BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEORIA DISPOSAL COMPANY, Petitioner, v. PEORIA COUNTY BOARD, Respondent.	)	PCB 06-184 (Pollution Control Facility Siting Appeal)

MOTION FOR SUMMARY JUDGMENT

and

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

(415 ILCS §5/39.2(e))

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Petitioner,	)	
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PEORIA COUNTY BOARD,	)	
	)	
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MOTION FOR SUMMARY JUDGMENT
(415 ILCS §5/39.2(e))

NOW COMES Peoria Disposal Company ("PDC"), by its attorneys, Brian J. Meginnes and George Mueller, and moves for Summary Judgment on its Petition for Review of the purported decision of the Peoria County Board (the "County Board") denying siting approval for expansion of PDC's hazardous waste landfill and, in support thereof, submits the accompanying Memorandum of Law in Support of Motion for Summary Judgment, incorporated herein by this reference, and further states as follows:

1. This matter concerns a Petition for Review brought pursuant to Section 40.1 of the Illinois Environmental Protection Act (the "Act"), 415 ILCS §5/40.1, of a vote of the County Board on May 3, 2006, purportedly denying the application of PDC for local siting approval of an expansion of its hazardous waste landfill located in Peoria County, Illinois (the "Application"). The Application was submitted to the County Board pursuant to §39.2 of the Act.

2. Summary judgment is an appropriate remedy when there is no genuine issue of fact in dispute and the only issues to be decided by the reviewing tribunal are issues of law.

3. Section 39.2(e) of the Act requires, in pertinent part, that "decisions of the County Board or governing body of the municipality are to be in writing, specifying the reasons for the decision, such reasons to be in conformity with subsection a of this section...If there is no final action by the County Board or governing body of the municipality within one hundred eighty (180) days after the date on which it received the request for site approval, the applicant may deem the request approved." 415 ILCS §5/39.2(e).

4. The Illinois Administrative Code requires, in pertinent part, "A Petition for Review must be filed within thirty-five (35) days after the local siting authorities action to approve or disapprove siting. Action means the local government's official written decision granting or denying local siting approval. Pursuant to §39.2(e) of the Act, action includes failure of the governing body to act within one hundred eighty (180) days after receiving a request for siting approval." 35 Ill. Adm. Code §107.204.

5. Peoria County has previously adopted a pollution control facility siting ordinance codified in Chapter 7.5 of the Peoria County Code. This ordinance specifies, among other things, the filing fee for a siting application, the number of copies to be filed, the minimum required contents of the siting application, hearing procedures and the elements of the decision making process.

6. On November 9, 2005, PDC delivered the Application to the County Clerk. The County Clerk received the Application and filing fee and, in return, gave PDC a receipt for the Application and the required filing fee. §7.5-41 of the Peoria County Code states, in pertinent part, that "the County Clerk shall not give a receipt or other indication of filing until such time as it is determined that the Application complies with the requirements of this resolution." Staff members of Peoria County subsequently certified the Application as being administratively

complete and complying with all local filing requirements, and "deemed" the Application to have been filed on November 14, 2005. Under the law and regulations, however, PDC's delivery of the Application on November 9, 2005, was the controlling event for triggering of the 180-day deadline under Section 39.2(e) of the Act.

7. On April 6, 2006, the Peoria County Pollution Control Facility Site Hearing Committee (the "Committee"), being a committee of the whole of the County Board, met to consider and recommend proposed Findings of Fact on the Application for final action at a later meeting of the County Board. At that meeting, the Committee failed to take binding or clear action on findings pertaining to criteria v, iii, ii or i under the Act (415 ILCS §39.2(a)). No minutes of the April 6, 2006, meeting of the Committee have ever been approved or filed with the County Clerk or with the Pollution Control Board.

8. On April 27, 2006, Karen Raithel, the Peoria County Recycling and Resource Conservation Director, caused to be filed in the County Clerk's office certain, "Recommended Findings of Fact" which she had prepared and which she believed were representative of the siting committee's actions on April 6, 2006, though the "Recommended Findings of Fact" prepared by her did not, in fact, correspond exactly with the official actions, if any, taken by the Committee at the April 6, 2006 meeting.

9. On May 3, 2006, the County Board met for the purported purpose of making a final decision on the Application of PDC. At that meeting, an oral motion to approve the Application with certain unspecified conditions failed by a vote of 6 in favor and 12 against. No vote was taken to deny the Application, or to approve the Application with different or no conditions. Therefore, no final action was taken on the Application, as neither an affirmative vote approving without conditions (or with different conditions) nor an affirmative vote denying

the Application was taken. The Application in this case is deemed approved pursuant to 415 ILCS §39.2(e).

10. On May 3, 2006, the County Board purportedly voted to adopt certain amended findings of fact, though no written record exists of what these are, or might have been. (It was recently discovered that County Staff member Karen Rathiel may have prepared a written summary of the Findings of Fact purportedly adopted by the County Board on May 3, 2006, which summary remained in Ms. Raithel's desk until shortly before her deposition). The amended findings of fact adopted by the County Board on May 3, 2006, do not appear to conform either to the actions of the Peoria County Pollution Control Facility Siting Committee on April 6, 2006, or the Recommended Findings of Fact filed by County Staff on April 27, 2006.

11. Also, no written decision or other writing of any kind, specifying reasons for the decision of the County Board, was created pertaining to the May 3, 2006 meeting. There are no written resolutions reflecting any actions of the County Board on May 3, 2006. No minutes of the May 3, 2006, meeting of the County Board have ever been approved or filed with the County Clerk or with the Pollution Control Board. No written record of any actions of the County Board exists (and therefore, obviously, no written record was ever tendered to PDC or placed in the Record maintained in the County Clerk's office). In its Record filed with the Pollution Control Board, the County Board identifies page C13710-48 as the "record and transcript of Peoria County Board's Decision and Findings." In fact, the "record and transcript" consists of a copy of a Resolution that was not considered by the County Board on May 3, 2006, the Court Reporter's undated transcript of the May 3, 2006 meeting, a copy of the "Recommended Findings of Fact" filed on April 27, 2006, and four pages with handwritten notes appearing to record the attendance and votes (though not the substance of the motions) of the County Board on May 3,

2006. These documents do not satisfy the requirement of the law and regulations that the County Board creates a written decision recording its actions on the Application and specifying its reasons for same. For this additional reason, the County Board failed to take "final action" on the Application within one hundred eighty (180) days after delivery of the Application, and the Application in this case is deemed approved pursuant to 415 ILCS §39.2(e).

12. No copy of the May 3, 2006 transcript was ever tendered or delivered to PDC, nor was the same ever placed into the public record available to the public in the County Clerk's office. A copy of same, without page numbers, was posted on the Peoria County website on May 12, 2006. As of June 7, 2006, no record of any kind whatsoever of the actions of the County Board on May 3, 2006, was available for inspection or review by the public in the office of the County Clerk. The one hundred eightieth (180^{th}) day after November 9, 2005, the day the Application was received by the Peoria County Clerk, is May 8, 2006. While the transcript of the County Board meeting of May 3, 2006, is not a written decision under Section 39.2(e) of the Act or 35 Illinois Administrative Code 107.204, regardless of same, the transcript of the May 3, 2006, County Board meeting did not appear in any form until May 12, 2006, when it was posted on the County's website. The four pages of handwritten notes did not appear in any form where PDC or the public could see them until after PDC filed for review herein. While "Final Findings of Fact" were apparently prepared by Karen Raithel, the Peoria County Recycling and Resource Conservation Director, these "Final Findings of Fact" were never filed in the County Clerk's office, and were first disclosed in discovery during this appeal. No writing containing the actions or purported decision of the County Board was ever tendered by the County Board to PDC or any of its representatives. For this additional reason, the County Board failed to take

"final action" on the Application within one hundred eighty (180) days after delivery of the Application, and the Application in this case is deemed approved pursuant to 415 ILCS §39.2(e).

WHEREFORE, PDC prays for Summary Judgment and a finding that its Application is deemed approved by operation of law.

Respectfully submitted,
PEORIA DISPOSAL COMPANY

BY: _____
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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PEORIA COUNTY BOARD,	)	
	)	
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MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
(415 ILCS §5/39.2(e))

NOW COMES Petitioner, Peoria Disposal Company, (hereinafter "PDC" or "Petitioner") by its attorneys, Brian J. Meginnes and George Mueller, and as and for its Memorandum of Law in support of its Motion for Summary Judgment pursuant to 415 ILCS §5/39.2(e), states as follows:

INTRODUCTION

The Illinois Environmental Protection Act (the "Act") provides, in pertinent part, that "[i]f there is no final action by the county board or governing body of the municipality within 180 days after the date on which it received the request for site approval, the applicant may deem the request approved." 415 ILCS §5/39.2(e). "Action" is defined in the relevant regulations as, "... the local government's official written decision granting or denying local siting approval." 35 Ill. Adm. Code §107.204. In this case, the County Board never voted to deny or approve PDC's application for siting approval (the "Application"), or even to approve the Application with different conditions. Therefore, the Application is deemed approved.

Additionally, Section 39.2(e) of the Act requires that "decisions of the county board...are to be in writing, specifying the reasons for the decision." 415 ILCS §5/39.2(e). The only vote taken by the County Board, *i.e.*, the vote to approve the Application with certain (difficult to identify) conditions, was never reduced to writing or memorialized in any writing. Therefore, even if a vote to deny the Application was not required, the County Board failed to ever create a decision "in writing, specifying the reasons for the decision" as required by law and regulations, and therefore, the Application is deemed approved.

Finally, even if a vote to deny the Application was not required, and the transcript and other documents in the Record did constitute a written decision under the law and regulations, such documents were not filed within 180 days after the date on which the County Board received the Application, and therefore, the Application is deemed approved. Under any of these bases, the Application is deemed approved as a matter of law pursuant to Section 39.2(e) of the Act. 415 ILCS §5/39.2(e).

