ILLINOIS POLLUTION CONTROL BOARD
October 1, 1987

A.R.F. LANDFILL, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 87-51
	)	
LAKE COUNTY,	)	
	)	
Respondent.	)	

CONCURRING OPINION (by B. Forcade):

I support the outcome that the county board decision be affirmed but disagree with some of the rationale and findings expressed in the Opinion filed with the Clerk of the Board on October 1, 1987.

FUNDAMENTAL FAIRNESS

I agree that the proceeding below was fundamentally fair and support the rationale on pages 1-6 of the October 1 Opinion. However, I am particularly concerned with the current trend in Section 39.2 proceedings: the landfill is tried before the county board and the county board members are tried before this Board. I certainly agree that issues of ex parte contacts, conflicts of interest and the like are appropriate issues for presentation to this Board as a showing that the proceeding below was not fundamentally fair. However, I also believe that the county board proceeding is entitled to a strong presumption of propriety that must be overcome before there can be a "fishing expedition" into the personal lives and mental processes of the county board members.

The interrogatories submitted to each county board member by A.R.F. asked identification of each and every communication with any person regarding the A.R.F. landfill; asked for disclosure of any financial interest the county board members had in Waste Management or property near the A.R.F. facility; asked for their attendance record at the A.R.F. hearings; asked for their participation in negotiations and voting record relating to the Heartland property annexation; asked for financial disclosure regarding interests in other landfills or incinerators in any jurisdiction; asked about financial benefits received from Waste Management; asked if the county board members had ever made public statements about the existing A.R.F. landfill; asked whether the county board member had read the entire transcript (if not, what parts were not read); and asked whether the county board member would have voted against the approval regardless of

the evidence (A.R.F.'s Interrogatories to Lake County Board Members, May 22, 1987). It would appear that some portion of this inquiry has both relevancy and materiality. But the threshold issue of whether the adjudicatory decisionmaker can be queried at all, absent some forceful prima facie showing of impropriety, remains unanswered. This is an especially difficult question where the adjudicatory decision is rendered not by a trial court judge, but by an institutional body.

The courts have struggled with this issue since the early 1930's. The basic framework for how institutional adjudicatory decisionmakers must "consider the evidence" and what inquiries can be made into that process, was laid down by the United States Supreme Court in the four Morgan cases and their progency (Morgan v. U.S., 298 U.S. 468 (1936) [Morgan I]; Morgan v. U.S., 304 U.S. 1 (1938) [Morgan II]; U.S. v. Morgan, 307 U.S. 183 (1939) [Morgan III]; and U.S. v. Morgan, 313 U.S. 409 (1941) [Morgan IV].

In 1936, the U.S. Supreme Court held that "the one who decides must hear." [Morgan I]. Subsequently, the district court allowed the Secretary of Agriculture to be examined on whether he had heard the case (read the record). On subsequent appeal, the Supreme Court reversed itself with Mr. Chief Justice Frankfurter stating in the Opinion:

> But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." Morgan v. United States, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, compare Fayerweather v. Ritch, 195 U.S. 276, 306-7, so the integrity of the administrative process must be equally respected. See Chicago, B.&Q. Ry. Co. v. Babcock, 204, U.S. 585, 593. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. United States v. Morgan, 307 U.S. 183, 191.
> United States v. Morgan, 313 U.S. 409 (1941) [Morgan IV].

The four Morgan cases, and their progeny, lay the groundwork for the questions now plaguing the Board. It seems clear that institutional decisionmakers must consider the evidence, but that you can only ask certain questions of the decisionmaker and then only if you meet some burden or prima facie showing that the decisionmaking process was flawed. What showing must be made and what questions you can subsequently ask is a very murky area of the law. In National Nutritional Foods v. F.D.A., 491 F.2d 1141 (2nd Cir., 1974), no examination of the Secretary was allowed even though it would have been physically impossible for the Secretary to read the hundreds of thousands of pages of record involved in the decisions the Secretary made in the first 13 days after he took office. See also Libis v. Board of Zoning Appeals of Akron, 292 N.E.2d 642 (Ohio Appellate, 1972).

