ILLINOIS POLLUTION CONTROL BOARD
April 4, 1985

BOARD OF TRUSTEES OF CASNER TOWNSHIP, JEFFERSON COUNTY ILLINOIS; CITIZENS AGAINST WOODLAWN AREA LANDFILLS; CYNTHIA CARPENTER; ERNEST CARPENTER; HATIE 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 (Consolidated)
COUNTY OF JEFFERSON and SOUTHERN ILLINOIS LANDFILL, INC.,	)	
Respondents.	)	

JAMES YOHO APPEARED ON BEHALF OF ALL PETITIONERS IN PCB 84-175, THE BOARD OF TRUSTEES OF CASNER TOWNSHIP, ET AL.;

GEORGE C. LACKEY APPEARED ON BEHALF OF PETITIONER JOHN PRYOR;

KATHLEEN ALLING, STATE'S ATTORNEY OF JEFFERSON COUNTY, APPEARED ON BEHALF OF THE RESPONDENT COUNTY; AND

R. EDWARD VELTMAN, JR. AND MARVIN G. MILLER (CRAIN, COOKSEY, VELTMAN AND PURSELL, LTD.) APPEARED ON BEHALF OF RESPONDENT SOUTHERN ILLINOIS LANDFILL, INC.

OPINION OF THE BOARD (by J. Anderson):

This Opinion supports the Board's Order of March 22, 1985 remanding this matter to Jefferson County for further proceedings.

This matter comes before the Board on petitions filed November 29, 1984, and December 3, 1984, involving an application by Southern Illinois Landfill, Inc. ("Southern"), pursuant to Section 39.2 of the Environmental Protection Act, for site location suitability approval for a proposed regional pollution control facility ("RPCF") made to the Jefferson County Board ("County"). Due to a deadlock of the County Board resulting in failure by the County to grant or to deny approval within 120 days of the filing of Southern's application, pursuant to Section 39.2(e) Southern was allowed to "deem the request approved."

The November 29, 1984, petition was filed by the Board of Trustees of Casner Township ("Casner"), located within Jefferson County; Citizens Against Woodlawn Area Landfills ("CAWAL"), an unincorporated voluntary association of Jefferson County citizens; and individual petitioners Cynthia Carpenter; Ernest Carpenter; Hattie Hall; Byron Kirkland; Patricia Kirkland; Peg O'Daniell; Ronald O'Daniell; Dennis Shroyer; and Patricia Shroyer, all residing in the immediate vicinity of the proposed facility. The December 3, 1984, petition was filed by John Prior, a landowner in the immediate vicinity of the proposed RPCF. Because both petitions seek review pursuant to Ill. Rev. Stat., 1983, chapter 111 1/2, 1040.1 of the same "deemed approved" application, the Board consolidated these matters by order of December 6, 1984. All Petitioners assert that they participated in the local hearing before the County Board. The Pollution Control Board (Board) conducted a hearing in this consolidated matter on February 6, 1985, in Mt. Vernon, Illinois [the transcript of which is hereafter cited as PCB R.___].

Southern filed an application with the County Board for site location suitability approval for a proposed regional sanitary landfill on July 11, 1984. The County Board held the statutorily required hearing on August 10, 1984, where Southern presented sworn testimony and submitted evidentiary exhibits in support of its proposal for a sanitary landfill. CAWAL and John Prior were represented by counsel at the County Board hearing [the transcript of which hereafter is cited as C.B.R. _____]. CAWAL presented testimony and evidentiary exhibits. Casner and named citizens-petitioners assert that they attended the August 10, 1984, hearing.

On August 13, 1984, at the regularly scheduled County Board meeting, the County Board voted on the issue of whether to deny approval of Southern's application for site suitability. The County Board deadlocked with a recorded vote of seven votes in favor of denial, six votes against denial, one abstention and one member absent. The County Board took a clarification vote, phrasing the motion in the converse, that resulted in seven votes in favor of approval, seven votes against approval and one member absent (PCB Exh. 3, 15). The County Board remained deadlocked for the remainder of the statutory 120 days and the site location suitability application was "deemed approved" by operation of law

on November 11, 1984. As aforementioned, petitions for Board review were then timely filed.

