ILLINOIS POLLUTION CONTROL BOARD
January 11, 1995

BEARDSTOWN AREA CITIZENS FOR A BETTER ENVIRONMENT,	)	
Petitioner,	)	
	)	PCB 94-98
v.	)	(Siting Review)
	)	
CITY OF BEARDSTOWN AND SOUTHWEST ENERGY CORPORATION,	)	
Respondent.	)	

GEORGE MUELLER, of HOFFMAN, MUELLER, CREEDON & TWOHEY, and RICCA SLONE APPEARED ON BEHALF OF THE PETITIONERS;

GEORGE McCLURE APPEARED ON BEHALF OF THE CITY OF BEARDSTOWN; and

MARK D. CHUTKOW, of SIDLEY & AUSTIN, APPEARED ON BEHALF OF SOUTHWEST ENERGY CORPORATION.

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

This matter is before the Board on a petition for review, filed by Beardstown Area Citizens for a Better Environment (petitioners) on March 25, 1994. Petitioners seek review, pursuant to Section 40.1 of the Environmental Protection Act (Act) (415 ILCS 5/40.1 (1992)), of the City of Beardstown's (City) February 22, 1994 decision granting siting approval to Southwest Energy Corporation (Southwest) for a municipal solid waste incinerator. The Board held public hearings on the petition on October 19 and 20, 1994, in Hampshire. Members of the public attended that hearing.

The Board's responsibility in this matter arises from Section 40.1 of the Act. The Board is charged, by the Act, with a broad range of adjudicatory duties. Among these is adjudication of contested decisions made pursuant to the local siting provision for new regional pollution control facilities, set forth in Section 39.2 of the Act. More generally, the Board's functions are based on the series of checks and balances integral to Illinois' environmental system: the Board has responsibility for rulemaking and principal adjudicatory functions, while the Board's sister agency, the Illinois Environmental Protection Agency (Agency) is responsible for carrying out the principal administrative duties, inspections, and permitting. The Agency does not have a statutorily-prescribed role in the local siting approval process under Sections 39.2 and 40.1, but makes decisions on permit applications submitted if local siting approval is granted and

upheld.

BACKGROUND

Southwest filed an application for siting approval with the City on September 17, 1993. (C1.)[1] Southwest is a wholly owned subsidiary of Kirby-Coffman, Inc. John Kirby is president of both Southwest and Kirby-Coffman. (Tr. at 20-22.) The application sought siting approval for a municipal waste incinerator. The proposed facility would use processed fuel technology to recover electrical energy and marketable materials from municipal solid waste. (C3.) The City held public hearings on that application on December 21 and 22, 1993. On February 22, 1994, the City granted siting approval.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. These statutory criteria are the only issues which can be considered when ruling on an application for siting approval. Only if the local body finds that all criteria are satisfied can siting approval be granted. In this case, the City found that all of the criteria have been met, and granted siting approval. (C2669-C2676.)

When reviewing a local decision on the criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26, 29; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1987), 160 Ill.App.3d 434, 513 N.E.2d 592; E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, aff'd in part (1985) 107 Ill.2d 33, 481 N.E.2d 664.) Additionally, the Board is authorized to review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. (E & E Hauling, Inc., 451 N.E.2d at 562.) In this case, petitioners have raised challenges to the fundamental fairness of the local proceeding, as well as challenges to the City's decisions on seven of the criteria.

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[1] "Cxxx" will be used to refer to the City's record of the siting proceeding, and "Tr. x" will be used to denote the transcript of the hearing held by this Board on October 19 and 20, 1994.

