ILLINOIS POLLUTION CONTROL BOARD
September 2, 1982

VILLAGE OF HANOVER PARK,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 82-69
	)	
COUNTY BOARD OF DuPAGE, DuPAGE COUNTY FOREST PRESERVE COMMISSION, AND E & E HAULING, INC.,	)	
	)	
Respondents.	)	

JOSEPH V. KARAGANIS, RUSSELL R. EGGERT AND DAVID G. LICHTENSTEIN (O'CONNOR, KARAGANIS AND GAIL, LTD.) APPEARED ON BEHALF OF PETITIONER;

BYRON L. FAERMARK, GEORGE SOTOS AND JOHN DAVIDOVICH, ASSISTANT STATE'S ATTORNEYS, APPEARED ON BEHALF OF THE DuPAGE COUNTY BOARD;

RICHARD A. MAKARSKI (CHAPMAN AND CUTLER) APPEARED ON BEHALF OF THE DuPAGE COUNTY FOREST PRESERVE DISTRICT; AND

THOMAS W. McNAMARA AND RUSSELL J. HOOVER (JENNER AND BLOCK) APPEARED ON BEHALF OF E & E HAULING, INC.

OPINION OF THE BOARD (by J. Anderson):

This Opinion supports the Board's Order of August 30, 1982.

This matter comes before the Board on the June 1, 1982 petition filed by the Village of Hannover Park (Village) for review of the April 27, 1982 decision of the County Board of DuPage (County) granting site location approval for the expansion of the existing Mallard Lake Landfill located in unincorporated DuPage County to applicants DuPage County Forest Preserve District (District) and E & E Hauling, Inc. The County's decision was made and this third party appeal was taken, pursuant to SB 172, P.A. 82-682 as it has amended the Environmental Protection Act (Act).[1]

As this action was the first such Section 40.1(b) third party appeal, on June 10, 1982 the Board on its own motion addressed three procedural issues. In its Order, the Board 1) dismissed as improperly joined respondents the 23 individuals who, collectively, comprise the Board and the District, 2) directed that the Clerk of the County Board prepare, file and certify the County's record,

[1]References to SB 172 as codified will reflect the renumbering of the Act as accomplished in the Revisory Act of 1982 (P.A. 82-783).

and 3) construed the 90 day decision deadline of Section 40.1(b) as giving respondents the right to receive (and therefore waive) a decision within that time period.

Hearings were held by the Board on August 2, 1982 in the Municipal Complex, Hanover Park, and on August 16, 1982 in the DuPage Center, Wheaton, at which members of the public and the press were present.[2] Prior to hearing, pursuant to motion, by Order of July 21, 1982 the Board had outlined its understanding of the scope of evidence discoverable and admissible in this case in furtherance of its Section 40.1(a) fundamental fairness review. The Board found that 1) the motives of County Board members in reaching their decision were not a proper subject of Board review, 2) that interrogatories concerning "ex parte" contacts were improper, and 3) that questions concerning hearing attendance were permissible but transcript reading were not. In addition the Board had found that the failure of the County and the District either to make timely objection, or to respond, to discovery requests constituted a pro tanto waiver of the 90-day time period.

Pursuant to the briefing schedule established at hearing, the Village filed its final brief on August 20. Respondents briefs were due August 25; E & E filed its brief late that day, while the County and District each filed its brief August 26. The Village filed a reply brief on August 26, requesting leave to do so. The Board will accept all briefs filed by all parties in the interest of fully informed adjudication.

In their briefs, the parties have asked for review of certain evidentiary rulings of the hearing officer, in addition to arguing the merits of the case. [The Village also filed separate motions "for reversal and remandment" on the grounds that a) "no county board hearing was afforded", (August 20) and b) "an incomplete record was certified" to the Board (August 26), which matters were addressed by respondents in the briefs. Both are denied as untimely; their merits are discussed in the course of this Opinion.] The Village argues, in sum, that the procedures employed by the County in reaching its decision were fundamentally unfair, and that its substantive decision was contrary to the County's own findings of fact and the evidence it received.

