessary in the interests of fundamental fairness. Similarly, under such circumstances, the argument that the admissibility of hearsay evidence which would be relied upon by the courts or the Board should be barred bacause of lack of an enabling County procedural rule might have some validity.

However, as the Board noted in Village of Hanover Park v. County Board of Du Page, et al., PCB 82-69 (Order of August 30, 1982; Opinion September 2, 1982), the County's §39.2 "fact finding public hearing is more characteristically legislative" [than adjudicatory in nature] (Op. at 8, see also p. 4-5). The purpose of such hearings is to adduce information "which is material, relevant, and would be seriously relied upon by reasonably prudent persons in the conduct of serious affairs" [Ill. Adm. Code 103.204(a)]. Technical "defects" or informalities in the conduct of the County's hearings which do not go to the fundamental fairness of the proceedings or the decision cannot, and should not, as a matter of policy serve as the basis for striking relevant information upon which the County relied.

The Board therefore finds that the Agency records were properly included in the County's record, despite the technical failure to label them as a County exhibit. The Board further finds that these hearsay records were properly "admitted" at hearing, particularly as no substantial reason has been offered to depart from the policy expressed in 35 Ill. Adm. Code 103.208.

The second item consists of attachments to a May 4, 1982 letter submitted to the County by the City of Zion during the 30 day public comment period provided by §39.2 (LC Rec 424-649). These attachments consist of newspaper articles, memos, position papers, book excerpts, etc., which BFI argues are hearsay inadmissible even in administrative hearings e.g. Russel v. License Appeal Commission of the City of Chicago, 273, N.E.2d 650 (1st Dist. 1971). The County argues that the attachments are referred to by number throughout the course of the letter, and are an integral part of the City's public comment. It notes that §39.2(c) requires the County to consider any timely filed comment, so that the legislature must have intended to exempt these comments from the hearsay rule. The County also suggested that questions concerning the "reliability of such documents and Petitioner's inability to cross-examine their authors should not effect (sic) their admissibility but only the weight to be given to them" (County Brief at 27).

The Board agrees with the County that to strike public comments as hearsay would render this §39.2(c) mechanism for public input meaningless. The Board notes that in its own quasi-legislative rulemaking authority under Title VII of the Act and the Illinois Administrative Procedures Act, that it is mandated to consider public comments as well as sworn testimony contained in a transcribed record. As the County notes, the apparent conflict is resolved by appropriate weighing of the differing submittals. The Zion letter with its attachments was properly included in the County Record.

The Board wishes to comment on eleven items which the County agreed to strike from its record upon BFI's motion. These items are letters and other documents which were "either not stamped by the County Clerk or were [letters] actually dated...beyond the 30 day public comment period" (R. 4), established in §39(c) of the Act and repeated without change in the County's Procedural Rules (LC Rec. 361). It was further stipulated that the County did not rely on these materials in making its decision (R. 4-5).

It would appear that the parties have construed §39.2(c) as providing a maximum period for public comment, which restrains the County's authority to consider comment. The Board considers 39.2(c) to be a guarantee to the public of the minimum period in which it may submit written remarks. This period could, therefore, be extended by procedural rule, or could be "stretched" to accept late-filed comments where to do so would not prejudice the applicant or the fairness of the hearing process.

Applicability of Hanover Park Decision

In the Hanover Park Opinion of September 2, 1982, the Board determined that since it must review the County's siting decisions and cannot hold de novo hearings pursuant to §40.1 to fill any gaps in the County's record or decision, that

> "the County's written decision must clearly indicate the information which it finds persuasive, and comment on what it does not. The reasons for its ultimate conclusions must be made clear. If conditions are imposed, the County must relate from which of the statutory criteria they flow, and why they are necessary." (Opinion at 10.)

BFI contends that the County's resolution is deficient in that it fails to contain explanatory information, and apparently suggests that it be remanded. The County argues that Hanover Park should not be retroactively applied to a decision taken July 13, 1982. It argues that it has substantially complied with the Act, citing Incinerator, Inc. v. Pollution Control Board, 59 Ill.2d 290, 319 N.E.2d 794 (1974), and that the Board should consider its decision and record.