FUNDAMENTAL FAIRNESS

Section 40.1 of the Act requires the Board to review the proceedings before the local decisionmaker to assure fundamental fairness. In E & E Hauling, the appellate court found that although citizens before a local decisionmaker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. (E & E Hauling, 451 N.E.2d at 564; see also Fairview Area Citizens Task Force (FACT) v. Pollution Control Board (3d Dist. 1990), 144 Ill. Dec. 659, 555 N.E.2d 1178.) Due process requires that parties have an opportunity to cross-examine witnesses, but that requirement is not without limits. Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. (Waste Management of Illinois Inc. v. Pollution Control Board (2d Dist. 1988), 175 Ill.App.3d 1023, 530 N.E.2d 682, 693.) The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. (Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163.)

Petitioners contend that the proceedings were fundamentally unfair in five ways: 1) several members of the city council and the mayor took a trip to another incinerator at Southwest's expense, but no members of the public were invited on the trip; 2) the local economic development director appointed a "shadow cabinet" of local residents who worked outside the public record and presented a report on the last day of the public comment period which affected the city council's decision; 3) local officials interfered with petitioners' efforts to disseminate information on the project, failed to place material submitted by petitioner into the public record, and failed to present the full record of public comment to the city council; 4) several members of the city council and the mayor engaged in improper *ex parte* contacts and improperly prejudged the application; and 5) the applicant (Southwest) is a shell corporation and not the real party in interest, so that neither the public nor the decisionmakers had information about the corporation's operating history.

Trip to View Incinerator

Petitioners first argue that the proceedings were fundamentally unfair because several members of the city council and the mayor took a trip to Massachusetts, at Southwest's expense, to view the SEMASS incinerator, which is the model for the proposed Beardstown facility. Petitioners contend that

because no members of the public were invited on the trip, there was no way to rebut the impressions made upon the decisionmakers during the trip.

On October 22-24, 1994[2], the mayor of Beardstown and his wife, six members of the city council, the Beardstown economic development director, and a local reporter visited the SEMASS incinerator in Rochester, Massachusetts. (Tr. at 199, 304, 479.) The SEMASS facility is operated by Energy Answers, Inc., with which Kirby-Coffman has a joint development agreement. (Tr. at 24, 105.) The trip, including airline tickets, hotels, meals, and local transportation, was paid for by Southwest, Energy Answers, and West Suburban Recycling and Energy Center.[3] The group toured the SEMASS facility, and went sightseeing in the area. (Tr. at 312-313, 368.) One council member testified at the Board's hearing that he discussed his impressions of SEMASS with an official from Southwest (Tr. at 314), and another council member testified that the trip to SEMASS "helped a lot" in reaching a decision on the application, and that he was impressed (Tr. at 349).

Petitioners contend that this trip constituted improper *ex parte* communications between the applicant and the council members. Petitioners maintain that they have been prejudiced by those *ex parte* contacts, by being unable to offset the council members' impressions of SEMASS since petitioners were not aware of the content of the communications. Petitioners argue that the record demonstrates a profound bias by the mayor and supporting council members. Finally, petitioners cite to the Board's decision in Concerned Citizens for a Better Environment v. City of Havana (May 19, 1994), PCB 94-44, stating that the Board found under almost identical facts that a trip to observe SEMASS led to a fundamentally unfair proceeding.

In response, Southwest argues that the trip was not an impermissible *ex parte* contact, but a necessary component of the city council's investigation of the application. Southwest notes that the Act does require local decisionmakers to conduct hearings comporting with fundamental fairness, but argues that the Act does not expressly restrict the decisionmakers' inquiry to that normally associated with judicial officers. Southwest states that reversing the City's decision, based on the trip, would stifle the instincts of local decisionmakers who seek to do

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[2] That date is after the application was filed, on September 17, 1994, and before the public hearings were held on December 21-22, 1994.

[3] John Kirby is also president of West Suburban. (Tr. at 28.)

what is best for their communities. Southwest also contends that the tour of SEMASS was not a lobbying effort, but a fact gathering trip, that the local community was kept informed of the results of the tour through coverage by the local press, and that it would be infeasible to invite all interested parties to tour SEMASS.