THE ACT, SB 172, AND THE MECHANICS OF THE DECISIONMAKING PROCESS

As a preface to consideration of the parties various arguments, it is essential to establish the context in which they must be received.

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[2] All parties have waived any error arising from the inadvertent siting of the Hanover Park hearing at a Cook County location, rather than at a DuPage County location as required by Section 40.1(b) (R. 30-31).

SB 172 was specifically enacted to revise the permitting system established under the Act, as interpreted by the courts. Legislative history indicates that Carlson v. Worth and subsequent cases interpreting the effects of the Act in relation to the powers of home rule as well as non-home rule units of local government were intentionally nullified. However, the local siting approval process which was grafted into the Act must, in the absence of indication of contrary legislative intent, be interpreted as intentionally embodying the unique, and often hybrid, nature of the permitting process previously contained in the Act.

The specific decisionmaking strictures placed on a county board are few:

1. "At least one public hearing is to be held by the county board" after publication of notice of same [§39.2(d)]

2. "The public hearing shall develop a record sufficient to form the basis of appeal of the decision" to the Board [§39.2(d)].

3. Written comments "concerning the appropriateness of the proposed site" postmarked not later than 30 days of the County's receipt of a siting approval application, are to be considered by the county "in making its final determination" [§39.2(c)]

4. The county board "shall approve" site location suitability only in accordance with 6 stated criteria (see infra, p. 10, 11) [§39.2(a)].

5. Written decisions must be made, "specifying the reasons for the decision" on the six criteria [§39.2(e)].

6. "Reasonable and necessary" conditions to approval may be made [§39.2(e)].

7. The decision must be made within 120 days of the application, to avoid issuance of approval by operation of law [§39.2(e)].

The limits placed on the Board's power to review siting approval decisions are also few:

1. It may accept cases filed within 35 days of the county decision from "a third party other than the applicant who participated in the public hearing" held by the county board [§40.1(b)]

2. A hearing shall be held after notice is given [§40.1(b)], which is to be "based exclusively on the record before the county board" [§40.1(b)], and is to adduce "no new or additional evidence in support of or in opposition to" the county board's order [§40.1(a)]

3. The Board's decision is to include in its consideration a) the county board's "written decision and reasons" therefor, b) the transcribed record of the county board's public hearing, and c) "the fundamental fairness of the procedures used by the county board...in reaching its decision" [§40.1(b)], and

4. The decision must be made within 90 days, or the site location may be deemed approved [§40.1(a), also see Order of June 10, 1982].

The intent of SB 172 was to divide between local government and the Agency decisonmaking authority formerly held by the Agency alone (see Waste Management of Ill. v. Board of Supervisors of Tazewell County, PCB 82-55, August 5, 1982 at 10). To the extent that SB 172 fails to spell out in detail the nature of the proceeding at the county level, the Board must "fill in the blanks" by resort to determinations it has made concerning the nature of proceedings before the Agency, where SB 172 does not dictate a contrary result.

In County of LaSalle, et al. v. IEPA et al., PCB 81-10, March 4, 1982 [appeal pending sub. nom. County of LaSalle ex rel., George L. Peterlin et al. v. IPCB et al., Nos. 82-180, 190 (Consolidated), 4th Dist.], a pre-SB 172 appeal challenging the grant of a hazardous waste permit decision, the Board discussed the nature of the proceeding before the Agency at some length. While this discussion was in the context of the applicability of the Administrative Procedures Act (APA), Ill. Rev. Stat. Ch. 127, §1001 to permitting hearings and procedures before the Agency,* the policy considerations apply equally here.

Section 39(c) of the Act had (prior to the Revisory Act of 1982) provided that the Agency was to conduct "a public hearing" prior to issuance of a permit for a hazardous landfill. The Board determined that the "public hearing" was informational and participatory rather than adjudicatory in nature, because, inter alia,

1. There are no "parties", only participants, at such a hearing, since "it is impossible to align the participants prior to an Agency decision in that the Agency does not take a position in conformity with or adverse to the permit applicant prior to reaching a decision" (Id., p. 5);

2. The drafters of the Act have distinguished in reference to Board hearings between "public hearings" held in the regulatory context (§28), and the "hearings" held in the adjudicatory context (§31(b), 37(a), 40(a)) (Id., p. 6).