Board Jurisdiction

The Board, in its December 6, 1984, Order consolidating these appeals, requested that the parties file briefs addressing three issues: 1) "does Section 40.1(b) convey jurisdiction on the Board to review an approval granted by operation of law?." 2) "what is the proper scope of the hearing to be held by the Board in this situation" and 3) "what is the standard of review to be utilized by the Board?" On January 4, 1985, Respondent Southern filed a motion to dismiss this proceeding on the basis that the Board lacked jurisdiction. On January 10, 1985, the Board ruled on Southern's motion to dismiss as well as the other issues raised concerning the nature of Board review. By a 4-1 vote, the Board found that it had jurisdiction and, therefore, denied Southern's motion. The Board found that the scope of the Board hearing in this case would be no different than that of a hearing conducted on a written decision to approve by a local body. The Board stated that:

> "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."

The Board also found that, as in other cases involving SB 172 (also known as P.A. 82-682), the decision of the County Board must be affirmed unless that decision is contrary to the manifest weight of the evidence.

On February 11, 1985, Respondent Southern filed a motion renewing its objection to the Board's jurisdicton. The Board affirms its January 10, 1985, order and denies Southern's renewed motion to dismiss. The Board will briefly review the basis for this ruling. A more detailed analysis is provided in the Board's Order of January 10, 1985, at page 3-7. The Board presumes that Southern's basis for its motion is expressed in its brief of January 4, 1985.

Southern argues that the statutory language of Section 40.1(b) 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. Southern also argues 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's Brief p. 4).

Petitioners Prior, Casner and CAWAL, et al., argue in their briefs, 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 Brief, p. 1-2). 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 no action, precisely because "the Act provides a single all-inclusive vehicle for hearings and appeals relating to site local approval, and, therefore, the General Assembly did not need to provide a separate provision for appeal of "deemed approval" requests.

To support its general argument, Respondent Southern cites Illinois Power Co. v. Illinois Pollution Control Board, 68 Ill. Dec. 176, 112 Ill. 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. 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 action taken "deemed" at a lower level.

Both the Petitioners and Respondent Southern look to the statutory scheme of SB 172 to support their positions. Petitioner Casner argues that the 120 day deadline and the "deemed approved" provision were 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. It further argues 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's Brief, p. 2-3.) Implicit in this 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).

In contrast to this, Respondent Southern 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, Southern argues, the County Board has forfeited not only its role in the process, but also has prevented any review for compliance with the six statutory site location suitability, 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.

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 itself to have the rights that it would have had under the Environmental Protection Act had the County Board actively and unconditionally granted approval--no more and no less. The Board believes the "deemed approved" mechanism was intended to move the case along without penalizing any of the parties to the process other than the local body itself. Specifically, this Board reaffirms its earlier interpretation that an approval by operation of law was not intended to shield the applicant from the special third party appeal process established in SB 172.

Standing of Casner Township

On February 4, 1985, Respondent Southern moved to dismiss Casner as a petitioner, claiming Casner had not participated in the County Board hearing of August 10, 1984. The Board, by Order dated February 7, 1985, denied Southern's motion with leave to renew its motion after hearing. The Board stated that "whether Casner 'participated' in the hearing below is a factual matter and any dispute should be addressed at hearing." On February 14, 1985, Casner filed a petition to intervene in the event the motion to dismiss were to be granted. On March 13, 1985, Southern filed a renewal of its motion to dismiss Casner, and on March 15, 1985, filed an objection to Casner's petition to intervene. On March 18, 1985, Casner filed a response to the objecton to petition to intervene. Casner filed a response to

Southern's renewal of motion to dismiss Casner as a petitioner on March 15, 1985. On March 18, 1985, Southern filed a supplemental motion to their earlier motion to dismiss Casner.

