ILLINOIS POLLUTION CONTROL BOARD
January 10, 1985

BOARD OF TRUSTEES OF CASNER TOWNSHIP, JEFFERSON COUNTY, ILLINOIS; CITIZENS AGAINST WOODLAWN AREA LANDFILLS; CYNTHIA CARPENTER; ERNEST CARPENTER; HATTIE HALL; BYRON KIRKLAND; PATRICIA KIRKLAND; PEG O'DANIELL; RONALD O'ODANIELL; DENNIS SHROYER; and PATRICIA SHROYER,	)	
Petitioners,	)	
v.	)	PCB 84-175
COUNTY OF JEFFERSON and SOUTHERN ILLINOIS LANDFILL, INC.,	)	
Respondents.	)	
JOHN PRIOR,	)	
Petitioner,	)	
v.	)	PCB 84-176 (Consolidated)
COUNTY OF JEFFERSON and SOUTHERN ILLINOIS LANDFILL, INC.,	)	
Respondents.	)	

ORDER OF THE BOARD (by J. D. Dumelle):

On December 6, 1984, the Board entered an Order in these consolidated dockets which, among other things, requested that briefs be filed addressing three questions related to the Board's jurisdiction to hear an appeal from a "deemed approved" request for site location suitability. The Order provided that initial briefs be filed by December 21, 1984 and responsive briefs be filed by January 4, 1985. It was the Board's intention that all parties who wished to file a brief do so by December 21, 1984 and that all parties wishing to file a second responding brief do so by January 4, 1985. The function of this briefing schedule was to enable the Board to rule quickly on this preliminary question by getting all arguments before the Board no later than January 4, 1985. The Board noted its intention to rule on the jurisdictional question on January 10, 1985 prior to the holding of a Board hearing on this matter.

Briefs were filed by Petitioner Casner Township on December 21, 1984 and by Petitioner John Prior on December 19, 1984. However, both of the Respondents apparently interpreted the Board Order as requiring Respondents to file their first and only brief by January 4, 1985. Although this was not the Board's intention, this Board cannot require anyone to file a brief or an initial brief, nor do we believe any harm has resulted from this misinterpretation of the original briefing schedule. Respondent Southern Illinois Landfill, Inc. (Southern Illinois) filed a brief addressing these questions, along with a motion to dismiss, on January 4, 1985.

The State's Attorney of Jefferson County filed a document entitled Response to Petitioner's Brief on January 8, 1985. In this Response, the State's Attorney states that it is representing the "People of the State of Illinois", not the County of Jefferson or its County Board. Unless a State's Attorney is representing the County or its County Board, that person is not a Respondent or party to this type of proceeding absent the grant of a petition to intervene. While the Board has noted the State's Attorney's comments herein, the standing of the State's Attorney in this proceeding is unclear at this time. Therefore, the Board requests that clarification be submitted within 14 days from the date of this Order by the State's Attorney as to whether that office is representing the County in this proceeding or is acting in an independant constitutional capacity as a representative of the people of the state.

I. MOTION FOR CONTINUANCE

On December 21, 1984, the State's Attorney for Jefferson County filed a Motion requesting a two week continuance of the time for filing its "responsive brief", because the State's Attorney planned to be on vacation from December 24, 1984 to January 6, 1985.* An objection to this motion was filed by Southern Illinois Landfill, Inc. The Board finds that a continuance in this situation is not justified. Delays in this type of proceeding which is subject to a statutory decision deadline cannot be granted absent a showing of genuine necessity. Therefore, the Motion for Continuance is denied.

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*This Motion was filed too late according to the Board's Procedural Rules to be considered at a Special Board Meeting held on December 27, 1984. Consistent with the State's Attorney's request, the State's Attorney's Office was informed by telephone on December 28, 1984, of the fact that this motion could not be ruled upon until the next regular Board Meeting to be held on January 10, 1985, six days after the deadline for the filing of briefs.

II. MOTION TO DISMISS

On January 4, 1985, Southern Illinois filed a Motion to Dismiss the appeal on the grounds that the Board has no jurisdiction under Section 40.1(b) of the Act to review a site location which is deemed approved by operation of law. As this Motion raises the fundmental question on which the Board requested briefing, the Board will discuss and rule on this Motion in the context of the briefs which were filed.