The above-quoted language from Hanover Park was intended to "flesh out" the §39.2 guidelines for written decisions by a county, with the expectation that "decisions...rendered after the date of [the] opinion would be more specific in this regard" (Incinerator, 319 N.E.2d at 799). The record in this case, which is most laudably well-organized both from the points of view of the mechanics of paper handling and of background material addressing the six criteria and various proposed conditions, does indeed demonstrate substantial compliance with the Act. Remand without consideration of the merits would therefore not be in the interests of administrative economy.

THE CONDITIONS

Spheres of Interest of the Agency and Local Government and The Waste Management Decision

Section 39.2(3) of the Act provides in relevant part:

> "In granting approval for a site the county board... may impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section and as are not inconsistent with regulations promulgated by the Board."

In Waste Management of Illinois, Inc. v. Board of Supervisors of Tazewell County, PCB 82-55, August 5, 1982, the Board determined that it was not one of the purposes of the Section to

give "local authorities concurrent jurisdiction with the Agency to review highly technical details of the landfill design and construction". The Board looked to legislative history in making this determination, citing the intent of SB 172's sponsor that "They [the local authorities] are not to make technical decisions concerning the suitability of the site, rather that power still lies in the Environmental Protection Agency" (p. 10).

Section 39.2(a) of the Act provides in pertinent part that:

> "The county board...shall approve the site location suitability for such new regional pollution control facility only in accordance with the following criteria:
>
> . . .
>
> (ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
>
> . . .
>
> (v) the plan of operation for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents."

The County alleges first, that the cited language is "clear and unambiguous", so that review of legislative intent is precluded e.g. Berwyn Lumber Co. v. Korshak, 34 Ill.2d 320, 215 N.E.2d 240 (1966). It then argues that the remark of one legislator does not establish the intent of the legislature.

Section 12(b) of Title I: General Provisions provides in part that:

> "it is the purpose of this Act, as more specifically described in later sections, to establish a unified, state-wide program supplemented by private remedies, ..." (emphasis added).

In the contest of this pre-existing legislative commitment to a "unified state-wide program", the language of §39.2 providing for local control of conditions concerning site location suitability is hardly clear and unambiguous. The extent to which and manner in which local siting concerns are to be dovetailed with statewide interests is in no manner "specifically described".

As to expressions of legislative intent, the Agency points out in its brief that some of the legislative history of §39.2 (SB 172) is contained in gubernatorial veto and amendatory veto messages.

As originally enacted SB 172 contained a proposed Section 7.2 which provided:

> "Sec. 7.2. Counties and municipalities may adopt and enforce ordinances regulating pollution control, provided such regulations and enforcement are in accordance with and no more stringent than the terms and provisions of this Act, except that the regional pollution control facility siting provision of Section 39.1 shall be the exclusive siting procedures for such facilities..." (Journal of the Senate, July 1, 1981, p. 4210.)

In exercising his veto authority under Article IV, Section 9(e) of the Illinois Constitution (1970), Governor Thompson, however, struck that proposed Section, stating:

> "The new Section 7.2, which would be added by the bill, is substantially equivalent to House Bill 847, which I have vetoed. In addition to my reasons for vetoing HB 847, it is also true that this authority is not directly related to the siting process outlined in SB 172, and serves only to add a confusing, extraneous provision which should be deleted." (Journal of the Senate, October 1, 1981, p. 4469.)

The Governor's veto of Section 7.2 was subsequently upheld (Journal of the Senate, October 30, 1981, pp. 4975-6).

In vetoing HB 847 (which paralleled SB 172), the Governor stated:

> "This bill would allow counties and municipalities to adopt and enforce pollution control ordinances which are no more stringent than the terms and provisions of the Environmental Protection Act. Though limited, the authority granted by HOUSE BILL 847 would have the potential for creating confusion and fragmented regulatory requirements for Illinois industry to meet around the State.
>
> I believe the Illinois Constitution and the Environmental Protection Act clearly intended that we establish a unified state-wide program of environmental protection. This goal is being met by a strong state program of pollution control regulation. It should not be frustrated by the duplication of efforts and lack of uniform standards and enforcement that would result from this bill." (Journal of the House of Representatives, October 1, 1981, p. 6493.)