Section 40.1(b) of the Act requires that only third parties "who participated in the public hearing conducted by the County Board ... may petition the Board" for review of a decision granting approval. Southern, in its motion to dismiss Casner, asserts that Casner "did not participate" in the county level hearing. Southern also argues that Casner is powerless to act "except when the members act together and as a body, and the action of individuals, in order to bind a city or similar municipal entity, must be taken in a meeting duly organized." Southern makes the unverified assertion that Casner has not "acted" through the appropriate method "by resolution or otherwise" and therefore has not "participated" and should be dismissed. There is no evidence in the county level record certified to the Board that Casner filed a formal appearance, provided testimony or cross-examined witnesses. Apparently, it is Southern's contention, that absent such formal documentation of "participation", Casner should be dismissed.

Casner presented sworn testimony at the PCB hearing that at least three trustees of the Board of Casner Township, including the township supervisor, attended the August 10, 1984, hearing in their capacity as township officials (PCB R. 101-106). One trustee testified he was not aware of any documents that attendees could or should sign in order to prove their attendance (PCB R. 103). The County level hearing was attended by over 120 people (CB R. 271). It began on August 10, 1984, and continued until approximately 2:00 a.m. on August 11, 1984 (CB R. 213, 268, 271). The record is replete with the hearing officer's comments and rulings restricting the length of testimony and questions (see infra, p. 8, 9). Under these circumstances, "participation" in the hearing was, in a very practical sense, limited to attendance for most of the people.

The Board has not previously been asked to consider what constitutes sufficient "participation" to afford standing to appeal a siting decision. As the record in the PCB hearing indicates that at least three trustees of Casner Township attended the county level hearing in their capacity as township officials, the question is whether this "mere" attendance is sufficient. The Board believes that it is. One of the clear purposes of the county level hearing requirement in the SB 172 process is to encourage public participation in siting decisions. Allowing public access to environmental proceedings and the encouraging citizen participation are some of the fundamental policies of the Act. To require some higher level of "participation" for a third party appeal would discourage that clear public policy.

Southern's next contention is that Casner has not "acted" as a Board in an appropriate manner. Southern asserts, in its

motion of March 18, 1985, that "the Clerk of the Board of Trustees of Casner Township has orally stated to Respondent that the Board of Trustees of Casner Township, prior to hearing of August 10, 1984, did not adopt by resolution, or in any other manner in a meeting duly organized, the authority of any of its members to participate on behalf of said Board of Trustees." Even were the Board to accept such unverified, hearsay assertions as evidence, the argument would fail. The record does not show what internal process is used in Casner Township to authorize its official participation at SB 172 hearings; specifically, there is a lack of evidence that a resolution or other formal action by Casner was necessary in order for the township officials to attend in their official capacity. Absent a showing that Casner's own procedures were violated, the Board must accept Casner's assertions that attendance of its trustees was intended as an official and representative act, rather than as a private and personal act.

The Board finds that Casner did participate at the county level hearing and, therefore, Southern's motion to dismiss is denied. Consequently, Casner's motion to intervene is denied as moot.

Southern's Motion to Supplement Record Below

At the PCB hearing on February 6, 1985, Southern made a motion to supplement the County Board record previously certified to the Board. The proposed supplement was a partial transcription and minutes of the August 13, 1984, County Board meeting where the Board members deadlocked. This motion was docketed with the Board on February 11, 1985. At hearing, counsel for Petitioners objected to this motion on the grounds that it was an incomplete and selective record of the County Board meeting. Eventually, all parties agreed to the introduction of a cassette tape of the complete County Board meeting of August 13, 1984, which was recorded by the Clerk of the County Board in his official capacity, in lieu of the partial transcription and minutes. This tape was admitted as PCB Exhibit 15. Consequently, Southern's motion of February 11, 1985, is denied.

FUNDAMENTAL FAIRNESS

At the outset, the Board wishes to state that it recognizes that missteps can occur in the SB 172 process, because of its adjudicatory nature. County and municipal board members as well as other participants must abide by adjudicatory constraints and restrict their customary personal interactions used in their customary quasi-legislative setting. However, even unintended missteps are unacceptable if they abridge the fundamental fairness of the proceeding. The Board has construed Section 40.1(a) of the Act as requiring its consideration of fundamental fairness issues, whether or not such issues have been raised on appeal (e.g. Industrial Salvage v. County Board of Marion County, PCB 83-173, February 22, 1984).

