ILLINOIS POLLUTION CONTROL BOARD
January 10, 1985

BOARD OF TRUSTEES OF CASNER TOWNSHIP, JEFFERSON COUNTY, ILLINOIS; CITIZENS AGAINST WOODLAWN AREA LANDILLS; CYNTHIA CARPENTER; ERNEST CARPENTER; HATTIE HALL; BYRON KIRKLAND; PATRICIA KIRKLAND; PEG O'DANIELL; RONALD O'DANIELL; 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
COUNTY OF JEFFERSON and SOUTHERN ILLINOIS LANDFILL, INC.,	)	
Respondents.	)	

CONCURRING OPINION (by J. Anderson and J. Marlin):

As an initial statement, we concur in denying the Motion to Dismiss this third party appeal because we support as liberal a construction as possible of a statutorily based third party appeal right. We also believe that the statutory interpretation contained in the Pollution Control Board's (Board) opinion was the best rationale that could be used to allow a third party appeal in this "deemed approved" site location suitability situation, a situation resulting from Jefferson County's (County) failure to take timely action pursuant to Section 39.2(e) of the Environmental Protection Act (Act).

Nevertheless, we are troubled by the resultant skewing of the SB 172 process at the Board's hearing, the altered role of the participants, and the awkward assumptions the Board must make in its review of the non-decision of the deadlocked County Board.

If the Board is to review this case as if the County actually approved, the Board must assume that the six criteria in Section 39.2(a) of the Environmental Protection Act (Act) have been approved, and that no conditions have been set pursuant to

Section 39.2(e) of the Act. Then, to remain consistent with its earlier holdings, the Board must apply the manifest weight standard to the correctness of the County's "decision", which County "decision" was to be based on the preponderance of evidence presented during the County's proceedings. These assumptions, however, do not accommodate other provisions of the Act applicable to the site location suitability process, commonly referred to as SB 172.

First, Section 40.1(b) of the Act requires that the County be a party co-respondent with the applicant in a third party appeal, even though the deadlocked County cannot function in this role. Thus, Section 40.1(b) as it applies to the respondent County essentially becomes inoperative.

Next, the Board arguably may not add conditions, as this implies de novo review contrary to Section 40.1(b). If so, the applicant could lose on a criterion where the applicant might have won if the County had set, or the Board had the power to set, conditions. Counties commonly use their authority to set conditions to allay concerns raised at hearing, to allow favorable decisions and to assure enforceability. It is an important component of the process. Here, again, another portion of the statute becomes inoperative in a "deemed approved" third party appeal setting. For example, if the applicant readily agreed that a condition be added by the County that cured a problem raised at the County hearing for a particular criterion, the Board arguably must rule against the applicant even though with the condition the applicant would have satisfied the criterion.

Finally, Section 39(c) forbids the Agency to issue a permit unless the applicant submits proof that the facility location "has been approved by the County Board . . . in accordance with Section 39.2 of this Act" (underlining added). The Board must construe this explicit language as also authorizing agency permit issuance in a "deemed approved" situation or the whole process becomes a nullity.

The Board provides for public participation in all its proceedings, believing that this is a necessary element when considering issues that affect the environment. Its determination that the default provisions in the statute can be construed so as not to extinguish statutory third party appeal rights reflects this belief. By so doing, however, we feel that the added issues raised concerning this already complex SB 172 process are considerable.

For these reasons, we concur.

Joan G. Anderson

John C. Marlin

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 5th day of February, 1985.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board