This veto was subsequently upheld (Id. at 6649).

The Board accordingly reaffirms its Waste Management finding that there is a separation of review criteria between the Agency and local authorities. The Agency, with its broad-based staff and research experience and capabilities, continues to have administrative jurisdiction over the detailed, specific, uniform "environmental" specifications of a landfill's construction, waste disposal procedures, and the like; pollution events resulting from faulty design or operation can easily cross the boundaries of the unit of local government having site location approval authority. It is given to the municipal and county authorities to review, and base its decision on, matters of more traditionally "local" concerns raised by potential conversion of a site from one use to another; these include odor, noise and pest nuisances, road maintenance and cleaning, increased call on police and fire departments, visual aesthetics, and so on.

This is not to say that both the Agency and the County cannot focus on a similar subject matter, but for different reasons. For example, the Agency's interest in a final cover designed to prevent a "bathtub" effect and the County's interest in a final planting cover designed for visual aesthetics emanate from different jurisdictional responsibilities, the former to protect the State's waters--which do not respect local boundaries--and the latter to prepare for, say, ultimate recreational uses--which do respect local boundaries.

Also, regardless of the quality and quantity of local staffs, to construe SB 172 as giving counties and municipalities the power over regional facilities to co-regulate in technical areas, especially as related to the Agency's permit purview, is to assure chaos. It is easy to visualize the consequences of counties, municipalities and the state collectively dictating conditions for, say, the proper placement, depth, numbers, use of, capping etc. of testing and monitoring wells. And to expect the Agency to later "adjust" county technical conditions that are incompatible with the Agency's view of the proper and safe use of testing and monitoring probes is to ignore the fact that, if the Agency does so, it can be contravening the County approval upon which the Agency's power to issue the permit is derived. And after the County's 120 day decision period is up, there is no "going back" for fine-tuning.

The County's site location suitability approval is a power which precedes the Agency's power to issue a permit, and is not a substitute for it or a site management overlay upon it. However, SB 172 places the County and its citizens in a strengthened and better informed position to effectively seek sanctions against a landfill operator who affronts the sensibilities of the person in the surrounding areas.

Enforcement of Local Approval Conditions: Special Condition X

The Agency strenuously objects to inclusion of Special Condition X, requiring the Agency to include County conditions in its permits and to enforce them.

Prior to the passage of SB 172 it was well settled that the Agency, not the Board, had exclusive authority to write and to issue permits, e.g. Landfill, Inc. v. Pollution Control Board, 74 Ill.2d 541, 387 N.E.2d 258 (1978). It had also been found that, as between the Agency and local government, permits could not be issued subject to local conditions, on the grounds that this could frustrate the Act's intent to establish a "unified, state-wide program" Carlson v. Village of Worth, 25 Ill. App.3d 315 (1st Dist. 1974), affd., 62 Ill.2d 406 (1976). The Agency asserts that passage of SB 172 does not alter either interpretation of the Act's permitting system.

Section 39.2 does not explicitly mandate inclusion of siting approvals in Agency permits, and does not mandate Agency enforcement of these conditions. The Agency further notes that Section 39(c) of the Act gives it authority to establish conditions "necessary to accomplish the purposes of this Act". It remarks that this authority is far broader than that granted to the County to impose site location suitability conditions, which is confined to conditions to "accomplish the purpose of this Section [39.2]".

Under these circumstances, BFI and the Agency argue that imposition of differing local conditions runs counter to development of a unified enforcement program, and would impose new financial and technical enforcement burdens on the Agency. In essence, the County's argument is that if siting approval conditions are unenforceable, that it has been given a hollow right for which no remedy exists. It then argues that since the Agency is a state-wide enforcement body, it is appropriate to have local conditions enforced via state permits.