The Board first notes that a party can, by inaction in the proceeding before the local decisionmaker, waive its right to raise the issue of *ex parte* contacts. (FACT, 555 N.E. 2d at 1182-1183.) However, in this proceeding petitioners did file, just prior to the beginning of the hearings before the City, a motion to disqualify the council members. (C88-C91.) Thus, petitioners have preserved their right to raise this issue on appeal.

Based upon our decision in Havana, the Board finds that the trip to the SEMASS plant, sponsored by Southwest, was improper. As we stated in Havana, "the Board finds that the applicants' sponsorship of and payment for a tour of a facility used as the model for the proposed facility which included the council, but not the public generally, led to a fundamentally unfair proceeding." (Havana, slip op. at 7.) The facts surrounding the trip in this case are almost identical to those presented in Havana, and the parties have not argued otherwise. Like Havana, we find that petitioners were prejudiced by being unable to appropriately address all the impressions formed by the council members who participated in the tour. In sum, we find no reason not to follow our earlier decision, and find that Southwest's sponsorship of, and payment for, a tour of the SEMASS facility which excluded the general public rendered the proceedings fundamentally unfair.

We reach this conclusion based upon appellate court decisions finding that the local decisionmaking process must be viewed as an adjudicatory, rather than a legislative, process. (E & E Hauling, 451 N.E.2d at 564-566; Tate v. Macon County Board (4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176.) We agree with Southwest that, in some circumstances, viewing a similar facility could be a valuable part of a siting proceeding. However, it is the particular circumstances in this case, with the applicant sponsoring and paying for the trip after the filing of the application for siting approval, and the fact that there was no opportunity for the general public to participate in the trip, which render the proceedings fundamentally unfair in this case.

"Shadow Cabinet"

Petitioners next contend that the proceeding was fundamentally unfair because the City's economic development director, June Conner, appointed a "shadow cabinet" to review

incinerator proposals presented to the City. (Tr. at 177-178, 181-182.) This committee consisted of people from the community with varying backgrounds, to assist Ms. Connor in assessing incinerator proposals. (Tr. at 177, 187-188.) Ms. Connor formed the committee in May 1993 (Tr. at 180), and did not ask permission from the mayor or inform the city council (Tr. at 178, 188.) The committee was not an official committee of the city council. (Tr. at 223.)

Petitioners argue that this committee worked without public notice, outside the public record, and presented a report on the final day of the public comment period. Petitioners maintain that this report was partly incorporated into the city council's ordinance approving the siting application. Petitioners contend that they were prejudiced by these actions, because they were excluded from the process until its conclusion, and had no opportunity to comment or offer rebutting evidence to the committee's report. Southwest did not specifically respond to this argument in its brief.

The Board finds that neither the existence of this committee, nor the actions taken by the committee, render the local proceedings fundamentally unfair. The committee was not an official committee formed by the city council[4], and had no special standing to make recommendations to the city council. In essence, this committee acted no differently than petitioners may have acted: investigating the proposal by meeting with the applicant and reviewing reports, and subsequently filing a report and recommendations as public comment. While the filing of the report on the last day of the public comment period does indeed prevent any response or rebuttal, it is no different than any other public comment which may have been filed on the final day. The legislature did not provide for any rebuttal period when establishing the 30 day public comment period in Section 39.2(c). Although the city council may (or may not) have decided to incorporate some of the committee's recommendations in its ordinance, petitioners fail to show why this is different than the possible inclusion of recommendations made by other commenters. In sum, we find no violation of fundamental fairness by either the existence of this committee, nor by its actions during the proceeding.

Interference and Incomplete Public Comments

Petitioners next argue that the proceeding was fundamentally unfair because local officials interfered with petitioners'

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[4] We also note that the committee was formed in May 1993 to evaluate incinerator proposals, well before Southwest's application was filed with the City on September 17, 1993.

efforts to disseminate information about their views on the application, failed to place petitioners' materials in the public record, and failed to present the full record of public comment to the city council to consider in its decision.