OVERVIEW OF EXHIBITS

Exhibit 1 hereto is a true and accurate copy of pages 1 through 6 of Petitioner's First Set of Requests to Admit, the entirety of which was filed with the Pollution Control Board on September 25, 2006. Exhibit 2 hereto is a true and accurate copy of Exhibit A to Petitioner's First Set of Requests to Admit, namely, copies of a cover letter and check. Exhibit 3 hereto is a true and accurate copy of Exhibit B to Petitioner's First Set of Requests to Admit, namely, a copy of a receipt. Exhibit 4 hereto is a true and accurate copy of the County Board's Partial Response to First Set of Requests to Admit of Petitioner, Peoria Disposal Company (Requests 1 through 81), which was filed with the Pollution Control Board on November 13, 2006.

Exhibit 5 hereto is a true and accurate copy of the transcript of the April 6, 2006 meeting of the Peoria County Pollution Control Site Hearing Committee. Exhibit 6 hereto is a true and accurate copy of Petitioner's Second Set of Requests to Admit, which was filed with the Pollution Control Board on October 16, 2006. Exhibit 7 hereto is a true and accurate copy of the County Board's Response to Second Set of Requests to Admit of Petitioner, Peoria Disposal Company, filed November 13, 2006.

Exhibit 8 is a true and accurate copy of a Memorandum generated by the State's Attorney's Office, dated April 26, 2006. (C13459-60). Exhibit 9 is a true and accurate copy of the "Recommended Findings of Fact", filed on April 27, 2006. (C13735-48). Exhibit 10 is a true and accurate copy of a Resolution, filed on April 27, 2006, which Resolution was never acted upon by the County Board. (C13710). Exhibit 11 is a true and accurate copy of the Agenda for the May 3, 2006 meeting of the Peoria County Board. Exhibit 12 hereto is a true and accurate copy of the transcript of the May 3, 2006 meeting of the County Board.

Exhibit 13 hereto is a true and accurate copy of the transcript of the discovery deposition of Karen Raithel, on September 28, 2006. Exhibit 14 hereto is a true and accurate copy of Exhibit D to Petitioner's Second Set of Requests to Admit, namely, a document titled "Final Findings of Fact." Exhibit 15 hereto is a true and accurate copy of the transcript of the discovery deposition of Russell Haupert, on September 13, 2006. Exhibit 16 hereto is a true and accurate copy of the transcript of the discovery deposition of Megan Fulara, taken on August 18, 2006. Exhibit 17 hereto is a true and accurate copy of the Affidavit of Brian J. Meginnes (the original of which will be or has been separately filed with the Pollution Control Board).

The documents contained in Exhibit 18 hereto are true and accurate copies of four (4) pages of notes possibly taken by the County Clerk at the May 3, 2006 County Board meeting (C13731-34).

Only Exhibits 9 and 10 were ever part of the "public record" maintained by the County Clerk throughout the siting process, and therefore, only Exhibits 9 and 10 bear the file-stamp of the County Clerk. While Exhibit 12, the transcript of the May 3, 2006 County Board meeting, was never placed in the official public record in the County Clerk's office, another version of same (without page numbers, non-condensed) was posted on the County's website on May 12, 2006, 184 days after the Application was delivered to and accepted by the County Clerk. The remaining Exhibits were gathered through discovery in this appeal.

STANDARDS OF REVIEW AND LAW

Pursuant to the Illinois Administrative Code, in hearings before the Pollution Control Board, "[i]f the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment." 35 Ill. Adm. Code §101.516(b).

> Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2002); *Hall v. Henn,* 208 Ill.2d 325, 328, 280 Ill.Dec. 546, 802 N.E.2d 797 (2003); *Ragan v. Columbia Mutual Insurance Co.,* 183 Ill.2d 342, 349, 233 Ill.Dec. 643, 701 N.E.2d 493 (1998).

Home Ins. Co. v. Cincinnati Ins. Co., 213 Ill.2d 307, 315, 821 N.E.2d 269, 275, 290 Ill.Dec. 218, 224 (2004).

STATEMENT OF FACTS

A. Submission of the Application

On November 9, 2005, PDC delivered the Application to the County Clerk. (Ex. 1, No. 73; Ex. 4, No. 73). The Application was accompanied by a filing fee in the amount of fifty thousand dollars ($50,000.00) as required by the Peoria County Code. (Ex. 1, No. 80; Ex. 4, No. 80). (Copies of the relevant portions of the Peoria County Code are attached hereto as Appendix A). On November 9, 2005, the County Clerk received the Application and filing fee (Ex. 1, Nos. 74, 81; Ex. 4, Nos. 74, 81) and the Deputy County Clerk signed an acknowledgment of same (Ex. 1, Nos. 68-72; Ex. 4, Nos. 68-72; Ex. 2). Also on November 9, 2005, the Peoria County Clerk gave PDC a receipt for the Application and the required filing fee. (Ex. 1, Nos. 75-77; Ex. 4, Nos. 75-77; Ex. 3).

Staff of the County Board subsequently certified the Application as being administratively complete and complying with all local filing requirements and "deemed" the Application to have been filed on November 14, 2005. However, the County Board has not disputed that the Application and filing fee were received on November 9, 2005. (Ex. 1, Nos. 74, 81; Ex. 4, Nos. 74, 81).

B. The April 6, 2006 Meeting

1. The Purple, Pink and Yellow Sheets

On April 6, 2006, the Peoria County Pollution Control Facility Site Hearing Committee (the "Committee"), being a committee of the whole of the County Board, met to consider and recommend proposed Findings of Fact on the Application for final action at a later meeting of the County Board. (Ex. 5). The Committee had, to assist it in its deliberations, various alternative proposed Findings of Fact prepared by the County Staff. (Ex. 5, 5/17-6/2; C13411-

12).[1] These consisted of the "purple sheets," described as Findings of Fact consistent with unconditional approval, the "yellow sheets," described as findings consistent with conditional approval, and the "pink sheets," described as findings consistent with denial of the Application. (Ex. 5, 5/2-16; C13411). Additionally, Board member Mayer had prepared an alternate set of pink sheets with regard to siting criterion i (415 ILCS 5/39.2(a)). (Ex. 5, 127/17-128/15; C13442).

None of the color-coded purple, pink and yellow sheets were tendered to PDC, made available to the public, filed in the County Clerk's office or made a part of the Record filed by the County Board herein with the Pollution Control Board. (Ex. 6, Nos. 1987-2013; Ex. 7, Nos. 1987-2013). On November 6, 2006 (approximately three and one-half months after initially filing the Record), the County Board moved to supplement the Record on this appeal with what appear to be black-and-white copies of the color-coded purple, pink and yellow sheets (and, possibly, Board member Mayer's alternate set of pink sheets) from the April 6, 2006 Committee meeting. PDC has responded to the County Board's Motion for Leave to Supplement Record on Appeal, and incorporates its Response as if fully set forth herein.

2. Criteria ix, viii, vii, vi and iv

The Committee voted unanimously to adopt findings of fact supporting approval of the Application as to criterion ix. (Ex. 5, 14/18-17/5; C13414). The Committee voted unanimously to adopt findings of fact supporting approval of the Application as to criterion viii. (Ex. 5, 17/7-19/1; C13414-15). The Committee voted unanimously to adopt findings of fact supporting approval of the Application with special conditions as to criterion vii. (Ex. 5, 23/1-7, 25/7-26/19; C13416-17). The Committee voted unanimously to adopt findings of fact supporting

[1] Citations to transcripts will be made in this format throughout this Memorandum: "Ex. #, [page]/[line]-[page]/[line]", or alternatively, "Ex. #, [page]/[line]-[line]".

approval of the Application with special conditions as to criterion vi. (Ex. 5, 27/6-13, 28/19-30/6; C13417-18). The Committee voted unanimously to adopt findings of fact supporting approval of the Application as to criterion iv. (Ex. 5, 64/4-65/20; C13426).

3. Criterion v

Regarding criterion v, Board member Riggenbach moved to amend one of the special conditions, stating as follows:

> MR. RIGGENBACH: I would like -- tell me the correct way to do this. I would like to amend one of the special conditions.
>
> CHAIRMAN WILLIAMS: Which one?
>
> MR. RIGGENBACH: Number three.
>
> And I would like to change the $1.50 per ton surcharge to a $5 surcharge, and have the minimum into the fund be raised from 225,000 to 750,000.
>
> MR. ATKINS: I think in order for your motion to be proper according to our procedure, you are essentially moving to accept the findings of fact on the approval with conditions and to amend the facts contained within the proposed approval with special conditions.
>
> MR. RIGGENBACH: Correct. Thank you.

(Ex. 5, 30/14-31/5; C13418). Board member Mayer also proposed a change to the findings of fact:

> MR. MAYER: I had one suggestion for a change in the findings of fact, which is just on that same page that you were on here with Tim [Riggenbach], the last finding, due to the types of wastes, to strike that and replace it with -- if you look on the pink sheet, the third one, just the facility is located close to and could present a danger for residents.
>
> MS. KENNEDY: I don't follow you here.
>
> MR. MAYER: Okay. In the yellow sheets, special conditions, look right above that. There is finding of facts established on that.

MS. KENNEDY: Okay.

MR. MAYER: The last one, due to the types of waste, there is little risk, to strike that and to replace it with -- it's slightly different but the same sentiment, different emphasis -- the third one on the pink sheet, the facility is located close to residential houses and a fire, spill or other operations accidents could present a danger for residents.

And just in speaking in favor of that, I think with the emergency conditions that we did with the mock disaster drill and all of that, that that is consistent with all of that.

CHAIRMAN WILLIAMS: Good point.