1. Statutory Language

The first of the three questions raised by the Board in its order of December 6, 1984, was "Does Section 40.1(b) convey jurisdiction on the Board to review an approval granted by operation of law?" The language of the Environmental Protection Act (Act) which is at issue here is contained in Sections 39.2(e), 40.1(b) and 39(c). (Ill. Rev. Stat. 1983, ch. 111½, pars. 1039.2(e), 1040.1(b) and 1039(c).) The Petitioners argue that Section 40.1(b) affords third parties a right to appeal to the Board where "the county board or the governing body of the municipality . . . grants approval under Section 39.2 of this Act" and that Section 40.1(b) makes no distinction between the granting of approval by "direct action" or "written decision" and granting of approval by "inaction" or "by operation of law." (Prior Brief, p. 3; Casner Township's Brief, p. 1-2.) Respondent Southern Illinois Landfill, argues that the statutory language distinguishes an active "granting" of approval by a local government body from an approval by operation of law, and that only the active "granting" of approval is contemplated by the appeal provision in Section 40.1(b). (Southern Illinois' Brief, p. 3.)

Respondent Southern Illinois raises a second related statutory argument that Section 40.1 provides for appeals to the Board where a local body "refuses to grant approval" and where it "grants approval", but does not provide a special route of appeal for "deemed approved" requests . It argues that "such omission was intentional because there is, in fact, no decision to review." (Southern Illinois' Brief, p. 4.)

Petitioner Prior argues that Section 40.1(b) makes no distinction between the granting of site approval by direct action and the granting of such approval by non-action, precisely because "the Act provides a single all-inclusive vehicle for hearings and appeals relating to site local approval." In other words, the General Assembly didn't need to provide a separate provision for appeal of "deemed approved" requests. Petitioner Casner Township supplements this argument stating that "the entire statute can be applied by, with the expiration of the 120 days, deeming local jurisdiction to be ended, thereby according the applicant the protection intended by the deadline, but making the matter subject to review pursuant to Section 40.1 of the

Act." The gist of Petitioners' various arguments on this point is that Section 40.1(b) can accomodate a "deemed approved" request if the County Board's decision is simply "deemed" to have been an approval. Thus, the omission of a separate provision for the appeal of "deemed approved" requests does not demonstrate an intention to omit third party appeals of these approvals.

In its Response to Petitioner's Brief, the State's Attorney of Jefferson County states that the Board "should and does have jurisdiction to review approval of the proposed new Regional Pollution Control Facility in spite of the expiration of the 120 day deadline."

To support its general argument, Respondent Southern Illinois cites Illinois Power Co. v. Illinois Pollution Control Board, 68 Ill. Dec. 176, 112 App. 3d 451 445 N.E. 2d 820 (1983) and Marquette Cement Mfg. Co. v. Illinois Environmental Protection Agency, 39 Ill. Dec. 759, 84 Ill. App. 3d 434, 405 N.E. 2d 512 (1980), for the proposition that the Board is without jurisdiction to review permits which have issued by operation of law. However, those cases both involved different questions. In Illinois Power, the court held that the Board had erred in its interpretation that the 90 day limit on its own decision period did not apply to NPDES permits and, therefore, erred in continuing its review after the 90th day. Illinois Power did not involve a third party appeal. Furthermore, in the case at hand, there is no question but that the 120 day limit applies to the County Board's decision and that, by having gone beyond that date without reaching a decision, the County Board has lost jurisdiction to review the site suitability. In Marquette Cement, the court held that the Board's failure to hold a hearing within the 90 day decision period resulted in the permit being deemed issued by operation of law. Again, this is not the question presented in this case. Neither of these cases involve a question of the Board's authority to hear an appeal from a "deemed" action at a lower level.

The only other provision for third party appeals to the Board which might shed light on this question is found in Section 40(b) of the Act which provides for the appeal of Illinois EPA (IEPA) decisions granting permits for hazardous waste disposal sites. The language in Section 40.1(b), in large part, parallels that in Section 40(b). Unfortunately, the question of a "deemed issued" hazardous waste site permit has never arisen in the context of Section 40(b) and, therefore, we have no case law precedent which can help us on the interpretation of this statutory language.