I have reviewed a substantial body of literature (and much of the case law cited therein)[1] in an attempt to determine what questions may be asked of county board decisionmakers in a Section 39.2 proceeding and what, if any, preliminary showing must be made prior to asking those questions. The law is, at best, murky. Nonetheless, if Chief Justice Frankfurters rationale in Morgan IV holds true, I find it difficult to believe that A.R.F.'s May 22, 1987, Interrogatories would have been allowed if posed to a trial court judge in Illinois.

CRITERION NO. 1

I support the rationale and finding of the October 1 Opinion (as expressed on pages 7-10) that the county decision on this criterion must be affirmed.

CRITERION NO. 2

I support the finding that the county board decision on Criterion No. 2 be affirmed and the rationale as stated at pages 10-20. I did, however, believe additional reasons supported the county board's determination. I was particularly concerned by the proximity of the proposed facility to drinking water supplies. The record discloses that there is a drinking water supply within 250 feet of a proposed cell of the facility

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1. K. Davis, Administrative Law Treatise, Section 11.02-11.04
2 Am Jur.2d, Administrative Law, Section 439
F. Cooper, State Administrative Law, Chapter 13, Section 3
18 A.L.R.2d, 606-629 (including Later Case Service)
Stein, Mitchell, Mezines, Administrative Law, Chapter 38
50 Washington Law Review, 749 (1978)
30 Administrative Law Review, 237

(January 28, 1987, transcript, p. 83), there are at least seven wells within 500 feet of the facility (January 20, 1987, transcript, p. 44) and there are about 133 wells within about 3 miles of the facility (February 4, 1987, transcript, p. 100). I believe the county board could have legitimately concluded that the density of drinking wells in this area was so high that the "location" was inappropriate for a landfill regardless of how carefully that landfill might be "designed" or "proposed to be operated." This issue takes on added importance when the possibility of sand lenses is considered and the post-closure leachate migration after the leachate collection system is turned off.

Additionally, the October 1, 1987, Opinion misses an issue I find quite persuasive. The county board made a particular finding that found evidence against the facility credible and questioned the credibility of A.R.F.'s witnesses' testimony on Criterion No. 2 (Regional Pollution Control Recommendation, p. 13). I do not believe this Board can lightly dismiss or disregard findings on credibility since we do not view the actual testimony.

CRITERION NO. 3

I disagree with the finding and rationale expressed in the Opinion filed October 1, 1987, as it pertains to Criterion No. 3. I would affirm the county board's decision that A.R.F. has failed to show compliance with Criterion No. 3.

In Waste Management of Illinois, Inc., v. Lake County Board and the Village of Antioch, (PCB 82-119, December 30, 1982), the Board held that the fact that a site is an extension of an existing system or is proposed to be located next to a previously operated site cannot be used to demonstrate the compatibility of the site. In that case, the Board cited two reasons for rejecting this type of demonstration. First, Sections 39.2 and 3(x)(2) of the Act clearly require that expansions of existing RPCF be subject to the same review process as that required for totally new facilities. Second, once a pre-existing landfill is closed, the character of the area becomes one of open space and the residents may have a reasonable expectation that it will be so maintained. The Board concluded that it would "not allow the potential of damage to the surrounding community due to a proposed expansion to be negated by a 'boot-strapping' argument that the existing landfill has already caused real or perceived damage to that same area." (Id. p. 12). This decision was explicitly upheld on review by the Second District Appellate Court (No. 83-166, May 8, 1984):

> We agree with the PCB that the clear intent of the statute is to require the local government units to consider a proposed facility expan-

> sion as a new and separate regional pollution control facility. Consistent with this legislative intent, therefore, petitioner should not be able to establish compatibility based upon a pre-existing facility.