(Ex. 5, 31/7-32/6; C13418). Chairman Williams then opined that "the motion is to pass criterion 5 as amended." (Ex. 5, 32/9-10; C13418). Board member Hidden "made the motion to accept this as amended" (Ex. 5, 55/1-3; C13424), and Board member Riggenbach seconded same (Ex. 5, 55/4-6; C13424). The Committee then voted unanimously to adopt findings of fact supporting approval of the Application with special conditions as to criterion v. (Ex. 5, 62/12-63/20; C13426).

4. Criterion iii

Regarding criterion iii, Chairman Williams opened the matter for discussion, and the following exchange occurred:

MR. WIDMER: Make a motion.

CHAIRMAN WILLIAMS: Is there a second there with the special conditions?

MR. O'NEILL: Yes.

CHAIRMAN WILLIAMS: Second by Tom O'Neill.

(Ex. 5, 66/5-9; C13427). Board member Mayer suggested that he would like to include additional information "for both Criterion 3 and 2":

> MR. MAYER: I apologize for not having the figure in front of me, but Chris Lannert as part of his report had a chart and a map that showed the population within a mile and five miles and that -- so I can't say I would like to add those specific numbers, but that's what I would like to do, is actually for both Criterion 3 and 2, I think it's important that as a finding of fact we list the population that the Applicant's expert testified is within a mile, within five miles. I think those were the increments.
>
> But I think that is very important because -- it doesn't have as much weight because it was in public comment, but one of the things that the Opponents did do was they had someone list the population of the towns that were next to other facilities, which are very different. And I think that it's important to get in the record, since the Applicant presented it, what the population is right next to this.
>
> * * *
>
> MR. MAYER: That's about the number I remembered. But I can't remember exactly, so I just ask Staff to write it up from Lannert's report so it's -- I don't think anyone contradicted the population numbers.

(Ex. 5, 73/14-74/9, 74/13-17; C13428-29). No vote was taken specifically as to the population figures. The County Clerk "read the special condition" (Ex. 5, 82/20; C13431) as follows:

> COUNTY CLERK THOMAS: Criterion 3, with the condition. Screening Berm. In order to address visual and noise concerns for the residences to the east of the proposed facility, the development of the eastern portion of the landfill shall be built in such a manner that visual barrier berms shall be placed and vegetated to minimize view of the landfill operations and to assist in minimizing possible noise from reaching residences to the east. The County Staff shall be given the right to approve the berm and barrier design prior to the design being submitted to IEPA for a permit.
>
> Then we are also adding that all population figures within one mile and five miles be included in this criterion, correct?
>
> MR. MAYER: Yes. However the -- I don't know if we found it in there yet.
>
> MR. BROWN: Not yet. We will get it.
>
> MR. MAYER: Yes, as presented in the testimony.

(Ex. 5, 82/22-83/18; C13431).

Board member Salzer requested clarification as to whether the County Board "[was] going to add, also, criteria that the residents of that area be part of the Perpetual Care Fund like he suggested?" (Ex. 5, 83/20-22; C13431). Assistant State's Attorney William Atkins clarified Board member Salzer's question as follows:

> MR. ATKINS: Actually, I think what you are getting at is to include the Perpetual Care Fund as a second special condition.
>
> It would be the exact same language that the Perpetual Care Fund would -- the way we described it in the prior criteria. I don't remember which one it was. But I think that was what Tim [Riggenbach] was actually getting at.

(Ex. 5, 84/1-8; C13431). The Chairman initiated conversation with the moving Board members, as follows:

> CHAIRMAN WILLIAMS: Do you agree with the Perpetual Fund?
>
> MR. WIDMER: I agree.
>
> MR. THOMAS: Yes.
>
> CHAIRMAN WILLIAMS: Jeff?
>
> MR. JOYCE: I would just like one small wording change there. Instead of County Staff giving the right of approval, I would prefer it come back to the Board since this is something that we are putting as a condition. Rather than placing that on Staff's shoulders, it's our responsibility to make sure that this is taken care of.
>
> CHAIRMAN WILLIAMS: Any objections?
>
> MR. WIDMER: No.
>
> CHAIRMAN WILLIAMS: So be.

(Ex. 5, 85/8-22; C13431).

Immediately thereafter, Board member Phelan "move[d] to divide the question." (Ex. 5, 85/24-86/1; C13431-32). The motion to divide was seconded by Board member Mayer. (Ex. 5, 86/7-8; C13432). Board member Thomas asked for clarification as to what was being divided, and was advised as follows:

> MR. PHELAN: I would like to vote on the conditions first.
>
> CHAIRMAN WILLIAMS: Okay.
>
> COUNTY CLERK THOMAS: The condition only?
>
> CHAIRMAN WILLIAMS: Yes.
>
> COUNTY CLERK THOMAS: You want me to read that?
>
> MR. ATKINS: First the motion to divide the question.

(Ex. 5, 86/10-18; C13432). The motion to divide the question passed unanimously. (Ex. 5, 87/4-88/13; C13432). Thereafter, Board member Phelan stated that he was "speaking in favor of the conditions." (Ex. 5, 89/17-18; C13432). Board member Mayer "seconded" Board member Phalen's statement in favor of the conditions, stating "I seconded Mike's motion to divide the question and I am seconding his motion to pass the special criteria, the berms and the Perpetual Care Fund." (Ex. 5, 89/19-22; C13432). A vote was then taken, which vote passed unanimously. (Ex. 5, 90/1-91/12; C13433).

Next, a second vote was taken, regarding the findings of fact. Board member Kennedy may or may not have made the motion (Ex. 5, 91, 15-17; C13433; Chairman Williams said, "Need a motion to vote on the facts" and Board member Kennedy said, "Okay"), which motion was not seconded. A roll call vote was taken, with some confusion:

> MS. HIDDEN: I don't quite understand what we are voting on.
>
> COUNTY CLERK THOMAS: We are voting on the facts.

> CHAIRMAN WILLIAMS: The finding of facts.
>
> COUNTY CLERK THOMAS: Finding of fact for 3, and the motion was to approve the finding of fact.
>
> MR. ATKINS: You have already voted on the conditions which are the last -- well, actually the last paragraph on the yellow sheets. And then also the Perpetual Care Fund was added to that as a condition. Now you are voting on the rest of the three pages of the yellow sheets.
>
> MS. HIDDEN: Okay. Aye.
>
> COUNTY CLERK THOMAS: Joyce?

(Ex. 5, 92/11-93/2; C13433). The motion failed, with seven votes in favor and ten against. (Ex. 5, 92/6-94/8; C13433-34).

Board member Trumpe then stated as follows, and was "seconded" by Board member Salzer:

> MS. TRUMPE: Well, we could offer the motion to accept the findings of fact on the pink page for Criterion 3, that the facility is not located so as to minimize incompatibility except those A list of statements and the B list of statement, and add, as Allen wanted, the population figures within one and five miles to that list.
>
> CHAIRMAN WILLIAMS: Okay. You need a second.
>
> MR. SALZER: Second.

(Ex. 5, 96/22-97/7; C13434). The "motion" passed, with ten votes in favor and seven against. (Ex. 5, 97/23-99/17; C13434-35).

5. Criterion ii

Board member Phelan moved as follows regarding criterion ii: "May I make a motion? I would say that the facility is not so designed, located and proposed to be operated that the public health, safety and welfare will be protected." (Ex. 5, 99/21-24; C13435). The motion was not

seconded. Board member Mayer suggested a litany of changes to the findings of fact, stating as follows:

> MR. MAYER: Some of the findings of facts that were put together by the County Staff on the yellow section, the approve with conditions, I think are actually still applicable and we ought to try to incorporate them here tonight. And I'll try to go through the ones that I think are, and then if it's amenable to the mover and the seconder, we can do it like we have been doing.
>
> But starting not on the first yellow page but moving to the second yellow page, the fourth comment, Opponent's primary comments were that the liner system would fail at some point in the future. The major difference, when the liner system begin to degrade.
>
> Skip the next one.
>
> Then the one following that, Applicant and Opponents agree that protection of the groundwater is the primary concern at the proposed facility.
>
> Could even put in the next one, considerable difference of opinion as to the magnitude and likelihood of a risk.
>
> Skip the next one.
>
> And then there is a whole section here dealing with Dr. Barrows and having to redo the modeling and even in the Staff not being able to get anything out of it.
>
> So starting there with, One area of concern for the County Staff was the groundwater impact assessment, and take the next one, next one, next one, flip to the next page, and then the first two on the next page. So ending with Because County Staff was not able to independently verify correct conclusions, the County is unwilling to accept the results of the modeling as a method of ruling out the possibility that the C trenches are or have released contaminants at the site.
>
> Then skipping down until the -- on that same page until you get to Mr. Liss testified for the Applicant that the groundwater monitoring data demonstrates that the existing facility is not contributing contamination to the groundwater at the site. But then the next one, add it as well. Mr. Norris disputed that conclusion by pointing to TOX sampling data. Keep going.

> Nothing on the next page.
>
> So the page after that, scan down until you get to the finding of fact about the surface impoundment. The County finds the surface impoundment presently located at the facility -- I am going to read this: The County finds the surface impoundment presently located at the facility and used for the collection and storage of leachate is less protective of the public health than other areas of the facility because it is only double lined and has no effective means of leak detection. Strike the rest of it.
>
> Next page. The second item. A number of the opponents, their witness Charles Norris, and Dr. Lee who submitted comments into the public record call into question the safety of the inactive portions of the site.
>
> COUNTY CLERK THOMAS: Excuse me, where are you? Which one?
>
> MR. MAYER: So you got the surface impoundment --
>
> COUNTY CLERK THOMAS: Okay.
>
> MR. MAYER: Next page, the second one. A number of the opponents --
>
> COUNTY CLERK THOMAS: Right. And the third one also?
>
> MR. MAYER: No, not the third one.
>
> COUNTY CLERK THOMAS: Okay.
>
> MR. MAYER: Just the second one.