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*The APA, in §1003.01 specifically excludes from the definition of "Agency", "units of local governments and their officers".

This analysis is equally valid here in that Section 39.2(d) orders the county to hold a "public hearing". Section 40.1(b), which affords the right of appeal of a siting approval, refers to "a third party other than the applicant who participated in the public hearing" (emphasis added).

The Board also addressed the meaning of the review "based exclusively on the record" language of what was then Section 40(b). Concerning the nature of the record itself, the Board found that post-hearing evidence could be relied on by the Agency, since to "cut off communications with the applicant at any time prior to the closing of the record might well result in the inability of the Agency to reach a fully informed decision". However, the Board found that if such contacts are relied on, that they should be made part of the record, to protect due process rights in the event of a later appeal (Id., p. 8-9).

The Board found that its review of the record would be meaningless

> "if the Agency has complete control of what constitutes the record. The Agency could pre-decide most any permit action, place only those materials in the record which support that decision, and then rely on the record, as presented, to support that decision."

The Board accordingly found that the petitioner had a "right to establish at the Board hearing that the record, as submitted was incomplete", and a further right "to complete the record and to demonstrate that the record failed to support the Agency's decision". The Board further noted that its decision could then be made on the basis of the corrected record (Id. at 8).

Section 40.1 disturbs only one aspect of that holding. As it prohibits Board receipt of "new or additional evidence in support of or in opposition to" the County's finding, the Board obviously could not make a de novo decision on the basis of a corrected record. In the interests of "fundamental fairness" however, the Board finds that it may properly accept evidence that a record is incomplete, and that it may direct the taking of such curative measures as may be necessary to allow for review of a siting decision on the merits. For it is also the Board's belief that the Act contemplates that review of the merits of a siting decision should ultimately be had, so as to discourage the possibility of the knowing manufacture by any person of procedural errors at the local government level.

EVIDENTIARY RULINGS OF THE HEARING OFFICER

In their briefs and on the hearing record, the parties raised and preserved several objections to Hearing Officer rulings concerning testimony and exhibits; the Village also made,

or attempted to make, some offers of proof. The Board hereby sustains all of the rulings made at hearing. Some deserve specific comment.

Respondents' general objections to "new or additional evidence" fall, insofar as they relate to testimony and exhibits concerning the completeness of the record and the "fundamental fairness of the procedures" (see p. 4-6, supra, and Order of July 21, 1982). Issuance of the hearing subpoena for witness Utt, Bennett, Knuepfer, and Swailes and acceptance of their testimony (as well as that of O'Neill) was therefore correct. However, the Paccione affidavits (Pet. Ex. B, B1, B-2) were properly denied admission as new evidence in opposition to the County's substantive findings (R. 399, 400).

The Hearing Officer properly denied, as untimely, the August 16 motion for subpoena for the various documents (R. 372-376) catologued and stored at the Helen Plum Library (R. 378-379). The question as to whether certain technical documents relating to the Mallard Lake landfill could have been properly subpoenaed at an earlier time will be considered later in this Opinion.

The Board reaffirms its Orders of July 21, and August 5, 1982 concerning the admissibility of evidence concerning the County Board members motives, "ex parte" contacts and transcript reading. Offers of proof on these points were properly denied (R. 244-46, 284, 292-298, 464, 467-470).

The Board notes that as Exhibit D-11 was withdrawn (R. 368), it was improperly forwarded to the Board.

THE MALLARD LAKE SITE, THE APPLICATION, AND THE PROCEEDINGS BEFORE THE COUNTY

On October 24, 1972, the creation of the Mallard Lake landfill was initiated by a joint resolution of the County and the District (Pet. Ex. CBA-6). The District recited its belief that "certain Forest Preserve lands can be improved by creating lakes and hills to enhance their scenic and recreation potential, in part through the use of the (sic) sanitary landfill methods". The County stated its belief that "DuPage County is in need of areas suitable for the operation of sanitary landfills", which the County had "certain power to license and regulate". Accordingly, the County and the District entered into an agreement allowing the District to operate a landfill at three locations, one being Mallard Lake.