The County Board Hearing

Viewing the County hearing record as a whole, the Board finds it to be fatally flawed. The conduct of the hearing as a whole can be characterized as unnecessarily rushed, arbitrary and biased. These shortcomings are more specifically detailed below.

The hearing apparently started at about 7:00 p.m., and ended around 2:00 a.m. the next morning. The Board notes that there were continual attempts to hurry the hearing along, and to shorten the applicant's presentation and attorneys' questions. Discussion was had concerning recessing the hearing at 10:00 p.m. and reconvening the next evening, but upon a vote of the attending Board members a decision was made to continue the hearing past midnight (C.B.R. 76, 100, 166, 191). The record contains no adequate explanation for the haste here. Southern had filed its application on July 11. The August 10 hearing could have been easily reconvened without jeopardizing the County's 120 day decision deadline, since only 30 days had elapsed.

The Chairman of the Board, in his role as hearing officer, repeatedly failed to conduct the hearing in an impartial, even-handed manner. Cross-examination rights were seriously abridged, and bias continued unabated throughout the hearing, particularly as it related to Mr. Pryor's attorney, Mr. Lackey. The Chairman apparently, though incorrectly, believed that Mr. Lackey's participation should be limited to that of a private citizen because Pryor had himself an SB 172 application on his own facility pending before the County. (C.B.R. 8). Although the Chairman backed away from his outright denial of Mr. Lackey's right to participate, he challenged again his rights to act as legal counsel (C.B.R. 15, 16). At one point, Mr. Musick, the attorney for a citizens group opposed to the siting (CAWAL) advised the Chairman, at the Chairman's request, that the statute requires fundamental fairness, akin to due process, and that "interested parties have the right to appear and make their statements and could confront and cross-examine witnesses, and respectfully, sir, I believe that this gentleman and his counsel have the right to cross-examine." No one disagreed (C.B.R. 79).

The Chairman, however, repeatedly continued to restrict Mr. Lackey as to scope and number of questions allowed (C.B.R. 80, 89, 114, 115, 116). At one point the Chairman stated, in refusing Mr. Lackey the right to continue to cross-examine, "You, in other words, are representing one party here and are asking and cross-examining and taking time that I think is without the benefit of the persons who have engineered and gotten Mr. Musick as their representative". (C.B.R. 117). The record shows further restraints at pages 118, 137, 166 (both Mr. Musick and Mr. Lackey held to the eight minutes used up by the proponents and the County Board), and at pages 175 and 269 (Mr. Lackey held to three minutes for his final statement).

The Board finds that the events, taken together, resulted in a fundamentally unfair process. The hearing "ground rules" kept changing, cross-examination was selectively cut short, participation was frustrated, the times allotted for presentation and questioning were arbitrary, and finally, the "exhaustion approach" was used to complete the hearing at one sitting. The actions taken together had a dampening and prejudicial effect on the applicant and the hearing attendees. The Board is particularly concerned about constraining cross-examination and public questioning, since these activities serve to enhance and clarify the record on which the County Board must rely when considering the six criteria (see Industrial Salvage, supra). The Board therefore remands this proceeding to Jefferson County to conduct another hearing to cure these defects. All who wish to add to the record should be allowed to do so.

Ex Parte Contacts

The Board and the appellate courts have essentially defined ex parte contacts as those unnecessary and avoidable contacts that take place without notice and outside the record between one in a decision-making role and a party before that tribunal E & E Hauling, et. al. v. Pollution Control Board, et. al., 116 Ill. App. 3d 586, 451 N.E. 2d 555 (2nd Dist. 1983). Ordinarily, the Board would determine whether ex parte contacts irrevocably tainted the proceedings, thus requiring a reversal of the County's Board's decision (although in this case it should be again noted that the County Board itself did not make a decision).