(Ex. 5, 109/9-112/10; C13437-38). A vote was taken "on the pink sheets" which passed, ten in favor, seven against. (Ex. 5, 126/1-127/14; C13442).

6. Criterion i

Regarding criterion i, Board member Mayer "move[d] to substitute the pink sheet that [he] passed out to Board members and to Staff before with the – and move[d] that the facility is not necessary to accommodate the waste needs of the area it is intended to serve, and to use the

findings that [he] distributed to the Committee." (Ex. 5, 127/17-23; C13442). Board member Phelan seconded the motion (Ex. 5, 128/7-9; C13442), and the matter was put to discussion. The Chairman refused Board member Riggenbach's request for a brief delay for reading of the substitute pages:

> MR. RIGGENBACH: Since we were just given this at the start of the hearing, can we have a five minute recess to give us a chance to review this?
>
> CHAIRMAN WILLIAMS: A second to a five minute recess?
>
> I don't think it's necessary. We will continue on.
>
> Any other discussion?
>
> MR. RIGGENBACH: Can we have time to read at least together?
>
> This goes right to the heart of what Mr Thomas has --
>
> CHAIRMAN WILLIAMS: Do you want to hold hands while we read together? We are all adults. I think we can read pretty good.
>
> MR. RIGGENBACH: I would like the time to read it.
>
> I would like to --
>
> MR. MAYER: I would like to respect Tim, especially since members of the audience might not have it, if we could read it out loud.
>
> COUNTY CLERK THOMAS: Want me to read it?
>
> MR. MAYER: It's going to take time, I realize, but I think it would --
>
> COUNTY CLERK THOMAS: Whatever you decide.
>
> CHAIRMAN WILLIAMS: I don't think it should be read.
>
> We need to move on with this.
>
> He's had time to read it.

MR. MAYER: You are the Chairman.

(Ex. 5, 130/2-131/8; C13443). Thereafter, the findings were approved, with ten voting in favor and seven against. (Ex. 5, 131/10-133/10; C13443).

Following the actions of the Committee members as one painfully winds through the transcript of this meeting, keeping a flow chart as to which motions were seconded, which amendments were accepted by the movants and what actually happened, it becomes clear that during the April 6, 2006, meeting of the Committee, what was supposed to be a quasi-judicial process degenerated into chaos. When one applies even the basic rules of order and procedure in analyzing this transcript, it is an inescapable conclusion that nothing binding or final happened with regard to criteria i, ii, iii and v.

C. Filings Subsequent to the April 6, 2006 Meeting

As set forth at greater length above, the purple sheets, the yellow sheets, and the pink sheets were never tendered to PDC, made available to the public, filed in the County Clerk's office or made a part of the Record filed by the County Board with the Pollution Control Board. (Ex. 6, Nos. 1987-2013; Ex. 7, Nos. 1987-2013). Moreover, even Board member Mayer at the April 6, 2006 Committee meeting acknowledged that his alternative "pink sheets" were not distributed to the public. (Ex. 5, 130/21-23; C13443).

The State's Attorney's Office prepared a Memorandum for the County Board, the County Clerk and the County Administrator, dated April 26, 2006. (Ex. 8). Therein, the State's Attorney set forth guidelines for the May 3, 2006 meeting of the County Board stating, in pertinent part, as follows:

> [Y]ou will vote on findings of fact, which may be the recommended findings from your previous meeting or may be different findings developed through amendments of those findings. * * *.

* * *

> [T]his application comes before you seeking approval. Although the Peoria County Pollution Control Site Hearing Committee found facts supporting a denial, no vote was ever taken to actually recommend a denial, approval, or approval with conditions. Even if there had been such a vote, you would still be sitting to decide an application seeking approval and having this proceed on a motion to approve will avoid the confusion of a yes vote being a no.

(Ex. 8, C13459; emphasis added).

The next day, April 27, 2006, "Recommended Findings of Fact" (Ex. 9) and a Resolution representing the County Staff's apparent interpretation of the Committee's actions on April 6, 2006 (Ex. 10), were filed with the County Clerk, along with other documents. Karen Raithel, the Peoria County Recycling and Resource Conservation Director, actually compiled the Recommended Findings of Fact which she believed were representative of the Committee's actions on April 6, 2006. (Ex. 9; *see* Ex. 13, 38/11-15 *et seq.*).

The Resolution filed on April 27, 2006, purported to be a recommendation by the Committee to approve the Application, contingent on PDC's acceptance of certain special conditions (contrary to the statement of the Assistant State's Attorney). (Ex. 10; *see* Ex. 8, C13459). The proposed Resolution begins with a statement of its intent: "Your Regional Pollution Control Site Hearing Committee does hereby recommend passage of the following Resolution...." (Ex. 10). The Resolution provided, in pertinent part, as follows:

> WHEREAS, on April 6, 2006 your Committee deliberated concerning the evidence presented at the hearing and found certain facts relevant to these statutory criteria to have been proven in these hearings; and
>
> WHEREAS, on April 6, 2006 your Committee did not recommend either approval or denial of the proposed site location of said facility.
>
> NOW THEREFORE BE IT RESOLVED, by the Peoria County Board, after due consideration of all of the evidence from

> the public hearing and public comment documents submitted, that the Peoria County Board approves local siting for the Peoria Disposal Company expansion of an existing hazardous waste facility; and
>
> BE IT FURTHER RESOLVED, approval of the application is subject to acceptance by Peoria Disposal Company of all special conditions identified in the Findings of Fact separately voted upon immediately following passage of this resolution.

(Ex. 10). (The Resolution was included with the Record filed by the County Board in this appeal, stamped C13710, though the Resolution was never the subject of a vote by the County Board).

D. The May 3, 2006 Meeting of the County Board

A page titled "Agenda" was included with the Record filed by the County Board in this appeal, pertaining to the May 3, 2006 meeting of the County Board. (Ex. 11; C13613). The first item listed on the Agenda related to a determination concerning the Application. (Id.) At the May 3, 2006 meeting, Assistant State's Attorney William Atkins explained the item as follows:

> One of [the items on the Agenda] is a motion for approval of the PDC Application. The reason that it is up for a motion for approval, there was no recommendation made for approval or denial by the Site Hearing Committee. There was certainly a recommendation made with regards to finding of fact and those findings of fact do certainly recommend or support a recommendation of denial, but there was no actual recommendation of denial. So the only action being sought tonight is on the part of PDC, which has filed an Application seeking approval. So this should come before you on a motion to approve. If you vote it down, that will be the end of the motion to approve. You would not have to have a second motion to deny the application. You either vote it up or down based on the motion to approve.

(Ex. 12, 16/10-17/4; C13715; emphasis added).

The Clerk announced the first item on the Agenda as follows:

> Item number one is an Application for Peoria Disposal Company for local siting approval of a pollution control facility that was filed with the Peoria County Clerk on November 14th, 2005.

(Ex. 12, 31/18-22; C13719). Board member Hidden moved for approval of the Application (Ex. 12, 32/1; C13719), which Motion was seconded by Board member Baietto (Ex. 12, 32/4; C13719). Board member Hidden's motion was not a motion for adoption of the Resolution attached as Exhibit 10 (which Resolution purports to memorialize the Committee's recommendation of approval of the Application subject to PDC's acceptance of certain conditions).

Board member Riggenbach moved as follows:

> I'd like to propose an amendment to the question. I would like it to include all of the special conditions proposed by the Applicant at the public hearings on February 22nd through 27th, the special conditions proposed by the County Staff in their initial Staff Report dated March 27th, the Supplemental Staff Report dated April 3rd, and in addition the special conditions adopted by this Regional Pollution Control Site Hearing Committee on April 6th, specifically I would like to point out the special conditions that no expansion occur over trench C-1, and I would like to encourage any additional conditions that we discuss tonight based upon our deliberations be offered as amendments at the appropriate time. The Staff has prepared a summary of these conditions. If it would be beneficial, we could have the Clerk read them or whatever you–

(Ex. 12, 32/7-33/4; C13719). The Chairman interrupted Board member Riggenbach, requesting a second. (Ex. 12, 33/5-6; C13719). Board member Kennedy seconded Board member Riggenbach's Motion to Amend. (Ex. 12, 33/7; C13719). Board member Phelan moved to divide the question (Ex. 12, 33/10-11; C13719), which Motion Board member Joyce seconded (Ex. 12, 33/14; C13719). The motion to divide passed. (Ex. 12, 34/2-3; C13720).

Next, the Chairman asked whether the Board members "have a copy for everybody on these conditions he [Board member Riggenbach] wants to add in?" (Ex. 12, 34/3-5; C13720).

Mr. Urich, the County Administrator, stated that "[t]here should be a yellow sheet, a list of 31 special conditions that the Staff put together" in the packets provided to the County Board members. (Ex. 12, 34/8-10; C13720). The Chairman told the County Clerk to "hit the highlights" from the "yellow sheet." (Ex. 12, 34/13; C13720). The County Clerk listed the 31 conditions as follows:

> These special conditions are, 1, no expansion over trench C-1; 2, surface impoundment; 3, environmental monitoring, leachate; 4 is leachate, collection sumps; 5 is C-1 sump manhole retrofit; 6, retain low permeability material over capped portions of cell C-2; No. 7 is an alternative manhole retrofit; No. 8 is an intermediate liner; No. 9, ambient air monitoring; 10, methane migration planning; 11, additional ground water monitoring wells; 12, construction quality assurance; 13, leachate collection system inspection; 14, sediment basin energy dissipators; 15, capacity guarantee for Peoria County generators; 16, additional expansions are prohibited; 17, minimize visual impact with a screening berm; 18, leachate removal from sumps; 19, storm water detention basin testing; 20, perpetual care fund effective upon PDC's receipt of a permit from the Illinois EPA to operate the proposed expanded landfill. PDC shall pay additional sums into a perpetual care fund on at least a quarterly basis equal to $5 per ton of the expanded volume of waste deposited in the PDC landfill; 21, minimum annual contribution to perpetual care fund; 22, an additional 1 million Post Closure Trust Fund contribution; No. 23, signage; No. 24, designated truck route notification; 25, annual emergency planning exercise; 26, annual mock disaster drill; 27, call back system; 28, Waste Review Committee; 29, restrictions on transfer; No. 30, no rail line spurs; 31, county involvement in permitting process.