2. Legislative Intent

Both the Petitioners and the Respondent Southern Illinois look to the statutory scheme of Public Act 82-0682, commonly referred to as SB 172, to support their positions. Petitioner

Casner Township argues that the 120 days deadline and the "deemed approved" provision was intended to protect the applicant's right to a decision from the local body within a specified timeframe by imposing the sanction that after the 120 days the local body would lose jurisdiction over the matter. They further argue that thereafter the "deemed approved" site location suitability may still be challenged in a third party appeal before the Board on the basis that the six statutory criteria in Section 39.2(a) have not been met by the applicant. (See Casner Township's Brief, p. 2-3.) Implicit in their position is the view that SB 172 intended to do more than simply grant local government bodies a role in the landfill siting process; that is, it also intended to insure that site locations were "suitable" by requiring compliance with the six statutory criteria in Section 39.2(a).

The State's Attorney of Jefferson County concurs with Petitioner Casner Township that "the applicant should prove its compliance with the Section 39.2(a) criteria." (See State's Attorney's Response to Petitioner's Brief.)

In contrast to this, Respondent Southern Illinois argues that SB 172 established a two part decision process for new landfills, allowing local governments the responsibility to review the location of the facility and the Illinois EPA the responsibility to perform a technical review of the proposed facility in its permit review. By its failure to act, the County Board has forfeited not only its role in the process, but also any review of site suitability, according to Southern Illinois. The Illinois EPA's review of the permit application is limited to technical matters, or, at least, to matters other than the six criteria which were made subject ot the SB 172 process. Thus, under this interpretation, the County Board's inaction works to prohibit any review of compliance with the six criteria. Implicit in this position is the view that the SB 172 review process was only intended to create a role for local government participation and that compliance with the statutory criteria for siting was not an independent concern of the General Assembly.

3. Effect of Disallowing Jurisdiction

Petitioners make the second point that the effect of not allowing Board review of a "deemed approved" request would be to give the local governing body the authority to grant a "super approval", of sorts, in that it could, by simply refusing to act, assure that neither the Board nor the courts could ever disturb its decision to approve. (See Casner Township's Brief, p. 3, Prior's Brief, p. 3.) Petitioner Casner Township points out that this is particularly bothersome since the local body may occasionally also be the owner of the facility and the applicant, as in one case previously heard by this Board. (See E & E Hauling,

Inc. v. Illinois Pollution Control Board, 116 Ill. App. 3d 586, 71 Ill. Dec. 587 (1983).) Petitioner Prior points out that this interpretation would also allow the local body the discretion to cut-off the statutory third party right of appeal.

Respondent Southern Illinois does not address the effect of its interpretation on the functioning of SB 172 process as a whole.

4. Conclusion

The Board interprets the language of Section 39.2(e) stating that "the applicant may deem the request approved" as meaning that the applicant may deem himself to have the rights that he would have had under the Environmental Protection Act had the County Board actively granted approval--no more and no less. Specifically, he has the right to proceed to the permitting process after submitting "proof to the Agency that the location of said facility has been approved by the County Board" by operation of law. (See Section 39(c).) However, there is no indication in the statutory scheme created by SB 172 that the General Assembly intended that the applicant should obtain greater rights by a County Board's inaction than he would have had by virtue of an active approval. Specifically, there is no indication that an approval by operation of law was intended to shield the applicant from the special third party appeal process established in SB 172.

Absent a compelling demonstration that the statutory language requires or the General Assembly intended that "deemed approved" requests be treated as different from active approvals, the Board cannot extinguish the third party's statutory right to appeal in Section 40.1(b). The Board does not find Respondent Southern Illinois' emphasis on the word "grant" or argument about the ommission of a special appeal provision for "deemed approved" requests to be compelling arguments. The Board believes the proper emphasis in the statutory scheme of SB 172 is on the word "approval" and that to "deem approval" is to deem that approval has been granted. The Board also finds that a special provision for the appeal of a "deemed approved" request would be redundent as the provisions of Section 40.1(b) adequately address both types of approvals.