Numerous ex parte contacts are explicitly and impliedly evidenced in the record on appeal. The applicant was in contact with Mr. Miller, a county board member, and discussed the site with him. One of the citizens being represented called Chairman Wells about work Mr. Miller performed for the applicant and was told that Miller shouldn't vote. The citizens were advised by one of the attorneys to contact Board members to urge the holding of another hearing. The Chairman and another Board Member met with and discussed the six criteria with the local newspaper editor, which discussion was subsequently published. (PCB R. 60, 61, 85, 111-117, 148, 151, 152.) These contacts all took place from the time the request was filed until the 120 day decision period ended.

Since the Board has already determined that this case is to be remanded to the County because of a lack of fundamental fairness in the hearing process, it need not determine whether on the basis of any single ex parte contact alone, reversal of this matter would have been required if the County had not deadlocked but had actually taken action. It is, however, clear that these contacts served to prejudice the hearing, if not also the vote. By way of dicta, the Board admonishes the County Board and the participants to conscientiously adhere to the ex parte constraints during the period of remand of this matter.

Conflict of Interest

One other issue concerning fundamental fairness was raised at the PCB hearing, namely, a conflict of interest. It was argued that Mr. Miller, a County Board member, should not have voted and should not have been present during the County Board's vote concerning the site because of work he had done for the applicant.

Miller, who owned an excavating company, testified at the PCB hearing that the owner of Southern Illinois Landfill, Inc. "flagged him down" after the application was filed, and sought assistance from Miller on getting some test holes dug at the site. At this time Miller recommended he get someone else to do the work, both because of his connection with the County Board and because of lack of time. Before the hearing, the owner again contacted Miller, at which time Miller agreed to perform the work later that day, after the owner told Miller he was unable to hire anyone else.

Miller dug five test holes and, one month later, returned to fill them up. Miller charged his hourly rate of $35, and estimated that it took him about 1 1/2 hours to dig the 2' x 10' x 12' holes and no more than one hour to later fill them up. He thought the holes may have been dug to see if water would pass through, but was unsure. In response to questioning, Miller stated that he did not have the equipment to do the kind of excavation needed to develop a landfill. (PCB R. 36-63).

At the County Board meeting of August 13, 1984, during the vote on the applicant's petition, two motions were made, the first to deny and the second to approve. Upon the motion to deny approval, Mr. Miller responded to the prompt of the Clerk by voting "no". Upon questioning by Chairman Wells as to whether he felt he was in a conflict of interest, Miller said he did not, but agreed to change his vote to "a pass", stating it would be the same as a no vote. On the second motion, Miller voted yes. (PCB Exh. 15).

Miller, at the Board hearing, explained that he voted "present", rather than no on the first vote because he had word that people were going to object to a possible conflict. On the second motion he voted yes, because he "wanted a landfill anywhere we can get it." (PCB R70).

At the Board hearing, Mrs. Shroyer, of the opposing CAWAL citizens group, testified that it was her husband who had called the chairman about the excavating work the day she had taken pictures of Miller at the site while excavating on August 1, 1984. She said she did not raise this issue at the county hearing or at the County Board meeting because "we did talk to Wells and it was our understanding that he [Miller] would not vote that night." She also testified that her group left the room before the vote took place (PCB R. 190, 191).

Some fundamental principals relating to conflict of interest were laid down by the Illinois Supreme Court in In Re Heirich, 140 N.E.2d 825 (1956), at 838-9:

> "It is a classical principle of jurisprudence that no man who has a personal interest in the subject matter of decision in a case may sit in judgment on that case. * * * For the guidance of this court's commissioners in future cases and of all other persons required to find facts or apply law in adversary proceedings, judicial or administrative, we hold that when such an arbiter has a financial interest in the subject matter, even though he personally be a man of the most fastidious probity, it is his duty to recuse himself. He must do so if challenged."

The Board finds that Mr. Well's excavating activities did not reach the level of a disqualifying conflict of interest. The hourly work was minimal--less than $150 in value--and transitory. Miller had no interest in Southern Illinois Landfill, Inc., and no continuing contractual relationship; there is testimony that the work performed would not be a first step in any future relationship with the company in developing the landfill.

However, assuming arguendo that Miller's contract work was a disqualifying financial interest, the conflict was cured by Miller's change of his "no" vote to a "pass". The Board emphasizes, however, that it is not condoning Miller's and the applicant's actions. Nor is it condoning the failure by all concerned to fully place the issue on the open record.