Petitioners state that on two occasions in December 1993, petitioners attempted to distribute literature at the local WalMart store, and that the assistant manager stated that the flyers could be placed in the shoppers' bags. (Tr. at 140, 150-151, 410.) Petitioners contend that when city council member Thomas Brewer learned of this, he reported the action to the mayor (Tr. at 321-322), who then called Rhonda Roberts, WalMart's manager (Tr. 141). Ms. Roberts testified that the mayor asked why WalMart was taking a stand on the issue, and asked for the name and number of the WalMart district manager. (Tr. at 141-142.) The flyers were then removed from distribution at the WalMart store. (Tr. at 142.) Petitioners allege that the mayor's conduct in contacting WalMart denied petitioners fundamental fairness.

In response, Southwest contends that after speaking with the mayor, Ms. Roberts realized that it violated store policy to distribute literature on political issues, and so directed her employees to stop distributing the literature. Southwest states that none of the WalMart employees testified that the mayor or Mr. Brewer asked them to stop distributing the material, and that both men stated that they did not make such a request. (Tr. at 144, 155, 294, 331.) Thus, Southwest maintains that it is unclear as to what "misconduct" petitioners complain of.

The Board finds no violation of fundamental fairness caused by Mr. Brewer's and the mayor's communications with WalMart regarding the flyers. Any activities that happened at WalMart were not a part of the official local proceedings on the application. Section 40.1 of the Act requires the Board to consider the "fundamental fairness of the procedures used by the [local decisionmaker] in reaching its decision." (415 ILCS 5/40.1 (1992).) We fail to see how the issue of whether WalMart allowed distribution of flyers could be considered part of the procedures used by the local decisionmaker. (See also Daly v. Village of Robbins (July 1, 1993), PCB 93-52 and PCB 93-54 (cons.), slip op. at 7, 10-12.)

Petitioners also contend that local officials failed to place petitioners' materials in the public record, and failed to present the full record of public comment to the city council to consider in its decision. (Tr. at 454.) Petitioners assert that the mayor stated publicly that the record would be held open until the city council voted in February (Tr. at 450-451, 453), but that citizens who brought public comments to the city clerk on January 22 and 23 were told that they were too late, and that those comments were not made part of the record (Tr. 90-91, 94-

99.). Petitioners further maintain that although a petition against the incinerator and an accompanying cover letter were brought to the city clerk, only the petition itself was place in the record. (Tr. at 157-158, 447.) Petitioners maintain that these actions denied them fundamental fairness.

In response, Southwest argues that neither the mayor nor any city council member remembers the mayor stating that comments could be submitted until February. (Tr. at 291, 372, 391.) Southwest contends that if the mayor did state that the public could communicate with the city council until February, petitioners misinterpreted this statement as an extension of the written comment period. As to the allegations that the cover letter is missing from the record, Southwest states that both the petition and the cover letter are included in the public comments portion of the record. (C1592-C1595.)

The Board has reviewed the parties' arguments and the record, and finds no evidence that petitioners were denied fundamental fairness in connection with the public comment period, or inclusion of public comments in the record. The record contains conflicting testimony as to what the mayor may have stated regarding an extension of the public comment period. (Tr. 291, 372, 391, 450-453.) However, Section 39.2(c) clearly establishes a 30-day public comment period, beginning after the date of the last public hearing. In this case, that statutory 30-day period ended on January 21, 1994. Given the conflicting testimony, coupled with the clarity of the statutory 30-day comment period[5], we find no violation of fundamental fairness.

As to the contention that the cover letter was not included in the record, it is unclear from petitioners' arguments which petition and cover letter they refer to. However, the record does contain at least two separate petitions against the incinerator, both with accompanying cover letters. (C1581-C1591; C1592-C1595.) Thus, we find no evidence that the City excluded a cover letter from the record.