Pursuant thereto, in June, 1974 the District contracted with E & E to build and operate the Mallard Lake facility, for a period of 10 years, which could be extended a maximum of 9 years.

Two hills were to be created, a "north hill approximately two hundred (200) feet in height with a 90-acre base and a south hill approximately one hundred eighty (180) feet high with a sixty-five (65) acre base". E & E was to pay royalties to the District, and to comply with various technical requirements (Pet. Ex. FPD-11, Ex. E, p. 23, 1).

Disputes arose between the District and E & E concerning the operation of the landfill, which resulted in the 1979 filing of actions before the federal court, the circuit court, and the Board (Id. p. 1). On April 1, 1981, the District enacted an ordinance approving agreement between it and E & E for settlement of all litigation. As part of this agreement, it was agreed that E & E and the District would jointly petition the Agency "for approval of plans relating to the modification of the design of Mallard Lake into an expanded one-hill concept" (Pet. Ex. FPD-11, p. 2-3).

On September 10, 1981 the District and E & E submitted to the Agency an application for modification of their original 1974 permit. At some point thereafter, the two petitioned the County Board for its approval of the change to a one-hill design. The County granted its approval by ordinance dated October 27, 1981 (Pet. Ex. CBA-10).

The Agency had scheduled a public hearing on the pending permit application for November 18, 1981. The passage of SB 172, effective November 11, 1981, necessitated initiation of its new formal siting approval procedures before the County. The IEPA hearing was cancelled.

The District and E & E filed separate requests for approval with the County on December 28, 1981 (County Rec. III L & M), accompanied by the "Permit Application Narrative" and "Geology and Hydrology Report" which it had also submitted to the Agency (Id., III N, O). "Permit application drawings" were also submitted at some point (Id., III P).

The modification to the original Mallard Lake plan involves elimination of one proposed hill. The resulting single hill would have an elevation of 980 feet above sea level in a project area containing 560.1 acres, with the landfill taking up 217.4 acres. This would involve an eastward expansion on the southern part of the site and a westward withdrawal on the northern portion.

On January 9 and 22, the Village informed the County by letter of its opposition to the proposed modification (Id. III C-D). Following issuance of statutory notice (Id., H-J), the County held its hearing of February 11, 1982. County Board Chairman Jack T. Kneupfer acted as Hearing Officer, at his own designation. The County Board members were present during some portion of the hearing. The hearing was conducted jointly with the Agency which has published its own notice, project summary and fact sheet, and which had designated its own areas of review

(Id., III B). The hearing was conducted pursuant to the County's own written "Rules of Procedures in Connection with Public Hearing on Site Location for Mallard Lake Landfill Expansion" (Id., III A).

At hearing, six witnesses testified for the applicants in favor of the proposed modifications, presenting 15 exhibits (Id., I). Reference was made by the applicants' witnesses to documents concerning the landfill on file at the Helen Plum Library, but were not offered as exhibits (Id. I, p. 23 and 176A, 27B). Testimony in opposition was presented by several citizens.

Following the hearing, the County accepted into its record two letters, one responsive to a question asked by Mr. Knuepfer at hearing, and another, from the District's counsel addressing comments presented by a witness at hearing (III A-G).*

Following the hearing, Mr. Knuepfer drafted proposed findings of fact and conditions to be imposed on a grant of approval (Pet. Ex. D-1). The initial draft was submitted to the County Board's Finance Committee for consideration at its April 14, 1982 meeting (ER-1). No agreement was reached, so the subject matter was taken up at 6 additional committee meetings, during and after which revised drafts were framed. These meetings were open to the public, but were not noticed as continuations of the SB-172 "public hearing". The sessions were open meetings, but for portions which were closed in order to discuss litigation. Representatives of the District and E & E were present, and assisted in the process of revising the working drafts. No representatives of the Village were present at any of these meetings (Pet. Ex. D1-D9).