The Board agrees that the power to enforce a Section 39.2 siting condition must necessarily be implied, to avoid rendering the section a nullity. The potential availability of enforcement of conditions in a circuit court under a quasi-contract or similar theory does not satisfy the Act's general concern that cases arising from the Act be adjudicated, and appealed if necessary, in an expedited manner. The hoary maxim that "Justice delayed is justice denied" most certainly applies here. However, the Board agrees that both itself and the County lack authority under Section 39.2 to interject themselves into the Agency permitting and enforcement system in the manner suggested by the County; Special Condition X is stricken.

This does not however leave the County without a remedy. It is the Board's opinion that the broad language of Sections 31(b) and 33(a) of the Act confers the right to enforce siting location suitability approval conditions in an enforcement action before the Board.

Section 31(b) provides that

> "Any person may file with the Board a complaint... against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term or condition thereof..." (emphasis added).

Section 33(a) provides that

> "...the Board shall issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances..."

Siting approval conditions are in the nature of conditions precedent to an Agency permit, or of a site-specific rule, enforcement of which falls within the intent of Section 31(b) to allow all causes arising from the Act to find a remedy. This construction effectuates legislative intent that local interests as well as state-wide interests arising under the Act be afforded an administrative forum, and a remedy "appropriate under the circumstances".

Certain other points argued in the briefs in the context of various special conditions should be addressed in the context of the powers of various agencies and entities under the Act. The Act establishes a system whereby any person or entity a) generally subject to Board regulations can participate in the rulemaking process itself and challenge the rules prior to their enforcement (§27-29) and b) specifically subject to Agency permit conditions can challenge permit conditions prior to their enforcement in a permit appeal proceeding (§40). The Act therefore provides an "up-front" mechanism by which a person can challenge requirements believed to be lacking in specificity, standards for exercise of discretion, or the like.

Many of the County's conditions include provisions requiring that BFI perform acts when, as, and if, the County determines them to be necessary at some time in the future. The County argues that BFI can challenge any such County directives made subsequent to permit issuance in the context of an enforcement action presumably brought by the County or Agency after BFI has failed to comply. This runs counter to the Act's established mechanism to allow for appeal, prior to enforcement exposure, of the reasonableness of actions required to be taken to implement the Act.

The Impermissible "Technical" Conditions: E, K, O, T, I

Special Condition E, allowing for County inspection of special waste manifests and manifest discrepancy testing, and Special Condition K, requiring BFI to have an on-site chemist of specified educational and experience background to perform specified tests in addition to all others later required by the

LCDPH, flow from the same set of County concerns. These are that BFI Site #1, the already permitted special and hazardous waste site, and Site #2 will be served by the same entrance gate and separated internally only by a 10 foot clay wall (LC Rec. 855-1009). Based on the testimony of former BFI employee Raymond Stanczak, rebutted by BFI, the County questions the adequacy of BFI's past conduct and testing procedures concerning Site #1. It also questions the Agency's ability to provide sufficiently close inspection supervision.

These conditions involve the highly technical subject areas which have been historically within the province of the Agency, and are covered in part by the Board's Chapter 9: Solid Waste Regulations. These are therefore stricken as being beyond the area of the County's §39.2 jurisdiction.

Special Condition O, specifying a 10 to 1 liquids to solids ratio, logging and reporting concerning ratio maintenance, and providing the County with authority to shut down the site if the ratio standard is violated, also impermissibly seeks to regulate a highly technical area of site operation. BFI notes that the shut-down provision, triggered by an inspection which "demonstrates problems" raises additional concerns. The definition of "problems" is left to the unfettered discretion of a County inspector, who presumably could overrule the opinion of an Agency inspector that no "problems" existed. Once a site were shut down, no standards specify conditions under or procedures by which it could be re-opened. In effect, the County as mini-EPA is attempting to assume closure powers granted in the Act only to the Board, in a manner which bypasses the up-front procedural safeguards contained in the Act. This condition is stricken.

Condition T, regulating the overall liquid level in the landfill and providing for pumping and unspecified "treatment" if the level exceeds 10 feet as determined by "sounding the gas vents", pinpoints another problem associated with local imposition of technical conditions: imposing inappropriate or even technically infeasible conditions. As BFI notes, there is no record basis for the 10 foot maximum chosen, and no definition of the "treatment required". BFI also notes that gas vents are not installed until after the trenches are closed, do not extend to the bottom of the fill, and are not installed for the purpose of measuring liquid levels (LC Rec. 0157). This condition is stricken.