(Ex. 12, 35/6-36/17; C13720). The "yellow sheet" was not placed in the files of the County Clerk or otherwise made available to the public or PDC as part of the Record required to be maintained by the County Clerk. (*See* Ex. 17, ¶¶12-14).

Even "as amended," the motion before the County Board would fail to synch with the Resolution filed on April 27, 2006, purporting to be the Committee's recommendation of approval of the Application subject to PDC's "acceptance" of certain conditions. (Ex. 10;

emphasis added). Essentially, the Resolution would have put the cart before the horse, impermissibly requiring PDC to acquiesce to conditions (thereby requiring PDC to waive its rights on appeal) prior to the actual grant of approval of the Application. (Ex. 10). The motion before the County Board, in contrast, would grant actual approval, subject to PDC's meeting certain conditions.

Prior to the vote on the motion to amend, the motion to divide, which had already been passed, was purportedly "withdrawn" by the movant:

> CHAIRMAN WILLIAMS: Thank you. Mr. Atkins? We got a little bit ahead of ourselves, Michael, on your dividing question.
>
> MR. ATKINS: Since there hadn't actually been a vote yet on the motion to amend, at this point there's no question to be divided. So I think it would be appropriate first to vote on the amendment, whether or not to amend the question, and then it can be divided once it actually has been amended.
>
> MR. PHELAN: I withdraw the motion.
>
> MR. ATKINS: Thank you.

(Ex. 12, 36/18-37/7; C13720). The motion to amend was then voted on and passed. (Ex. 12, 37/9-39/3; C13720-21). No subsequent motion to divide was made by any Board member. The motion to approve as amended with special conditions was voted on and failed. (Ex. 12, 39/11-/6-36/17; C13720).

The County Clerk announced the second item on the Agenda as follows:

> Item number two is a recommendation from your Peoria County Regional Pollution Control Site Hearing Committee to approve findings of fact concerning Peoria Disposal Company's Application for local siting approval of a pollution control facility that was filed with the County Clerk on November 14th, 2005.

(Ex. 12, 41/11-18; C13721). Board member Mayer moved as follows:

> I move to adopt the findings of fact as presented this evening which do not include specific population figures. I'd also like to add to criterion number two, County Staff indicated upon questioning at the April 3, 2006, hearing that it was their opinion that the Application as submitted did not satisfy criterion two. County Staff indicated it was their opinion that only with the imposition of numerous special conditions could criterion two be satisfied.

(Ex. 12, 42/12-23; C13722). Board member Mayer's motion to adopt the findings was seconded by Board member Elsasser. (Ex. 12, 43/3; C13722). The motion to adopt the findings was voted on and passed. (Ex. 12, 44/1-45/15; C13722). Because the findings were not read into the transcript at the May 3, 2006 meeting (as is required by parliamentary procedure), and no writing containing the findings was ever approved by the County Board, it is impossible to determine with certainty what findings were adopted by the County Board.

No vote was taken to approve the Application without special conditions or with different special conditions. No vote was taken to deny the Application.

E. Documents in the Record after May 3, 2006

No written resolution reflecting any actions of the County Board on May 3, 2006, was ever approved by the County Board. No minutes of the May 3, 2006, County Board meeting have ever been approved by the County Board. The transcript of the May 3, 2006 meeting of the County Board was first posted on the County's website on May 12, 2006 (which transcript did not include page numbers). (Ex. 1, No. 47; Ex. 4, No. 47; *see also* Ex. 15, 31/22-32/23). The best recollection of the Peoria County Information Technology Director Russell Haupert is that he received the transcript directly from the Court Reporter on May 11, 2006. (Ex. 15, 28/16-24). This is consistent with the recollection of Peoria County Recycling and Resource Conservation Director Karen Raithel. (Ex. 13, 29/6-18).

A hard-copy of the transcript of the May 3, 2006 meeting of the County Board, including page numbers and an index, was subsequently filed in this appeal. (Ex. 12; C13711-27). The hard copy of the transcript was not tendered to PDC or made available to the public prior to this appeal. (*See* Exhibit 17).

On June 7, 2006, thirty-five (35) days after the County Board meeting on May 3, 2006, and the last day on which PDC could petition the Pollution Control Board for review of whatever did or did not happen at the May 3, 2006 meeting, PDC's attorney Brian Meginnes met with Peoria County Deputy Clerk Megan Fulara (Ex. 16, 7/2-10) at her office for the purpose of seeing if the Record of the proceedings on the Application contained a copy of the transcript of the May 3, 2006 meeting. (Ex. 17). The Record available to the public did not contain such a transcript at that time. (Ex. 17, ¶¶8-9, 14). The Record available to the public also did not contain the Agenda pertaining to the May 3, 2006 meeting at that time. (Ex. 17, ¶¶10-11, 14). The Record available to the public also did not contain the "yellow sheets" referenced at the May 3, 2006 meeting at that time. (Ex. 17, ¶¶12-14). In her discovery deposition, Megan Fulara did not and could not contradict the Affidavit of Brian Meginnes regarding this point. (Ex. 16, 56/11-18, 58/9-24). Additionally, the recollection of Peoria County Recycling and Resource Conservation Director Karen Raithel corroborates the Affidavit of Brian Meginnes. (Ex. 13, 51-53).

On appeal, the County Board filed a group of documents, titled "Record and Transcript of Peoria County Board's Decision and Findings" (C13710-48) consisting of the following:

- The Resolution, on which the County Board never voted, approving the Application subject to PDC's acceptance of certain special conditions, filed with the County Clerk on April 27, 2006 (Ex.10; C13710);
- The undated transcript of the May 3, 2006 County Board meeting (Ex. 12; C13711-27);

- A page including a printed list of the Board members, and another column labeled "Comments," with the names Baietto, Elsasser, Hidden, Joyce, Kennedy and Mayer written in by hand (Ex. 18; C13731);

- A page with check marks next to the Board members' names, seemingly recording their votes on "amend" (handwritten), "Vote #1" and "Vote #2," and, apparently, their attendance (Ex. 18; C13732);

- Two legal-size sheets divided into seven columns titled "County Board Minutes" bearing handwritten notes (possibly the County Clerk's), listing citizens' remarks and the movers and seconding members on the votes (Ex. 18 (reduced); C13733-34);

- The "Recommended Findings of Fact" filed with the County Clerk on April 27, 2006 (Ex. 9, C13735-48).

During depositions in this case, it was discovered that Peoria County Recycling and Resource Conservation Director Karen Raithel compiled "Final Findings of Fact" which she believed were representative of the County Board's actions on May 3, 2006. (Ex. 14; *see* Ex. 13, 56/13 *et seq.*). The "Final Findings of Fact" (Ex. 14) were, in fact, different than the "Recommended Findings of Fact" filed on April 27, 2006 (Ex. 9). (Ex. 13, 58/23-59/13). The "Final Findings of Fact" (Ex. 14) were never shown to any member of the County Board. (Ex. 13, 59/17-19). The "Final Findings of Fact" (Ex. 14) were never filed in the County Clerk's office or otherwise made available to PDC or the public, except in discovery in this appeal. (Ex. 6, Nos. 1978-1986; Ex. 7, Nos. 1978-1986). The "Final Findings of Fact" (Ex. 14) were not filed as part of the Record by the County Board in this appeal. (Ex. 6, No. 1982; Ex. 7, No. 1982).

ARGUMENT

I. THE COUNTY BOARD DID NOT VOTE TO DENY THE APPLICATION, AND THEREFORE, THE APPLICATION IS DEEMED APPROVED.

Section 39.2(e) of the Act provides, in pertinent part, as follows regarding the deadline for "final action" by a municipal siting authority:

> * * *. If there is no final action by the county board or governing body of the municipality within 180 days after the date on which it received the request for site approval, the applicant may deem the request approved.

415 ILCS §5/39.2(e). The Illinois Administrative Code defines "action" as follows for purposes of triggering the appeal deadlines in siting cases:

> * * *. Pursuant to Section 39.2(e) of the Act, action includes failure of the governing body to act within 180 days after receiving a request for siting approval.

35 Ill. Adm. Code §107.204.

At the May 3, 2006 meeting, the County Board took only the following actions: (a) a motion to approve the Application with certain special conditions failed, and (b) findings of fact were adopted (although, as above, the failure to read same into the transcript or approve a writing containing same makes it impossible to determine with certainty what findings were adopted by the County Board). The County Board did not affirmatively deny the Application. The failure to pass the motion to approve with special conditions is not the same as the passage of a motion to deny siting approval.