The County adopted its resolution approving the site, with conditions, on April 27, 1982 by a vote of 16-7, 2 members being absent. The District enacted an ordinance consenting to the conditions contained therein on May 18, 1982 (Pet. Ex. FPD-9).

THE NATURE OF THE PROCEDURES OF DECISIONMAKING

As earlier alluded to in the La Salle discussion, the Board finds the SB 172 siting approval process to be quasi-judicial and quasi-legislative in nature: the statute makes requirements concerning the form of the decision and record which have judicial characteristics, while the fact finding public hearing is more characteristically legislative.

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*The information referred to in the preceding five paragraphs, in addition to the County's April 27, 1982 resolution approving the location (Id. III, K) was certified by the County Clerk as being "a true and correct copy of the entire record of the proceedings held by the County...in this matter". The Board notes that while the resolution itself refers to three appendices to it, these appendices were not included in the record submitted by the County.

The Board finds no fault with the public hearing procedure employed by the County. The statute does not require that a quorum of county board members be present at hearing; the quorum requirements are relevant only to its final decision. Mr. Knuepfer's designation of himself as hearing officer was not improper, based on this record. The County's creation of special hearing procedures was not only permissible, but advisable in the interests of informing the public of the ground rules for conduct of the hearing. The hearing itself was conducted in a fair manner, with ample opportunity for cross-questioning of witnesses and presentation of public comment.

The County's discussion of its draft decision at its open-to-the-public Finance Committee meetings was permissible, as an exercise of its quasi-legislative prerogatives in this matter.

However, the County has failed to submit to the Board the complete record on which its decision was based, hampering the Board's ability to review its decision. As noted in the earlier La Salle discussion, post-hearing contacts must be reflected in the record submitted to the Board.

The minutes of the Finance Committee meetings reflect that the discussion revolved around the conditions for approval being considered by the County. Additional information, not contained in the hearing record was received, e.g. an explanation of the difference between surety bonds and insurance contracts (April 26, 1982), and an explanation of conditions "which would be impossible for the operator to meet" (April 19, 1982). Based on the record presented to the Board, the reasonableness of and necessity for the conditions is impossible to review because of the lack of information.

The Helen Plum library materials, to the extent they are relevant to Mallard Lake, should have been entered into the record. These materials were generally referenced by the District's Superintendent Utt, and the public was told it could rely on these materials.

Finally as previously noted, the record is also incomplete insofar as the appendices to the County's resolution were not submitted to the Board.

THE COUNTY'S RESOLUTION

The Village asserts that the county board's substantive decision was contrary to its own findings of fact and was unsupported by the evidence recited in the resolution itself. The Board does not find that SB 172 requires the county to per se make "findings of fact and conclusions of law". This Board does however find that since the Board must review the county's decision and cannot hold a de novo hearing under the SB 172 provisions, that

the County's written decision must clearly indicate the information which it finds persuasive, and comment on what it does not. The reasons for its ultimate conclusions must be made clear. If conditions are imposed, the County must relate from which of the statutory criteria they flow, and why they are necessary.

The County's resolution is deficient in this regard, as to some criteria, and all of the conditions:

1. Necessary to accommodate waste needs of the area it is intended to serve.

Of the County's two paragraph consideration of this point, only one sentence is relevant to this concern: "[I]t is necessary to dispose of urban wastes". The county's resolution does not speak of the area intended to be served. The resolution fails to explain why use of the expanded facility is necessary after 1993, the expiration of the original contract period, inasmuch as approval appears to have been sought for at least 19 years from the date of issuance of any new Agency permit (County Rec. III N). While there is discussion in the record concerning the capacity of existing landfills in the area, the Board cannot determine what, if any, of this evidence the County found credible. The County's bare conclusion cannot be sustained.

