ILLINOIS POLLUTION CONTROL BOARD
December 20, 1985

CITY OF COLUMBIA, WALTER BYERLY, JR., BARBARA HEINLEIN, DANIEL HEINLEIN; HOMER STEMLER AND LORETTA STEMLER, Petitioners,	)	
v.	)	PCB 85-177
COUNTY OF ST. CLAIR AND BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INC., Respondents.	)	

ORDER OF THE BOARD (by J. Anderson):

On December 2, 1985 petitioners pursuant to Section 40.1 of the Act (also known as P.A. 82-682 and SB 172) filed an appeal to "preserve" an issue which they asserted might be at issue: whether the County's decision must be made within 120 days or 180 days of Browning-Ferris Industries' (BFI's) filing of its application for site location suitability approval for a new regional pollution control facility to avoid the application's being "deemed approved" pursuant to Section 39.2(e). The petition was accompanied by a motion to require BFI to file an answer containing any assertion that a 120 day or a 180 decision deadline applied to this action. On December 5, 1985 the Board issued an Order requesting additional information from the parties to allow the Board to determine whether a timely filed case or controversy exists of which the Board might take jurisdiction. Each party has filed a response.

The factual situation is as follows. BFI filed its request for site location suitability approval with St. Clair County on June 27, 1985. The statute in effect on that date, P.A. 82-682, contained a 120 day deadline for County decision on the application which would have been October 25. However, P. A. 83-1552, which became effective four days later on July 1, 1985, amended P. A. 82-682 to provide, inter alia, that the County decision was due 180 days after the application's filing, which would have been December 24. The County made a decision to deny the application on November 25.

BFI asserts, in it December 20 filing, that it intends to file an appeal (due December 30) of the County's decision which will include as one ground the assertion that, pursuant to Section 39.2, it may deem its application approved as of October 26 for failure of the County to render a decision in 120 days.

The Board finds that the City of Columbia's, December 2, 1985 petition was timely filed pursuant to Section 40.1(b) and

that a controversy exists over which the Board must take jurisdiction. The Board notes that this situation is procedurally awkward, as the Board's 120 day decision timeclock, which runs in favor of the applicant, has commenced well before the filing of any appeal by the applicant. The Board further notes, in the interests of administrative economy, its intention to consolidate any appeal by BFI with the City's appeal.

In the absence of a waiver by the applicant, the Board faces a tight time schedule. While the Board acknowledges the disruption of normal business activities occasioned by the holiday season, adherence to the following filing and briefing schedule is essential to allow the Board to make a timely decision in this matter. As explained in greater detail below, the County is directed to file its record in this matter on or before January 10, 1986. All parties are directed to file simultaneous briefs on or before January 10, 1986 asserting legal arguments as to the decision deadline applicable to the County. Any responses thereto shall be filed on or before January 21, to allow for possible resolution of this component of the action by the Board at its January 23 meeting. Hearing may be scheduled, but shall not be held, until after the question of the applicable decision date is determined.

The Board wishes to advise the City of its intention, in the event that the Board determines that a 120 day deadline is applicable as a matter of statutory construction, to order the filing of an amendment to the City's petition on or about January 31 specifying 1) any factual or legal basis for estoppel of BFI from benefitting from a 120 day determination, 2) in what regard the County's procedures were fundamentally unfair, and 3) why "approval" is contrary to the manifest weight of the evidence (see Petition, ¶5). This amendment will be required to give focus to the hearing.

Record before the County Board

P. A. 82-682, also known as SB 172, as codified in Section 40.1(a) of the Act, provides that the hearing before the Board is to "be based exclusively on the record before the county board." The statute does not specify who is to file with the Board the record before the County or who is to certify to the completeness or correctness of the record.

As the St. Clair County Board alone can verify and certify what exactly is the entire record before it, in the interest of protecting the rights of all parties to this action, and in order to satisfy the intention of SB 172, the Board believes that the County must be the party to prepare and file the record on appeal. The Board suggests that guidance in so doing can be had by reference to Section 105.102(a)(4) of the Board's Procedural Rules and to Rules 321 through 324 of the Illinois Supreme Court Rules. In addition to the actual documents which comprise the record, the County Clerk shall also prepare a document entitled

"Certificate of Record on Appeal" which shall list the documents comprising the record. Seven copies of the certificate, seven copies of the transcript of the County's hearing and three copies of any other documents in the record shall be filed with the Board, and a copy of the certificate shall be served upon the other parties. The Clerk of the St. Clair County Board is given 21 days from the date of this Order to "prepare, bind and certify the record on appeal" (Ill. Supreme Court, Rule 324).

Section 40.1(a) provides that if there is no final action by the Board within 120 days, petitioner may deem the site location approved. The Board has construed identical "in accordance with the terms of" language contained in Section 40(b) of the Act concerning third-party appeals of the grant of hazardous waste landfill permits as giving the respondent who had received the permit a) the right to a decision within the applicable statutory time frame, and b) the right to waive (extend) the decision period (Alliance for a Safe Environment, et al. v. Akron Land Corp. et al., PCB 80-184, October 30, 1980). The Board therefore construes Section 40.1(b) in like manner, with the result that failure of this Board to act in 120 days would allow respondent to deem the site location approved. Pursuant to Section 105.104 of the Procedural Rules, it is each petitioners' responsibility to pursue its action, and to insist that a hearing on its petition is timely scheduled in order to allow the Board to review the record and to render its decision within 120 days of the filing of the petition.

Transcription Costs

The issue of who has the burden of providing transcription in Board site location suitability appeals has been addressed in Town of Ottawa, et al. v. IPCB, et al., 129 Ill. App. 3rd, 472 N.E. 2d 150 (Third District, 1984). In that case, the Court ordered the Board to assume transcription costs (472 N.E. 2d at 155). The Supreme Court denied leave to appeal on March 14, 1985.

In cognizance of this ruling, the Board will provide for stenographic transcription of the Board hearing in this matter.

Finally, the Clerk's Office is directed to serve the parties with copies of this Order today by first class mail, in addition to the usual certified mail.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 20th day of December, 1985, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board