The question has been raised as to whether if Miller had not attended the County's meeting, it might have changed the outcome of the vote; this assumes that the County could act by a majority of those present at the meeting rather than by a majority of the 15 member Board. The Board need make no ruling at this time as to whether local governments can rely on their various voting procedures derived from their enabling statutes, especially those allowing offical action to be taken by other than a majority of the local Board in an SB 172 proceeding. [See Section 39.2(a) and (c)].

The Statutory Criteria

Given the Board's determination to remand this proceeding for remedy of hearing deficiencies, it would be premature for the Board to address arguments concerning Southern's success or failure in meeting its burden of proof concerning most of the criteria. However, the Board will briefly address legal arguments concerning Criterion No. 4, in order to promote efficiency at the remand hearing.

Under Section 39.2(a)(4) of the Act, site location suitability may properly be approved when:

> "the facility is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation, or the site is flood-proofed to meet the standards and requirements of the Illinois Department of Transportation and is approved by that Department."

At the County hearing, Southern stated there is a creek along the west side of the landfill (C.B.R. 29) and it had plans for a compensatory flood storage area (C.B.R. 30). Southern testified that the facility is flood-proofed (C.B.R. 43). On the issue of Department of Transportation ("DOT") determinations, three exhibits were entered (Ex. 10, 11 and 49). Exhibits 10 and 11 appear to be a form letter from DOT to two different people the salient portion of which states:

> "Inasmuch as the site is located within a rural area and on a stream with a drainage area of less than ten square miles, an Illinois Department of Transportation, Division of Water Resources permit will not be required for the landfill.
>
> With regard to Section 39.1 of the Illinois Environmental Protection Act, this letter constitutes Illinois Department of Transportation approval upon your receipt of all appropriate Illinois Environmental Protection Agency approvals."

Exhibit 49 (also called Citizen Exhibit 7), is a letter from the same DOT Chief Flood Plain Management Engineer and provides in relevant part:

> "As I pointed our during your visit, there is a stream running through the site so, obviously, a portion of the site is within the 100-year flood plain of that stream. However, no study has been completed by this Department to define the extent of such flood plain. Also, due to the fact that the stream drains less than ten square miles at the site, it is not within our regulatory authority and, therefore, a Department of Transportation, Divison of Water Resources permit is not required.
>
> I also advised you during our meeting that the Department of Transportation has no specific

> standards regarding flood-proofing of regional pollution control facilities. It is my understanding that the Illinois Environmental Protection Agency [Agency] does. Therefore, if a proposed facility meets all of the requirements of the Illinois Environmental Protection Agency regarding flood-proofing, it is deemed to comply with the requirements of Chapter 111 1/2, Section 39.1 insofar as the Department of Transportation is concerned."

The Board construes this language as constituting DOT approval pursuant to Criterion No. 4.

The only mechanism in the Act by which the Agency can approve a facility design is by way of the permitting process, which the Agency is precluded from doing until after the County Board approves site location suitability [see Section 39(c)]. Arguably, then, the statute creates a "cart before the horse" situation, as DOT cannot approve a facility until after an Agency permit is issued, although the Act is clear in stating that an Agency permit can issue only after local government approval which must be based on DOT approval. It was further argued that Criterion No. 4 cannot be met in this manner.

However, the Board does not find this argument to be persuasive. Criterion No. 4 does not, by its terms, require or allow the County to "second guess" or to evaluate DOT determinations. The floodproofing determination has been solely delegated by the legislature to DOT, with the County being required to accept any DOT approval determination. Thus, DOT's determination of the sufficiency of its permitting requirements, any DOT decision to establish its standards and requirements by interagency reference, and any DOT reliance on subsequent Agency action in granting DOT approval, are not subject to County review. The Board notes that other portions of the design and operation of the facility as proposed at the County Board hearing are also subject to subsequent alteration during the Agency permitting review process, if the Agency determines such alterations to be necessary to fulfill the requirements of the Act (see Section 39).

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

B. Forcade and J. T. Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion was adopted on the 4th day of April, 1985 by a vote of 4-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board