2. Design, location, and proposed operation to protect the public health, safety and welfare.

The one paragraph finding answers the design and location question affirmatively, but lists "concerns" and "reservations" concerning proposed operation (p. 7). The testimony on this point discussed earlier is also overwhelmingly negative, as it relates to concerns about former dumping of sludge in the landfill and an incomplete leachate collection system, given the site's location immediately adjacent to the west bank of the DuPage River. It is however noted that "the site operator's practices seem to have improved in the past few months (p. 5). (For guidance on scope of this criteria, see Waste Management of Ill. v. Board of Supervisors of Tazewell County, PCB 82-55, August 5, 1982, p. 10.)

Condition 1, 2, and 4 are obviously related to curing the County's concerns. However, as the County has not explained the reasoning behind its imposition of these conditions as they relate to this criteria, the conclusion and the conditions based on this criteria must fall.

3. Location to minimize incompatibility with the character and property values of the surrounding area.

The County's one paragraph discussion noted no depreciation of homes or lots in the area, and stated that berms constructed on the west and north sides of the site minimize the landfill's visual effects. Paragraph 2 of the "waste needs" section also

supports this finding. Citation of odor, debris and noise problems does not undercut the validity of these findings, and the County is sustained as to this.

4. Location outside the boundary of the 100-year floodplain.

The County cites unrebutted evidence on this point, and its conclusion stands.

5. Design to minimize dangers from fire, spills or operational accidents.

The County determined that fires and spills were not of concern. The Board notes that the resolution's other concerns are irrelevant to this criteria, as they do not relate to "upsets". This finding therefore remains undisturbed.

6. Traffic patterns designed to minimize impact on the existing traffic flows.

The County noted that "trucks are a concern on Schick Road", but also noted that increased urbanization has caused "a substantial increase in total traffic". The precise conclusion was that the "County has plans to widen Schick Road in the future, so that we can find no reason for believing that the landfill materially impacts on traffic flows".

The Board cannot sustain the County's reason as written, as the record does not detail its road construction plans, although other credible evidence that the criteria has been satisfied exists in the record.

Given its findings on these criteria, the Board will not further address the conditions themselves.

FAIRNESS OF THE FORUM

The provisions of SB 172 embodied in Sec. 39.2 and 40.1 of the Act provide, among other things:

1. That the County Board make the siting decision;

2. That, prior to decision, a public hearing be held;

3. That local zoning and other land use requirements shall not be applicable to such siting decisions, and

4. That there be fundamental fairness in the procedures.

Standing alone, the Board finds no inherent conflict in the legislatively granted power of County Board members to serve as the Commissioners of the Forest Preserve District any more than it finds any inherent conflict in the above referenced provisions in the Act. However, in this case, the above named provisions in the Act came in conflict with each other when the County Board and the District attempted to implement their responsibilities under SB 172, after having made "final" decisions prior to the passage of SB 172.

For example, the County had approved, by ordinance, the landfill expansion and modification (Pet. Ex. CBA-10), agreed to earlier by the District and E & E. That agreement was embodied in a District ordinance (Pet. Ex. FPD-11), which itself reflected a stipulated settlement of litigation between the District and E & E. These actions all encompassed extensive conditions concerning the expansion, operation and use of the landfill.

The County ordinance expressly approved the application of the District and E & E to the Illinois Environmental Protection Agency for a permit.

Thus, by using its land use or zoning power, the County Board members had approved the site, and as District Commissioners had contracted with E & E hauling to operate the site--all before the public had a chance to participate in a hearing mandated by SB 172.

While any required public hearing should be a meaningful part of any decisionmaking process, the public hearing in the siting process has legislatively been given particularly high status. It must be transcribed (Sec. 40.1(a)) and must develop a sufficient record for appeal of the decision (Sec. 39.2(d)). If the decision-makers have already taken "final" actions in other statutory capacities approving the siting after negotiating certain conditions, the hearing inevitably loses its intended purpose. As the Board noted in La Salle, "a public hearing is for the public...not simply a hearing to be held in public" (p. 6).

The difficulty in trying to set post-hearing conditions under these circumstances was specifically evidenced in the minutes of the County's Finance Committee.* Also, in the final adopted resolution, the County Board as a whole, in considering the six criteria, had difficulty in stating its reasons for approval and setting conditions in a manner that would mesh with the prior litigation and settlement terms with E & E Hauling.