Neither can the Board find a legislative intent to eliminate third party appeals of "deemed approved" requests. On the contrary, the Board finds that there are compelling arguments for upholding Board review of these approvals. The 120 day deadline for a local body to act is an essential element of the SB 172 statutory scheme. Without a deadline, the local body could frustrate the entire permitting process by simply not acting, and the legislative history shows that the General Assembly believed that many local bodies would be under pressure to do just that. The "deemed approved" mechanism functions to move the case along without

penalizing any of the parties to the process other than the local body itself. However, if Board jurisdiction to review third party appeals were disallowed in these cases, the symmetry of the SB 172 system would be destroyed. Not only does this create the spectre of manipulation of the process and third party's rights by the local body, it would also produce a situation in which the site suitability which was of fundamental concern to the General Assembly could never by reviewed or assured. This would certainly be an absurd consequence in light of the elaborate public participation and review processes SB 172 created to ensure complete review of these questions.

On the basis of the foregoing discussion, the Board finds that it does have jurisdiction to hear this appeal pursuant to Section 40.1(b). Respondent Southern Illinois' Motion to Dismiss the Appeal is hereby denied.

III. SCOPE OF HEARING

The second question raised by the Board in its December 6, 1984 Order was "What is the proper scope of the hearing to be held by the Board in this situation (e.g. is the hearing to be restricted to oral argument, or may evidence not before the county be introduced)?"

All parties who briefed this question argue that the scope of the Board hearing is limited to the record created at the County level. (See Casner Township's Brief, p. 4, Prior's Brief, p. 5, Southern Illinois' Brief, p. 6.) Only the State's Attorney of Jefferson County, in its Response to Petitioner's Brief, stated that a de novo hearing should be conducted by the Board.

The Board agrees with Petitioners' statements that the scope of the hearing in this case should be no different than that of a hearing conducted on a written decision to approve by a local body. As provided in Section 40.1, the County Board and the applicant shall appear as co-respondents at this hearing; the rules prescribed in Sections 32 and 33(a) of the Act shall apply; and the burden of proof shall be on the Petitioners. The County Board will be deemed to have found that the applicant has demonstrated compliance with each of the six criteria listed in Section 39.2(a). No new substantive evidence will be accepted at the Board hearing. However, as is usual in these proceedings, evidence may be introduced concerning the standing of the parties, the completeness of the record certified by the local body, and the fundamental fairness of the procedures used by the County Board.

IV. STANDARD OF REVIEW

The third question the Board requested briefing on was "What is the standard of review to be utilized by the Board?"

Petitioner Prior argues that, as there was no decision at the County level, the approval is not entitled to the presumption of correctness which underlies the manifest weight standard. Therefore, he concludes, the Board should review the record and make an independent determination as to whether or not the applicant met its burden of proof regarding the Section 39.2(a) criteria. (Prior's Brief, p. 6-7.) Prior also argues that the applicant should bear the same burden he would have born before the County Board, i.e. preponderance of the evidence. Petitioner Casner Township argues that the standard of review here should be the same as in any other SB 172 appeal, i.e. manifest weight of the evidence (Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, 79 Ill. Dec. 415, 463 N.E. 2d 969.)

Respondent Southern Illinois argues strongly against Petitioner Prior's position (and the State's Attorney of Jefferson County's de novo hearing position), saying that this would be tantamount to de novo review and that Section 40.1 "does not state, suggest or imply that this Board, in any circumstance, may determine the approval of a site in the same mode or with any authority that is vested in the local authorities." (Southern Illinois' Brief, p. 8.) Southern Illinois also rejects Prior's contention that the burden of proof remains upon the applicant on appeal. Southern Illinois concludes that the proper standard of review is manifest weight of the evidence.

The Board agrees with the arguments of Petitioner Casner Township and Respondent Southern Illinois. As stated earlier, this appeal comes to the Board in exactly the same posture as any other SB 172 appeal. The County Board is deemed to have approved the applicaton by operation of law and the applicant should find himself in the same position he would have been had the County Board approved the request by written decision. Specifically, the same presumptions and burdens of proof apply here and the Board will review the record using the manifest weight standard articulated in earlier SB 172 cases.

These preliminary questions having been addressed, the Hearing Officer is hereby directed to set this matter for hearing in a speedy manner consistent with all applicable notice requirements.

IT IS SO ORDERED.

Board Member J. Theodore Meyer dissented. Board Members J. Anderson and J. Marlin concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 10th day of January, 1985 by a vote of 4-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board