Special Condition I, to the extent that it allows the County to require additional monitoring wells and testing devices to determine water and air pollution, is stricken. This condition is, again, standardless and seeks to regulate in a highly technical area. In addition, the requirement duplicates a Special Condition 8 already included in BFI's December 23, 1981 operating permit. (As BFI has not challenged the requirement to provide the County with monitoring well test results, the provision stands. See also discussion immediately following.)

Inspection Authority: Condition C
Nuisance Control Recommendations: Conditions G & H

At hearing, counsel for BFI represented that

> "obviously we have no objection to the Counties (sic) conducting inspections, advising us, recommending things. We have no problem with County receiving all our information. We have no problems with the County appearing on inspections with the EPA and so on." (LC Rec. 1289.)

BFI objects to three conditions directly involving these areas. Special Condition C would give the LCDPH the right to make unannounced inspections at reasonable times. The nuisance control conditions involve traditional local health concerns: G, with any nuisance associated with special waste disposal, and H apparently with pest, odor, litter and dust problems connected with the disposal operation as a whole. They differ in that G involves a right to "discuss and recommend" while H involves a right to "discuss and require".

BFI argues that an inspection right would be duplicative of the inspection rights accorded to the Agency by Section 4(c-d) of the Act, that an investigative right is not contained in Section 39.2 of the Act, and that continuing involvement in the site is, in essence, incompatible with the concept of a County's authority to make a one-time determination concerning the suitability of a site's location.

In support of imposition of the inspection condition, the County asserts that the Agency's approximate monthly inspection schedule (LC Rec. 930, 1006-1007) is insufficient to insure its citizens health, safety, and welfare. It would also follow, but was not specifically argued, that inability to inspect would undermine the County's ability to implement and enforce conditions such as G and H.

Even prior to enactment of SB 172, it is true that the Act vested "any person" with authority to bring enforcement actions, but only the Agency with specific investigative authority. Of course, some entities are in possession of independent statutory authority to inspect facilities for other than "environmental" purposes. A County health department is among these, having authority "[w]ithin its jurisdiction, and professional and technical competence, [to] make all necessary sanitary and health investigations and inspections" pursuant to Ill. Rev. Stat. Ch. 111½, ¶20c13.8.

As SB 172 requires that a regional pollution control facility apply for local government site location approval a) prior to seeking any initial permit, b) prior to any physical expansion, and c) prior to seeking any first-time permit to accept special or hazardous waste, SB 172 clearly contemplates an ongoing

relationship between a county or municipality and a site. However, the Board does not find that SB 172 provides any independent authority for investigation of a site by a county department not authorized to do so by other enabling statutes. As Condition C is essentially a restatement of existing LCDPH authority, it will be stricken.

Condition G and H involve a proper sphere for county interest. As BFI points out, however, these conditions do involve areas addressed in permits it currently holds. The Board finds it entirely proper for the LCDPH to "discuss and recommend" control measures, but not to "require" measures which might conflict with permit conditions. Condition G is affirmed, and Condition H will be amended to confer a parallel right to "recommend", but not to "require".

Drainage Conditions: M, N, P

The Board has previously found that drainage conditions are a proper area of local concern. Condition M requires compliance with "the water quality goal of the 208 Areawide Water Quality Management Plan" by reducing stormwater runoff pollution loads by 50%. BFI argues that this "goal" has not been enacted as law, and so cannot be enforced. It also argues that compliance with the plan has no relation to site location suitability. The County argues that, since the County can be penalized for not enforcing the plan, BFI should be made to comply with it (LC Rec. 1263).

Fulfillment of the 208 Plan by siting condition goes beyond the scope of the criteria listed in Section 39.2. It is therefore stricken.

Condition N is affirmed to the extent it requires notification before pumping of water off-site; this was agreed to at hearing (LC Rec. at 1000-1001), and concerns in part volumes and patterns of runoff. The testing for unspecified "pollutants before pumping begins" portion of the condition is stricken as vague and involving pollution control monitoring and testing techniques and parameters more appropriately within the Agency's purview.