In the case of Hoesman, *et al.* v. City Council of the City of Urbana, Illinois, *et al.*, the Pollution Control Board found that it was unable to take a final action in a siting appeal, because of a "deadlock." PCB 84-162, 1985 WL 21156, *1 (Illinois Pollution Control Board, March 7, 1985). In order for the Pollution Control Board to take an action, an affirmative vote is required

of at least four (4) members of the Board. 415 ILCS §5/5(a). In Hoesman, the five voting members of the Pollution Control Board split 2-3 on a motion to reverse the City Council's decision, and split 3-2 on a motion to affirm the City Council's decision, creating a deadlock. Therefore, the applicant could consider the application approved pursuant to statute. The Order entered by the Pollution Control Board provides, in pertinent part, as follows:

> On March 7, 1985, at its regularly scheduled Board Meeting, the Board met to take final action on this appeal. The Board by statute is composed of seven members and an affirmative vote of four members is required in order for the Board to take any action. (See Section 5(a) of the Act.) Two motions were offered. The first motion moved the Board to reverse the determination of the Council. That motion failed to carry by a vote of 2-3, with 5 members of the Board present. [FN1] A second motion moved the Board to uphold the determination of the Council. That motion failed to garner the votes of a statutory majority of the Board (4), and, therefore, also failed by a vote of 3-2. Therefore, the Board is unable to take final action on this appeal.
>
> Pursuant to Section 40.1(a) and (b) of the Act, if there is no final action by the Board within 120 days from the date the petition is filed, the respondent (in a Section 40.1(b) appeal) may deem the site location approved. Respondents, by letter, provided a limited waiver of their right to a decision within 120 days and extended the decision period through March 7, 1985.
>
> Due to the failure of separate motions to gain the necessary four votes to affirm or reverse the Council's action, and the termination of the statutory decision period, it is the Board's opinion that the Respondent may deem the site location in question approved by operation of law. (See Section 40.1(a) and (b). Also see Cement Mfg. Co. v. Pollution Control Board (1980), 84 Ill. App. 3d 434, 405 N.E. 2d 512); Illinois Power Company v. Illinois Pollution Control Board (1983), 112 Ill. App. 3d 457, 445 N.E. 2d 820.)

Id. (emphasis added).

The Hoesman Order makes two things perfectly clear: (1) an affirmative motion is required to take action as a body (in this case, a motion to approve or a motion to deny), and (2) the failure of a motion to approve to pass with the requisite votes is not the same as an

affirmative motion to deny. *See also*, City of Sycamore v. Illinois Environmental Protection Agency, PCB 83-172, 1985 WL 21412, *1 (Illinois Pollution Control Board, July 11, 1985) ("The Agency's Supplemental Motion to Dismiss was taken up at the Board's January 10, 1985 meeting. However, the motion failed to muster the four affirmative votes required under 35 Ill. Adm. Code 101.109 [now §101.108(d)] to become a 'final determination.' Consequently, no action was taken on the motion and the case proceeded to hearing").

The requirement that an application for siting approval be affirmatively denied by the local siting authority was previously addressed by the Pollution Control Board in Smith, *et al.* v. City of Champaign, *et al.*, PCB 92-55, 1992 WL 207560 (Illinois Pollution Control Board, August 13, 1992). In that case, the Champaign City Council failed to vote affirmatively to deny an application for siting approval within the statutory deadline:

> One council member, Gary Shae, read a letter stating that he had decided to abstain because of an ex parte communication which had such an influence on him that he was unable to ignore it and make a decision based on the record. (C. 1628.) The vote on the proposed ordinance was one vote "yes", two votes "no", and six abstentions. (C. 1634-1635.) The city council's rules of order require that all ordinances be passed by affirmative votes of no less than five members. (Pet.Exh. 2, § 2.64(c).) The mayor, Dannel McCollum, declared a temporary loss of quorum, based on the six abstentions. (C. 1635.) Pursuant to the council's rules of order, a temporary lack of quorum results in postponement of the matter under consideration until the next regular meeting. (Pet.Exh. 2, § 2.64(j).) The next meeting was scheduled for March 17, 1992, two days after the March 15 decision deadline. A motion to reconsider the vote failed, with four "yes" votes, four "no" votes, and one abstention. (C. 1638- 1640.) On March 16, 1992, counsel for ISWDA and XL advised Champaign that the applicants considered the application to be approved as of March 15, 1992 "as a result of the City of Champaign's lack of taking final action within the 180 days allowed by Ill.Rev.Stat. ch. 111 1/2 , par. 1039.2(e)." (C. 1608.) Petitioners filed the instant appeal on April 15, 1992.

Id. at *2. The Pollution Control Board held that there was no "final action" under the Act within the statutory deadline, and therefore, the application was "deemed approved":

> Section 39.2(e) clearly states that if a local decisionmaker does not take final action within 180 days, "the applicant may deem the request approved." (Ill.Rev.Stat.1991, ch. 111 1/2 , par. 1039.2(e).) Therefore, the Board rejects petitioners' claim that the application was denied because the application failed to command a majority vote. The statutory language also repudiates petitioners' argument that an approval without an affirmative vote by a majority of council members would be unconscionable. Section 39.2 gives local governments the power and the responsibility to rule upon an application for siting approval. The statute clearly contemplates a situation, such as this, where the local decisionmaker fails to take final action within the statutory deadline. The remedy provided by the legislature is that the application is deemed approved. This case fits the statutory scheme perfectly: Champaign failed to take final action within 180 days, and therefore the application for siting approval is deemed approved.

Id. at *6 (emphasis added).[2]

Moreover, the Illinois Administrative Code now explicitly defines "action" as including a failure to act on the part of the local siting authority:

> * * *. Pursuant to Section 39.2(e) of the Act, action includes failure of the governing body to act within 180 days after receiving a request for siting approval.

35 Ill. Adm. Code §107.204. Surely the regulation contemplates more than a failed oral vote to approve siting with certain special conditions. It cannot be said that the clear will of the County Board, as would be understood by a reasonable person, was to affirmatively deny the

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[2] The Pollution Control Board also expressly rejected the concurrence in the case of Guerrettaz, *et al.* v. Jasper County, *et al.*, PCB 87-76, 1988 WL 160128 (Illinois Pollution Control Board, January 21, 1988):

> The Guerrettaz concurring opinion cited by petitioners is dicta, since that case was actually decided on the grounds that the required notice of the filing of the application was deficient. The majority opinion never discussed the question of "final action" or the effect of the tie vote in that case. (Guerrettaz v. Jasper County (January 21, 1988), PCB 87-76.)

PCB 92-55, 1992 WL 207560, *5.

Application. Even after the vote of the County Board failing to approve the Application with the listed special conditions, the County Board could still have approved the Application, unconditionally or with different or additional special conditions.

A review of the facts at issue herein makes clear that no vote was taken to deny the Application at the May 3, 2006 meeting of the County Board. Pursuant to the Rules of Order of the Peoria County Board, "[a] majority of the members of the Board shall constitute a quorum for transaction of business; and all questions which shall arise at meetings shall be determined by the votes of the majority of the members present at such meetings...." Rules of Order, §7. (Copies of the relevant portions of the Rules of Order of the Peoria County Board are attached hereto as Appendix B). Therefore, the affirmative vote of ten (10) of the eighteen (18) Board members present at the May 3, 2006 meeting was required to pass any motion brought before the County Board. (*See* Ex. 12).

A motion was made for approval of the Application (Ex. 12, 32/1, 32/4; C13719), as was a motion to amend the motion for approval (Ex. 12, 32/7-33/4, 33/7; C13719). A "motion to divide" passed (without explanation as to what exactly was being divided). (Ex. 12, 33/10-11, 33/14, 34/2-3; C13719-20). The motion to amend was voted on and passed. (Ex. 12, 37/9-39/3; C13720-21). Finally, the motion for approval, as amended (to, presumably, include certain special conditions), was voted on and failed to pass, as only six of the Board members voted in favor of the motion. (Ex. 12, 39/11-/6-36/17; C13720). No vote was taken to deny the Application, or to approve the Application unconditionally, or to approve the Application with different special conditions. Had the County Board been so inclined, the Board could have voted again to approve the Application unconditionally or with different special conditions, as the failure of the amended, conditional motion for approval did not "kill" the Application. Very

simply, the failure of the amended, conditional motion for approval to pass is not the same as the passage of a motion for denial of the Application.

Based on the foregoing, no final action was taken on the Application, as neither an affirmative vote approving nor an affirmative vote denying the Application was taken. Section 39.2(e) of the Act requires that "[i]f there is no final action by the county board or governing body of the municipality within 180 days after the date on which it received the request for site approval, the applicant may deem the request approved." 415 ILCS §5/39.2(e). Therefore, the Application in this case is deemed approved.

II. NO WRITTEN DECISION WAS EVER CREATED BY THE COUNTY BOARD, AND THEREFORE, THE APPLICATION IS DEEMED APPROVED.

Section 39.2(e) of the Act further provides that a "decision" constituting "final action" must be written, and must embody the reasons for such decision:

> (e) Decisions of the county board or governing body of the municipality are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section. * * *. Such decision shall be available for public inspection at the office of the county board or governing body of the municipality and may be copied upon payment of the actual cost of reproduction. If there is no final action by the county board or governing body of the municipality within 180 days after the date on which it received the request for site approval, the applicant may deem the request approved.

415 ILCS §5/39.2(e) (emphasis added). The Illinois Administrative Code defines "action" as follows for purposes of triggering the appeal deadlines in siting cases:

> * * *. Action means the local government's official written decision granting or denying local siting approval. * * *.

35 Ill. Adm. Code §107.204 (emphasis added). Clearly, a writing specifying the reasons for the decision is required by the law and regulations in order for there to be "final action."

The normal "writing" in siting cases is a resolution passed by the local siting authority, indicating the decision of the body and its supportive findings of fact. For example, in Land and Lakes Co. v. Illinois Pollution Control Bd., the Village of Romeoville issued a written resolution:

> Here, the record shows the Village issued a written resolution within the statutory time limit required by the Act. The resolution clearly denied the petitioners' application for site approval based upon the Village's determination that it did not have jurisdiction to approve the application.

245 Ill.App.3d 631, 642, 616 N.E.2d 349, 356, 186 Ill.Dec. 396, 403 (3 Dist. 1993), *appeal denied*, 152 Ill.2d 561, 622 N.E.2d 1209, 190 Ill.Dec. 892 (1993). *See, e.g.*, Waste Management of Illinois, Inc. v. County Board of Kane County, PCB 03-104, 2003 WL 21512770, *3 (Illinois Pollution Control Board, June 19, 2003) ("Twenty-three members of the Kane County Board voted in favor of Resolution 02-431 denying siting, and two members voted against that resolution. [Footnote omitted.] The Kane County Board's written decision includes Resolution 02-431 and adopts the local hearing officer's findings of fact and conclusions of law....").