Ex Parte Contacts

Next, petitioners argue that the proceeding was fundamentally unfair because the mayor and several members of the city council engaged in improper *ex parte* contacts with the applicant and prejudged the siting controversy, and should have been disqualified. Among other things, petitioners point to a

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[5] We also note that the January 21 deadline was included in the City's hearing ordinance, was reiterated by the hearing officer, and published in the newspaper. (Tr. at 88, 97-98, 168; C64.)

luncheon meeting with Patrick Mahoney of Energy Answers, held on September 15, 1993, which was attended by the mayor and at least two council members. (Tr. at 270-271, 387.) There was also a reception for Mr. Mahoney held that afternoon at city hall, to which petitioners contend that members of the Chamber of Commerce who were opposed to the incinerator, and some city council members, were not invited. (Tr. at 190-193, 445.) Petitioners further contend that the mayor exhibited bias in his treatment of opponents, by, *inter alia*, refusing to change the hearing dates as requested by petitioners, although he had changed the hearing schedule to accommodate Southwest, and adjourning a city council meeting while an incinerator opponent was addressing the council. Petitioners also maintain that three city council members told a reporter after the vote that they had made up their minds months ago. (Tr. 338-341, 345.) Petitioners contend that the behavior of the mayor and several council members demonstrates that they prejudged the facts and the law, and so should have been disqualified on petitioners' motion. (C88-C91.)

In response, Southwest argues that city council members testified that they based their decision on the application on the hearing record (Tr. at 326, 331-332, 355, 374-375, 393-394, 507), and that the three city council members named in the newspaper article denied under oath that their minds were made up prior to the hearing (Tr. at 338, 340-341, 355-356, 357, 392-394). As to petitioners' requested change in hearing dates, Southwest maintains that the December hearings had been moved forward a day at Southwest's October request, before the hearings were formally scheduled, while petitioners did not request a change in dates until two weeks prior to hearing. Southwest argues that given the tardiness of petitioners' request, and the considerable advance notice of the hearing dates, the denial of the request was reasonable. In sum, Southwest contends that the hearing process was fair to all parties and that there were no contacts between Southwest and city council members that biased or predisposed the council members in favor of siting approval.

After reviewing the record, and the parties' arguments, the Board finds no violation of fundamental fairness caused by *ex parte* contacts or prejudicial behavior by the mayor or city council members. Initially, we reject petitioners' claims of impermissible *ex parte* contacts before the application was filed on September 17, 1993. The luncheon and reception for Mr. Mahoney occurred on September 15. Petitioners have cited no authority which would apply *ex parte* restrictions prior to the filing of an application for siting approval.[6] Thus, we find no

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[6] We note that the September 15 contacts did occur after notice of the upcoming filing of the application was published. However, we decline to find that *ex parte* restrictions apply

error in any contacts which occurred prior to September 17, 1993.

We also find no violation of fundamental fairness caused by bias towards opponents. As to the requested change in hearing dates, we find that the city council's refusal to change the dates was reasonable and does not show bias. Southwest requested a one-day change in dates in October, before the hearings were formally scheduled on October 19, 1993, while petitioners requested, two weeks before hearing, a postponement of the December 21-22, 1993 hearings until January 1994. (Tr. at 84, 202-204, 282, 300; C23.) As to the claim that the mayor adjourned a city council meeting while an incinerator opponent was speaking, we point out that this action occurred at a city council meeting, not at the hearing on the application for siting approval. Again, Section 40.1 of the Act requires the Board to consider the "fundamental fairness of the procedures used by the [local decisionmaker] in reaching its decision." (415 ILCS 5/40.1 (1992).) We do not believe that a local decisionmaker is somehow required to allow unlimited discussion on a siting application to occur at any meeting held by that decisionmaker during the time that the application is pending.

Finally, we find no violation of fundamental fairness caused by prejudgment of the application by city council members. There is conflicting evidence on the issue of whether three city council members stated that they had made their decision "months ago". However, those three members specifically testified that their decisions were based on the hearing record and were not finally made until after the hearings. (Tr. at 338-43, 355-357, and 392-394.) The Board's hearing officer found the testimony of each witness to be credible. (Tr. at 529.) After reviewing the record, we find insufficient evidence of prejudgment to find a violation of fundamental fairness.