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*These minutes speak for themselves:

"The committee discussed the question of whether or not the County Board has the responsibility to deal with the terms of the contract between E & E Hauling
(footnote continued next page)

Therefore, the Board finds that the County Board under these particular circumstances cannot act in conformance with all the provisions of SB 172 and still comply with fundamental fairness.**

In this case, SB 172's internal provisions are in conflict. The Act itself empowers no alternative entity to make SB 172 decisions. The specific intent of the amendment was to divest the Agency of such authority. The Illinois Pollution Control Board, itself a creature of statute, cannot hear such cases absent legislative direction; no original jurisdiction has been vested in the courts. These alternatives would, in any event be repugnant to the legislative intent to place siting approval decisions in the hands of elected officials.

The Village suggests that an alternative decisionmaker is available. It suggests that the County could have transferred its decisionmaking ability to another "unit of local govenment", pursuant to the Illinois Intergovernmental Cooperation Act, Ill. Rev. Stat. Ch. 172, §741 et seq. The Board is persuaded by

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*(footnote continued from page 12)

and the Forest Preserve District. Chairman Knuepfer felt that given the six criteria to be used by the County Board in judging the suitability of the proposed modification, that the Board has a right to impose certain stipulations. Mr. McNamara [representing E & E] disagreed with Mr. Knuepfer's position that the Board can renegotiate contract terms, especially since responsibilities and liabilities for operation of the landfill are established in the owner-operator contract and in the 1981 court decree from Judge Nolan" (April 21, 1982).

"On a motion by Vaughn and seconded by Kretschmer on the committee went into executive session to discuss probable litigation. On a motion by Kretschmer and seconded by Hankinson open session resumed.

Vice-Chairman Lahner advised those present that pursuant to the committee's discussion on probable litigation, the committee would recommend the following changes to the eleven stipulations for approval of the modification request: [Attorneys for the Board, the District, and E & E to negotiate proposed conditions 3, 4, 6]" (April 23, 1982).

**The County Board, of course might have tried to allow the District and E & E Hauling to prevail by doing nothing, thus allowing the approval to take effect by operation of law after 120 days. The Board members are to be commended for not using this strategy for "opting out" of a sticky situation and thus in effect avoiding both the public participation process and their deliberative responsibilities.

respondents' arguments that such a transfer as would be involved here is not contemplated by that statute. In addition, as a matter of policy, the Board finds that it would violate the "local control" intent of SB 172 to have DuPage County transfer its site approval authority to, for example, Kane (or even Jo Daviess) County or to a municipality within the county, even if these local governments agreed to such a transfer, which they need not.

Since this Board cannot bring consistency to the letter of the provisions in the Act, it feels that the fairest course is to find a method to bring consistency to the underlying intent of the Act, in particular the rights of the public to have a meaningful "say" and the right to make a decision at the county level.

In order to avoid turning SB 172 into a nullity in this case, to preserve the local control in the decisionmaking process and to preserve fundamental fairness in the decisionmaking process this Board finds that a panel of County officers (see Sec. 4(c) of Art. VII of the 1970 Ill. Constitution) acting in lieu of the County Board would be appropriate to the SB 172 process envisioned in the Act. These officers are elected countywide and have not been involved in the de facto prior approval exercised by the County Board.

The noted record deficiencies should be corrected and the criteria should be more specifically addressed at a public hearing. The Board again notes that it is not implying that the conduct per se of the original hearing was improper or that it cannot be incorporated into a subsequent hearing record. However, another hearing will serve to better address the criteria "on point" without becoming diverted by prior decisions that emanated from powers exercised under Chapters 34 and 96½.

The Board construes the 120 day decision period as re-commencing on the County's receipt of this Opinion.

The Board, in remanding this back to the County Board, recognizes that it is placing the County in a difficult and challenging situation. Nevertheless, the Board feels that the localy elected County Board officials should be given deference to allow them to try to establish alternate procedures that comply with the intent of all the provisions of SB 172 and the Act.

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

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 2nd day of September, 1982 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board