The Peoria County Code itself assumes that a resolution is created embodying the final decision of the County Board, defining the "Record" as including, "[a] copy of the resolution containing the final decision of the county board." Peoria County Code, §7.5-45(a)(9). The County Board includes the Resolution recommending approval of the Application (described above) in its "Record and Transcript of Peoria County Board's Decision and Findings" filed in this appeal, presumably because there was no other Resolution available for inclusion therein. (Ex. 10; C13710). As described above, the County Board never acted on the Resolution in the Record (Ex. 10), because (again following the "stream of consciousness" style demonstrated so graphically at the April 6, 2006 meeting of the Committee) the County Board failed to move for adoption of the Resolution at the May 3, 2006 meeting, and actually acted on a motion to

approve with different terms than those recommended in the Resolution. (*See* Ex. 12, 32/1-4; C13719).

In the absence of an actual Resolution embodying the action of a municipal siting authority, proper minutes of the meeting of such authority have been held to satisfy the writing requirement in 415 ILCS §5/39.2(e) and 35 Ill. Adm. Code §107.204. For example, in the case of Solid Waste Agency of Northern Cook County (SWANCC) v. City of Des Plaines, the Pollution Control Board found that "the Des Plaines city council vote on February 18, 2003 to approve siting, as reduced to writing in the minutes of that meeting (Mot. Exh. 5), constituted final action for the purposes of this appeal." 2003 WL 21405868, *2, PCB 03-161 (Illinois Pollution Control Board, June 5, 2003).[3] The Board also noted that since the Des Plaines city council had granted unconditional approval, a finding that all siting criteria had been proven was inherent in the approval itself as reflected in the official minutes of the meeting. Id. at *3. In the SWANCC case, an opponent or any other member of the public would have been able to learn everything there was to know in order to perfect an appeal simply by reading the meeting minutes.

In this case, unlike in the SWANCC case, no minutes of the May 3, 2006 County Board meeting were ever approved or adopted by the County Board. The County Clerk is required to maintain minutes by statute:

[3] The instant facts are also distinguishable from those in Waste Management of Illinois, Inc. v. PCB, 145 Ill. 2d 345, 352, 585 N.E.2d 606, 609, 165 Ill.Dec. 875 (1991). In that case, the Court considered whether an order by the Pollution Control Board constituted "final action" under 415 ILCS §5/40.1, without the necessity of filing the Board's written opinion. Because there is no express statutory requirement pertaining to the Board that requires a written decision for "final action", the Court held that the written "Order" itself was sufficient. The Court rejected the argument that actual findings were required, because that requirement is found in an unrelated portion of the Act, and to impose that requirement would be to improperly tie one statutory provision to another. (It goes without saying that even a Board "Order" is in writing). In this case, however, both the Act and the administrative regulation require the local governing body's final decision to be in writing, and 415 ILCS §39.2(e) also requires that written decision to specify the reasons for such decision.

> Subject to the provisions of "The Local Records Act", the duties of the county clerk shall be—
>
> 1st. To act as clerk of the county board of his county and to keep an accurate record of the proceedings of said board, file and preserve all bills of account acted upon by the board * * *.

55 ILCS §5/3-2013. The Illinois Attorney General has summarized the requirements of the County Clerk's statutory duties as follows:

> The county clerk is charged by statute with the duty to keep the record of the proceedings of the county board, and, because that duty is one imposed by statute, the county board cannot alter it. The record kept by the clerk is the only competent proof of the official acts of the board. People v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. (1915), 271 Ill. 226, 228-29.
>
> * * *
>
> Although it might be suggested that the duty to "keep an accurate record of the proceedings" of the board could be satisfied by the preservation of records created by others, a mere custodian generally cannot assure the accuracy of such records. Section 3-2013 of the Counties Code clearly contemplates that the clerk is not charged merely with the preservation of the records of proceedings, but is responsible for creating them.

Illinois Attorney General Opinion, No. 2000-004 (emphasis added). (Clearly, the transcript is not equivalent to minutes of the May 3, 2006 Board meeting, as the Clerk did not create such transcript).

Moreover, the Rules of Order of the Peoria County Board require that the record of a County Board meeting maintained by the County Clerk pursuant to the statute be approved and adopted by the County Board at the subsequent County Board meeting:

> Section 13: The order of business presented before the Board shall be as follows, unless otherwise determined upon by action of the Board:
>
> * * *
>
> (l) The proceedings of the preceding meeting as prepared by the Clerk of the Board may be:

(1) read and corrected, and shall be
(2) approved and adopt[ed] * * *.

Rules of Order, §13(l) (emphasis added). No such vote to approve and adopt any documents or record pertaining to the May 3, 2006 County Board meeting occurred at the subsequent meeting of the County Board.

Having failed to produce a Resolution embodying its "decision," and having failed to have minutes of the May 3, 2006 County Board meeting prepared by the County Clerk, the County Board has instead collected a great mass of documents which, all together, purport to represent the County Board's "final action" on the Application. The "writings" proffered by the County as the written decision required by the law and regulations, titled as a group, "Record and Transcript of Peoria County Board's Decision and Findings" (C13710-48), consist of the following:

- The recommended Resolution for approval of the Application, conditioned on PDC's acceptance of certain conditions, filed with the County Clerk on April 27, 2006 (Ex.10; C13710), but never acted upon by the County Board;
- The undated transcript of the May 3, 2006 County Board meeting (Ex. 12; C13711-27);
- Four pages bearing handwritten notes, possibly taken by the County Clerk during the May 3, 2006 County Board meeting (Ex. 18; C13731-34); and
- The "Recommended Findings of Fact" filed with the County Clerk on April 27, 2006 (Ex. 9, C13735-48).

Very recently, on November 6, 2006, the County Board filed its Motion for Leave to Supplement Record on Appeal and File Second Amended Index. The Supplemental Record would include, according to the language of the County Board's Motion for Leave, "Proposed Findings of Fact prepared by County Staff for consideration by and distributed to the County Board prior to the April 6, 2006, committee meeting at which the Proposed Findings of Fact were reviewed and discussed" and "[t]he one (1) page sheet of findings of fact generated by

County Staff at the May 3, 2006, County Board meeting incorporating the one change decided and made by the County Board at that meeting." Therefore, with the inclusion of the Supplemental Record, it seems that the County Board created at least three different documents purporting to be "Findings of Fact" for the Record, plus the fourth "Final Findings of Fact" prepared by Karen Raithel and introduced during her deposition. (Ex. 13; Ex. 14). Moreover, the "Proposed Findings of Fact prepared by County Staff for consideration by and distributed to the County Board prior to the April 6, 2006..." sought to be filed with the Supplemental Record includes multiple versions of each set of findings on the nine criteria, and is fifty-five (55) pages long.

The "Recommended Findings of Fact" that were filed in this appeal are merely one County Staff member's interpretation of the events that occurred at the April 6, 2006 meeting of the Committee, and do not actually reflect the final findings of fact approved at the May 3, 2006 meeting of the County Board. (Ex. 9; Ex. 13, 58/23-59/13). The "Proposed Findings of Fact prepared by County Staff for consideration by and distributed to the County Board prior to the April 6, 2006..." sought to be filed with the Supplemental Record are themselves internally contradictory, including multiple versions of each set of findings. The "Final Findings of Fact" were never shown to any member of the County Board (Ex. 13, 59/17-19), or filed in the County Clerk's office or otherwise made available to PDC or the public (Ex. 6, Nos.1978-1986; Ex. 7, Nos. 1978-1986). Most likely, the same goes for the unauthenticated and un-attributed "one (1) page sheet of findings of fact generated by County Staff at the May 3, 2006, County Board meeting" sought to be filed with the Supplemental Record. The "Final Findings of Fact" (Ex. 14) were not filed as part of the Record by the County Board in this appeal (Ex. 6, No.1982; Ex. 7, No. 1982), and are not sought to be filed in the County Board's Motion to Supplement

(presumably because the County Board has admitted that the "Final Findings of Fact" left Karen Raithel's office for the first time shortly before her discovery deposition (Ex. 6, Nos. 1977-1986; Ex. 7, Nos. 1977-1986)).

The fact of the matter is that there is no document (nor even two or three documents together) that memorializes the decision of the County Board on May 3, 2006 (assuming, *arguendo*, that a decision was actually made). Altogether, it appears that the County Board is asserting that the following are its "Record and Transcript of Peoria County Board's Decision and Findings":

Recommended Resolution (1 page) (Ex. 10; C13710)
+ May 3, 2006 transcript (49 transcribed pages) (Ex. 12, C13711-30)
+ "Recommended Findings of Fact" dated April 27, 2006 (13 pages) (Ex. 9; C13735-48)
+ Clerk's handwritten notes (4 pages) (Ex. 18; C13731-34)
+ "Proposed Findings of Fact" (55 pages) (seeking to file)
+ "Findings of Fact generated ... May 3, 2006" (1 page) (seeking to file)
= 123 pages

It is essentially impossible, given the variety, redundancy and volume of the foregoing, to determine what, if anything, happened on May 3, 2006. This pile of paper can hardly satisfy the written decision requirement of the law and regulations. More troubling still is the fact that the documents are contradictory and inconsistent with one another. Most confusing of all, however, is the fact that the only Resolution placed in the Record in the County Clerk's office for review by PDC and the public (which is also the only Resolution in the Record on appeal in this case), actually recommended conditional approval of the Application. (*See* Ex. 5; Ex. 10; Ex. 11). For this additional reason, no final action was taken on the Application, and the Application is deemed approved.