Southwest as a "Shell Corporation"

Finally, petitioners argue that the proceedings were fundamentally unfair because the applicant is a shell corporation with no assets, and that other corporations paid the fees and are the real parties in interest, so that neither the city council nor the public had information about the corporation's part operating history. In response, Southwest contends that it is not error for a sister company (in this case West Suburban Recycling and Energy) to pay an application fee, and that it (Southwest) did indeed present evidence on Energy Answers and its operation of SEMASS.

The Board finds no violation of fundamental fairness caused by Southwest's corporate structure, or by the fact that

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starting as of the date of notice of filing.

West Suburban paid the application fee. We reiterate that Section 40.1 of the Act requires the Board to consider the "fundamental fairness of the procedures used by the [local decisionmaker] in reaching its decision." (415 ILCS 5/40.1 (1992).) We fail to see how the corporate structure of Southwest could be considered part of the procedures used by the local decisionmaker.[7]

APPLICATION OF SECTION 39.2 TO INCINERATORS

Petitioners also contend that Section 39.2 of the Act is fundamentally unfair because the applicant completely controls the content and the timing of the process. Petitioners further argue that Section 39.2 is specifically fundamentally unfair as applied to the siting of municipal waste incinerators, because of the interaction of the Retail Rate Law (220 ILCS 5/8-403.1 (1992)) with Section 39.2. In essence, petitioners allege that the Retail Rate Law provides such a huge potential profit for incinerator developers that the upfront costs of siting are of little consequence. Finally, petitioners assert that incinerator siting should not be subject to local control, because incinerators "inherently pollute a greater area than most landfills."

In response, Southwest argues that Section 39.2 does apply to waste-to-energy facilities, and is fundamentally fair to petitioner.

We reject petitioners' arguments on this issue. Once again, we must point out that the Board's inquiry into fundamental fairness is limited to a review of the procedures used by the local decisionmaker in reaching its decision. The content and requirements of the siting statute are not the subject of a fundamental fairness inquiry. Additionally, the Act clearly states that the siting procedures of Section 39.2 apply to new regional pollution control facilities, and the definition of regional pollution control facility includes waste incinerators. (415 ILCS 5/3.32(a), 39, 39.2 (1992).) In sum, it would have been error not to apply the provisions of Section 39.2.

CONCLUSION

As stated above, the Board finds that these proceedings were

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[7] To the extent that petitioners challenge the sufficiency of evidence on the operating history of the applicant, which is one of the criteria which may be considered pursuant to Section 39.2(a), that challenge would properly be made as a claim that the local decisionmaker's finding on the operating history is against the manifest weight of the evidence.

fundamentally unfair as a result of the tour of the SEMASS facility. We reject the other fundamental fairness challenges raised by petitioners. Because we find the proceedings to have been fundamentally unfair, we reverse the City's decision granting siting approval. We have found that petitioners were prejudiced by being unable to address all the impressions formed by the council members who participated in the tour. Remand of the decision, in this case, cannot cure that prejudice. (See, Havana (July 21, 1994), PCB 94-44, slip op. at 2.)

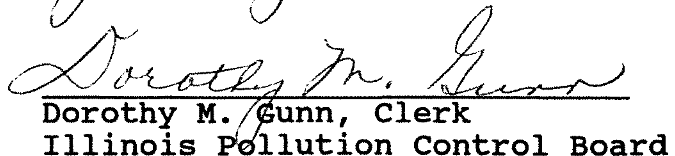
ORDER

The February 22, 1994 decision of the City of Beardstown, granting siting approval to Southwest Energy Corporation, is hereby reversed as the result of a fundamentally unfair proceeding. This docket is closed.

IT IS SO ORDERED.

C. Manning concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 11th day of January, 1995, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board