The reasoning and law are equally applicable here. With one exception, all of the evidence supporting A.R.F.'s claim of minimizing incompatibility presumed and included the presence of the existing landfill in evaluating the impact of the proposed expansion. That exception is Mr. Whitney's statement that the proposed expansion would have minimal impact even if the existing facility were not there (January 30 transcript, p. 85). Although Mr. Whitney's evaluation of impact with the existing facility was formulated from January 7 until January 29. His opinion on the impact, absent the existing facility, was formulated "briefly after Mr. Kissel asked the question" (January 30, transcript, p. 89). This briefly formed opinion seems to be at odds with Mr. Whitney's prior statements that the existing facility has an impact on surrounding land values and that property values would increase if the existing facility closed (January 29, transcript, pp. 106-107). This conflict would support the county board's decision that Mr Whitney's testimony was not credible (Regional Pollution Control Recommendation, p. 14).

Perhaps the most troublesome aspect of the proceeding on Criterion No. 3 is that all evidence supporting minimizing compatibility took the location as a given, and evaluated, design and operational factors that might minimize the impact. "Based upon the configuration of the property with the setbacks, the berming and the landscaping, it's my opinion that impact on these properties will be minimized" (R. January 29, 1987, p. 104).

Neither the construction of the earthen berm nor any other construction, design or operational plan are evidence that the site is located so as to minimize incompatibility. These efforts to mitigate the impact of the facility take the location of the facility as a given. They are correctly considered under Criterion No. 2 and Criterion No. 5. However, Criterion No. 3, if it is to be given a meaning which is distinct from Criterion No. 2 or Criterion No. 5, must be interpreted as also requiring a review of the location of the site in terms of the character of the surrounding area. Such review should be independent of any measures which may be taken to mitigate an adverse impact on the area. This is not to say that construction, design and operational features are irrelevant. They may certainly be evidence of the character of the site itself. However, they do not negate the need to independently consider the character of the area in which the site is to be located.

In summary, I would uphold the county board on Criterion No. 3.

CRITERION NO. 4

I also cannot support the October 1, 1987, Opinion finding on Criterion No. 4. That Opinion and prior holdings by a majority of the Board have reduced this criterion to a meaningless exercise in paper shuffling. Under Section 39.2(a)(4) of the Act, site location suitability may be approved only if:

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

My interpretation of this language is that Criterion No. 4 requires two factors:

1. A determination by Illinois Department of Transportation ("IDOT") that the facility is located outside the boundary of a 100-year flood plain or a determination that the facility is flood-proofed to meet IDOT standards and approved by IDOT; and

2. Competent evidence on IDOT's determination must be presented to the County board.

IDOT's "determination" or "approval" comes in a standard form letter which states in relevant part:

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

First, it is clear from the language of the form letter that IDOT is specifically not making determination on the 100-year flood plain and specifically not making a determination on flood-

proofing. Second, prior cases make it clear that IDOT sends this form letter for all sites, even where there is a stream running through the site and routine flooding is acknowledged. Board of Trustees of Casner Township, et al. v. County of Jefferson, et al., PCB 84-175 and 176, April 4, 1985. In fact, IDOT sends this form letter to citizens who write objecting to the landfill, Casner Township, supra.

The October 1, 1987, Opinion continues a line of precedent holding that facility applicants must get a meaningless form letter from IDOT to satisfy Criterion No. 4. I cannot agree with that position.

It is clear from the record that most of the proposed facility is not only in a flood plain, but has recently flooded. Further, no flood proofing plans were submitted to IDOT. Therefore, there is no credible evidence, to me, that IDOT has made the necessary determination and I would uphold the county board.

The October 1, 1987, Opinion continues the facade that county boards can consider the actual fact finding on flood plain issues under Criterion No. 2. Yet the October 1 Opinion contains no reference to flooding issues in the Criterion No. 2 discussion. I am personally unable to write Criterion No. 4 out of the Illinois Environmental Protection Act by administrative fiat.

CRITERION NOS. 5 & 6

I support the findings and rationale on Criterion No. 5 and No. 6 as expressed in the October 1, 1987, Opinion at pages 27-31.

Bill S. Forcade
Member of the Board

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 1st day of October, 1987.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board