ILLINOIS POLLUTION CONTROL BOARD
April 11, 1991

LAND AND LAKES COMPANY, JMC OPERATIONS, INC. and NBD TRUST COMPANY OF ILLINOIS, AS TRUSTEE UNDER TRUST NO. 2624EG,	)	
Petitioners,	)	
v.	)	PCB 91-7 (Landfill Siting)
VILLAGE OF ROMEOVILLE,	)	
Respondent.	)	

ORDER OF THE BOARD (by B. Forcade):

On March 25, 1991, Land and Lakes Co., JMC Operations, Inc. and NBD Trust Company of Illinois, as Trustee under Trust No. 2624EG ("Land & Lakes") filed a Motion for Certification of Interlocutory Appeal. The issue on appeal is the intervention by the People of Will County, represented by the State's Attorney for Will County ("Will County"), which intervenor status was granted by the Board in its Order of February 7, 1991. The Board granted Land & Lakes motion to reconsider that decision and affirmed the decision to allow intervention in its Order dated March 24, 1991. On April 10, 1991 Will County filed a response to Land & Lakes' motion for Certification of Interlocutory Appeal, requesting that the Board deny the motion.

Supreme Court Rule 308(a) provides as follows:

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appeallate Court may thereupon in its discretion allow an appeal from the order.
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> Ill. Rev. Stat. 1989, ch. 110A, par. 308(a) (emphasis added).

The Board, through its own procedural rules and judicial interpretation, has authority to issue the requested certification for appeal. (See 35 Ill. Adm. Code 101.304; People v. PCB, 129 Ill. App. 3d 985 (1st Dist. 1985); and Getty Synthetic Fuel v. PCB, 104 Ill. App. 3d 285 (1st Dist. 1982)). To do so, the Board must find that a two pronged test has been satisfied: a) that its decision involved a question of law involving a substantial ground for difference of opinion and b) that immediate appeal may materially advance the ultimate termination of the litigation.

First, the Board notes that its initial decision to grant intervenor status was by unanimous vote of the Board, and that in this same case that status was denied by the Board to citizens and to the Forest Preserve District who sought third party intervenor status. In denying those requests to intervene, the Board granted leave to file amicus curiae briefs. In allowing Will County to intervene, the Board considered that the State's Attorney is a constitutional officer whose duties extend to environmental issues and whose participation in various matters is provided for in the Environmental Protection Act. This being the case it was appropriate to allow more than the filing of an amicus curiae brief to the State's Attorney, who now may participate fully in the Board's public hearing.

Nonetheless, since the matter of the intervention by the State's Attorney is one of first impression for the Board, it is possible to conclude that a substantial difference of opinion on the question of law could exist.

The second issue relates to the ultimate termination of the litigation. Here, the Board is uniquely constrained in that the statute requires the Board to render its decision within 120 days, unless Land & Lakes itself elects to give the Board a waiver which extends the date for the action's ultimate disposition. Thus, the disposition of the case cannot be delayed by the Board's decision regarding intervention.

This is a matter of standing before the Board. The parties have intertwined the issues of standing and subject matter jurisdiction. This Board has often noted that the Board's review is limited to the record before the local government, and that record is certified to the Board and defines the scope of review. Allowing intervention does not imply that the State's Attorney can dispute criteria on appeal which were not raised by Land & Lakes in its appeal of the Village of Romeoville's denial of siting approval.

Land & Lakes argues that interlocutory appeal would frame the issues on appeal with respect to which criteria are to be reviewed on appeal and "assure that only the appropriate criteria are considered in this appeal". Motion at . 4. Land & Lakes

also asserts that expanding the criteria to be reviewed would extend the length of the hearings and the briefs to be filed. Motion at p. 5. In response Will County states that "no hardship exists if as Land & Lakes argues it will be required to show support in the record for the findings favorable to Land & Lakes with the State's Attorney of Will County as a party". Response at p. 3. The Board does not agree that the grant of intervenor status reopens the decision with respect to every criterion or that this would impose no additional burden.

This Board finds that allowing intervenor status does not enlarge the scope of review beyond the challenged criteria, which here are criteria 1 and 2. Furthermore, the possible addition of some hours of hearing time or preparation of briefs associated with Will County's intervention and the Board's review of such record are not so significant in the 120 day statutory decision timeframe that this Board could conclude any hours so saved would "materially advance the ultimate termination of the litigation". The Board must review the record below and, in fact, is limited to that record. The Board's hearing officer may not admit evidence outside the record except with regard to jurisdiction and fundamental fairness. See DiMaggio v. Solid Waste Agency of Northern Cook County, PCB 89-138, 107 PCB 49 (January 11, 1990) and Madison County Conservation Alliance v. Madison County and Environmental Control Systems, Inc., PCB 90-239 (April 11, 1991).

The Board finds that Land & Lakes has not shown that interlocutory appeal would satisfy the requirements of Supreme Court Rule 308(a). Therefore, the motion is denied.

IT IS SO ORDERED.

J. C. Marlin and J. Anderson dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certifies that the above Opinion was adopted on the 11th day of April, 1991, by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board