Condition P requires that BFI obtain state permits if stormwater is to be diverted from the Lake Michigan watershed. As this is a restatement of existing law, it is stricken as superfluous.

Private Well Testing: Condition S

Condition S would require BFI to test the waters of private wells located within 500 feet of the site on a quarterly basis (if the owner so consents) and to report results to the LCDPH.

While this provision flows from a concern of risks to health in the event wells are contaminated, the condition is so vague as to be unenforceable. The record does not support the choice of the 500 foot limit. No specific tests are specified, which is not surprising in that the LCDPH itself does not have a routine monitoring list of parameters to be tested (LC Rec. 1212). The condition is stricken.

Financial and Cost-Shifting Conditions: V, W and the unnumbered proviso

Condition V essentially requires BFI to yearly pay all LCDPH inspection costs. W requires provision of proof of financial responsibility. The proviso requires BFI to pay the costs of notice publication, court reporting and transcription arising from the site approval hearings. All are stricken.

Section 39.2 in no manner directly refers to payment of costs or imposition of financial responsibility. As to hearing costs BFI argues, and the Board concurs, that Sections 39.2(b) and (d) seem to imply that costs of notice are to be borne by the person responsible for publishing them. The County argues that this and another set of SB 172 hearings has cost in excess of $11,000 and that this financial burden should be imposed on BFI, whose land has been made more valuable, rather than on the taxpayer. In this context, it argues that "local government's (sic) have long charged filing fees to cover the costs of conducting zoning hearings" (LC Brief at 23).

The legislature has specifically authorized the Agency in Section 4(i) of the Act to charge reasonable fees for permits (which are not in the aggregate to exceed the costs of its inspection and permit programs). The Board cannot construe the silence of Section 39.2 as authorizing the county to assess even actual cost fees. As to the County's usual practice in zoning cases, Section 39.2(f) specifically provides that "local zoning ...requirements shall not be applicable to such siting decisions". As no other statutory basis for the shifting of costs has been cited to the Board, the Board cannot affirm this condition.

Even were such authority to be found, the ex post facto manner in which the County has attempted to impose the condition is fundamentally unfair. The Board notes that an $8,000 application fee is provided for in the procedural rules enacted the day after the BFI application was filed, so that the County has attempted to play "catch-up". Had BFI been denied siting approval, how, if at all, would the County have attempted to recover its costs?

The inspection program fee, too, falls for lack of statutory authority. Even did it not, the provision for payment of an "unstated, open-ended amount to be determined unilaterally by the County Board at the end of the year" would amount to a fundamentally unfair exercise of power.

Special Condition W provides for proof of financial responsibility in the amount of $3,000,000 for the life of the site (estimated at 20 years) plus 20 years. Section 39(a) of the Act provides that the Agency may not require a bond or other security as a condition of issuance of a permit, although this prohibition is modified by Section 22.3 as it relates to hazardous waste disposal sites. Absent legislative authorization, the County cannot accomplish what the Agency is prohibited from doing. (The Board also notes that the Agency could hardly enforce this condition if Condition X were to have been upheld.) Additionally, the record does not explain or support choices as to the amount and the period of time included in the requirement, and provides for no standards to govern the "payment to a person authorized by Lake County to determine and execute the remedies necessary".

This Opinion constitutes the findings of fact and conclusions of law of the Board in this matter.

ORDER

Upon review of the July 13, 1982 decision of the County of Lake conditionally approving site location suitability of Browning Ferris Industries of Illinois, Site #2, it is the Order of the Pollution Control Board that:

1. Special Conditions G, I sentence #1, and N clause #1 are affirmed.

2. Special Conditions C, E, I sentence #2, K, M, N clause #2, P, O, S, T, V, W, X and the proviso in the unnumbered paragraph on page 8 are stricken.

3. Special Condition H is to be amended by deleting the words "may require" and replacing them with the words "to recommend".

Board Chairman J. Dumelle dissented.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 2ND day of December, 1982 by a vote of 4-1

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board