The language of the Act is clear and plain. Timely final action in the form of a written decision specifying the reasons for approval or denial is required in order for there to be "final action." This is reinforced by the Illinois Administrative Code's definition of "final action" as constituting either the local siting authority's written decision or, more appropriately in this case, the failure of the local siting authority to act. 35 Ill. Adm. Code §107.204. No half measure is acceptable under the Act or the Illinois Administrative Code. These provisions are not advisory; they are mandatory. These provisions protect the integrity of the siting process, and protect the interests of the public, as well as the applicant, in that process.

The fact in this case is that on the last day to perfect a review to this Board (June 7, 2006), and on every day before that date, it would have been literally impossible for a member of the public to determine what, if anything, happened at the May 3, 2006 meeting of the County Board, based on a review of the official public record maintained in the County Clerk's office. In fact, as of that date, an attorney representing a party to these proceedings was unable to locate any documents purportedly constituting a written decision by the County Board (*e.g.*, the transcript from the May 3, 2006 County Board meeting, or the "yellow sheets" pertaining to the Application referenced at the May 3, 2006 County Board meeting) in the office of the County Clerk, even with the assistance of the Deputy County Clerk vested with the responsibility to maintain the files pertaining to the Application (Ex. 16, 11/13-21). (*See* Ex. 17).

Until the day the Act is amended to allow for parties to a siting application and the public to get their information regarding the decision of the local siting authority from internet websites, rather than the Record maintained pursuant to existing law, regulation and ordinance, the Application must stand approved by operation of law.

III. THE FILING OF THE TRANSCRIPT AND OTHER DOCUMENTS IN THE RECORD WAS NOT TIMELY, AND THEREFORE, THE APPLICATION IS DEEMED APPROVED.

It is indisputable that the County Board actually received the Application in this case on November 9, 2005. PDC anticipates that the County Board may allege that it effectively "received the request for site approval" under Section 39.2(e) of the Act on November 14, 2005, the day the County Board purportedly completed its initial review of the Application, which date the County Board has referenced as the "deemed filed" date throughout these proceedings. In fact, under the law, the date of actual, physical receipt of the Application is the starting date for the 180-day deadline under Section 39.2(e) of the Act. 415 ILCS §5/39.2(e).

The County Board does not have the power to modify the date of receipt of the Application under the Act. In the case of McLean County Disposal Company, Inc. v. County of McLean, a county rejected an incomplete application, deeming same "filed" on the date the amended, complete application was received by the county. PCB 87-133, 1988 WL 160134, *3 (Illinois Pollution Control Board, January 21, 1988). The Board found that for purposes of the 180-day deadline in Section 39.2 of the Act, "a county or municipality does not have the authority to extend the 180-day deadline without a waiver by the applicant. Section 39.2 establishes the exclusive procedures to be used by localities when reviewing siting applications." Id. at *4. The Board based this ruling on the strict construction of Section 39.2 of the Act:

> Section 39.2 establishes the exclusive procedures to be used by localities when reviewing siting applications. That section, through the 180- day deadline placed upon final action by a locality, shows the legislature's intent to move the regional pollution control facility siting process at a quick pace. Such intent is also shown in section 40.1, which allows the Board only 120 days to take final action on a siting appeal. The legislature, in providing that a site may be deemed approved if either of those deadlines is missed, reinforced its desire for quick resolution of siting applications by setting a somewhat harsh penalty for violation of the deadlines. Given such a clear expression that time is of the essence, the Board

> cannot find that the county board impliedly has the power to extend the 180-day deadline by determining when an application is deemed filed. To do so would violate the language of the statute.

Id. (emphasis added). The Board recognized and disregarded the county's claims of undue prejudice:

> The Board is aware that the finding that a locality may not unilaterally extend the decision deadline could work hardship on the locality in cases where an application is deficient and the applicant refuses to waive the 180-day deadline. However, the locality could solve such a potential problem by holding the mandatory public hearing and following the other applicable procedures of Section 39.2, and subsequently denying site approval on grounds of insufficient information.

Id. The Board affirmed its decision on reconsideration of same, stating that "a unit of local government has no authority to use local procedures to extend the statutory 180-day deadline for decision." 1988 WL 160250, *2 (March 10, 1988).[4]

The County Board has admitted that PDC delivered the Application and the filing fee to the County Clerk on November 9, 2005 (Ex. 1, No. 73, 80; Ex. 4, No. 73, 80), and has admitted that the County Clerk actually received the Application and the filing fee on November 9, 2005 (Ex. 1, Nos. 74, 81; Ex. 4, Nos. 74, 81). The Deputy County Clerk signed an acknowledgment of same (Ex. 1, Nos. 68-72; Ex. 4, Nos. 68-72; Ex. 2), and gave PDC a receipt for the

[4] On appeal of the foregoing case, the Appellate Court made a finding of fact that "[t]he record reflects all of the parties participated without specific objection in proceedings which were apparently premised on the assumption that the application was first filed on March 17, 1987." Citizens Against the Randolph Landfill, (CARL) v. Pollution Control Bd., 178 Ill.App.3d 686, 696, 533 N.E.2d 401, 108, 127 Ill.Dec. 529, 536 (4 Dist. 1988). Therefore, the Appellate Court concluded that "[b]y participating in public hearings after the deadline for such hearings had passed on the basis of a January 22, 1987, filing date and by filing a reply brief after the deadline for county board action had passed on the basis of a January 22, 1987, filing date, the disposal company waived its right to a decision by the county board on or before that purported deadline." Id. The Appellate Court did not address the Board's conclusion that counties cannot extend the 180-day deadline for decision through local "filing" procedures, instead finding that "if the McLean County Disposal Company's application for landfill site approval was filed on January 22, 1987, the disposal company waived compliance by the County of McLean with the 180-day deadline for action on the application." Id. at 697, 409, 537.

Application and the required filing fee (Ex. 1, Nos. 75-77; Ex. 4, Nos. 75-77; Ex. 3). Section 7.5-41 of the Peoria County Code states, in pertinent part, that "the County Clerk shall not give a receipt or other indication of filing until such time as it is determined that the Application complies with the requirements of this resolution." (Appx. A). Therefore, the County Board has actually admitted that the controlling filing date in this case is November 9, 2005, pursuant to Requests to Admit in this case and pursuant to its own ordinance.

The County Board lacks the authority to extend the statutory 180-day deadline for decision through local procedures. Therefore, November 9, 2005, was "the date on which [the County Board] received the request for site approval" under Section 39.2(e) of the Act. The 180th day after November 9, 2005, was May 8, 2006. PDC took no actions and participated in no processes after May 8, 2006, other than the filing of a Petition to Review with the Board, wherein PDC states that the Application was deemed approved pursuant to Section 39.2(e) of the Act. Clearly, there is no argument for waiver in this case.

The transcript of the May 3, 2006 meeting of the Peoria County Board was not posted on the County's website until May 12, 2006, four (4) days after the statutory deadline. (Ex. 1, No. 47; Ex. 4, No. 47; *see also* Ex. 15, 31/22-32/23). On June 7, 2006, Brian Meginnes and Peoria County Deputy Clerk Megan Fulara (Ex. 16, 7/2-10) could not find a copy of the transcript of the May 3, 2006 meeting in the County Clerk's office. (Ex. 17, ¶¶8-9, 14). The hard copy of the transcript was not tendered to PDC or made available to the public prior to this appeal. (*See* Ex. 17). Therefore, even if the posting of the transcript on the County's website constituted "filing" of same, the transcript still was not filed until May 12, 2006, more than 180 days after the County's receipt of the Application. (The Record available to the public and PDC on June 7, 2006, also did not contain the "yellow sheets" referenced at the May 3, 2006 meeting, or the

majority of the documents with which the County Board has subsequently sought to supplement the Record pursuant to its Motion for Leave filed on November 6, 2006. (Ex. 17, ¶¶10-14)). Having been filed outside of the 180-day window from receipt of the Application, the transcript cannot constitute part of the "written decision" of the County Board.[5] Without the transcript, there is no record whatsoever of the actions purportedly taken by the County Board on May 3, 2006.

Therefore, pursuant to Section 39.2(e) of the Act, if the County Board failed to take "action" and to memorialize same properly on or before May 8, 2006, the Application is deemed approved.

[5] The transcript cannot and does not constitute minutes or official record of the May 3, 2006 meeting in any case. *See* Illinois Attorney General Opinion, No. 2000-004 and preceding discussion.

CONCLUSION

PDC acknowledges, in the interests of transparency, that in many cases in Court and before the Pollution Control Board dealing with approvals based on failures to act within statutory decision deadlines (both at the local siting authority and Board levels), automatic approval has not been enforced because the party benefiting from the automatic approval played a part in inviting or waiving the failures that caused decision deadlines to be missed. *See, e.g.,* Citizens Against the Randolph Landfill, (CARL) v. Pollution Control Bd., *supra.* In this case, PDC never did anything that can be even remotely construed as a waiver of or inducement to error by the County Board. It is not up to PDC or this Board to speculate as to why the County Board failed to take final action within the statutory decision deadline. It is, however, an indisputable fact in this case that the County Board failed to take any final action whatsoever on the Application, much less creating a written decision specifying reasons for same within the statutory decision deadline.

For all the foregoing reasons, the Motion for Summary Judgment pursuant to 415 ILCS §5/39.2(e) filed by PDC should be granted.

WHEREFORE, Petitioner, Peoria Disposal Company, prays that this Board issue summary judgment in favor of Petitioner, Peoria Disposal Company, and award Petitioner, Peoria Disposal Company, such other and further relief as is deemed appropriate under the circumstances.

Respectfully submitted,
PEORIA DISPOSAL COMPANY

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APPENDIX

Appendix A: Excerpts from the Peoria County Code of Ordinances

Appendix B: Excerpts from the Peoria County Board Rules of Order