ILLINOIS POLLUTION CONTROL BOARD
May 25, 1989

WABASH AND LAWRENCE COUNTIES TAXPAYERS AND WATER DRINKERS ASSOCIATION,	)	
Petitioner,	)	
v.	)	PCB 88-110
THE COUNTY OF WABASH AND K/C RECLAMATION, INC., an Illinois Corporation,	)	
Respondents.	)	

MR. STEVE SAWYER, ESQ., STATE'S ATTORNEY OF WABASH COUNTY APPEARED ON BEHALF OF THE WABASH COUNTY BOARD.

MR. RICHARD KLINE, ESQ., WOODCOCK, KLINE AND KAID, APPEARED ON BEHALF OF MR. AND MRS. KOMINICK.

MR. JOHN CLARK, ESQ., APPEARED ON BEHALF OF THE WABASH AND LAWRENCE COUNTIES TAXPAYERS AND WATER DRINKERS ASSOCIATION.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board on the July 15, 1988 petition for appeal filed on behalf of the Wabash and Lawrence Counties Taxpayers and Water Drinkers Association ("Water Drinkers") pursuant to Section 40.1 of the Environmental Protection Act ("Act"). The Water Drinkers appeal the June 29, 1988 decision of the Wabash County Board of Commissioners ("Commissioners") supporting an application for a new pollution control facility which has been filed by K/C Reclamation, Inc. ("K/C"). The proposed landfill is to be sited in Wabash County.

The Water Drinkers contend that the decision by the Commissioners should be reversed for one or more of the following reasons:

A. A procedural violation of the Act occurred.

B. The hearing before the Commissioners was fundamentally unfair.

C. The decision of the Commissioners was

contrary to the manifest weight of the evidence.

Based on the record before it, the Board finds that the County Board had proper jurisdiction and that the hearing below was conducted in a fundamentally fair manner. The Board additionally finds that the decision of the Commissioners to approve K/C's application based on K/C's ability to meet its burden of proof on the statutorily-defined criteria is not against the manifest weight of the evidence. The decision of the Commissioners is accordingly affirmed.

BACKGROUND

On January 12, 1987, K/C filed an application for approval of the site location for a new regional pollution control facility. In the application, K/C proposed to design, construct, operate and own a 45-acre solid waste landfill located on a 172 acre parcel of land located in northern Wabash County on the Lawrence County border. The proposed landfill is intended to serve Wabash and Lawrence Counties as well as parts of adjacent counties.

The Commissioners held public hearings on May 11, May 18, and May 27, 1987. The Commissioners received numerous written comments and petitions concerning the application. On June 29, July 1 and July 6, 1987, the Commissioners met to deliberate and vote on the application. On July 1, the Commissioners voted to approve site location suitability, and on July 6, the Commissioners adopted a written decision which enunciated the conditions of approval. The Board held a hearing on the 1987 application on October 2, 1987 on docket number PCB 87-122.

In an opinion and order of December 3, 1987, the Board vacated the decision of the Commissioners on the basis that the Commissioners did not have jurisdiction to make a determination concerning K/C's application due to the applicant's failure to comply with the notice requirements of Section 39.2(b) of the Act. Wabash and Lawrence Counties Taxpayers and Water Drinkers Association and Kenneth Phillips v. The County of Wabash and K/C Reclamation, Inc., PCB 87-122 (December 3, 1987). K/C refiled its original application with the Commissioners on January 20, 1988.

Public hearings were held on this matter on April 28, April 29 and May 9 of 1988. On June 29, 1988, the Commissioners rendered a decision which approved the siting of K/C's landfill subject to certain conditions adopted in the decision by the Commissioners. The Water Drinkers filed their appeal to the Board and on October 28, 1988, a hearing on the appeal was held in Mt. Carmel, Wabash County. Three witnesses testified at the Board's hearing. On December 2, 1988 the Water Drinkers filed a

post-hearing brief. K/C filed its brief on December 27, 1988 and the Commissioners filed their brief on December 28, 1988. The Water Drinkers filed a reply brief on December 30, 1988.

JURISDICTION

Before the Board reviews the decision by the Commissioners, the Board needs to determine whether the Commissioners had jurisdiction to decide site location for the proposed regional pollution control facility.

Courts have held that the notice requirements of Section 39.2(b) are jurisdictional. Kane County Defenders, Inc. v. Pollution Control Board, 139 Ill. App. 3d 588, 487 N.E. 2d 743 (2d Dist. 1985); Browning Ferris Industries, Inc. v. Illinois Pollution Control Board, No. 5-86-0251, ____ Ill. App. 3d ____, N.E. 2d _____ (5th Dist. 1987). Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc., 144 Ill. App. 3d 344, 494 N.E. 2d 180 (2d Dist. 1986); The Village of Lake in the Hills v. Laidlaw Waste Systems, Inc., 143 Ill. App. 3d 285, 492 N.E. 2d 969 (1986); See also McHenry County Land Fill, Inc. v. Environmental Protection Agency, 154 Ill. App. 3d 8, 506 N.E. 2d 372 (2d Dist. 1987). (Although the Second District found that the requirements of Section 39.2(b) were jurisdictional, the Board's own failure to provide notice in accordance with Section 40.1 was not jurisdictional under the circumstances in this case). Section 39.2(b) provides:

> No later than 14 days prior to a request for location approval, the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located. Such written notice shall also be served upon members of the General Assembly from the legislative district in which the proposed facility is located and shall be published in a newspaper of general circulation published in the County in which the site is located.
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> Ill. Rev. Stat. 1987, ch. 111½, par. 1039.2(b)

The Water Drinkers argue that the notice requirement was violated in three instances. The first jurisdictional issue involved property that was listed on the tax records as owned by "the John Trimble heirs". The heirs of John Trimble are John Trimble, Leo Knapp, Susie M. Potts and Alice Steckler. However, only John Trimble was sent notice of the request for location approval. The petitioner maintains that the statute uses the word "owners" to clearly indicate that all of the owners of each property must be notified in order for the county board to have jurisdiction and the failure of K/C to give notice to each of John Trimble's heirs means K/C has failed to notify all owners of property within 250 feet as required.

The Board does not accept the petitioner's argument. The Board sees the phrase "owners being such persons or entities which appear from the authentic tax record of the County" as being the decisive language in determining whether "owners of all property" were properly notified under 39.2(b). The meaning of this language is clear. The language gives the applicant, the county board and the reviewing bodies a clear standard to determine which parties must be notified. The "authentic tax records of the County" include the names or titles and addresses of the purported property owners. If the applicant has sent proper notice to the owners listed on the tax records he has complied with the requirements of 39.2(b).

In the matter of the property owned by the Trimble heirs, the applicant had the notice of hearing sent to John Trimble, who receives the tax statement (R.3 at 22)[1], at the address listed in the authentic tax records of the County. This notice complies with the requirements of 39.2(b), even though all of the heirs were not sent personal notice, because notice was given to the "owners...which appear from the authentic tax records of the County..." as required.

The second jurisdictional argument presented by the petitioner involves property owned by Vernon Buchanan and his wife. Mr. Buchanan testified that they did not receive notice when the application was refiled in 1988 (R.3 at 9). However, Mr. Buchanan also testified that he was making payments to First National Bank on a contract for deed at the time notice was due. He further testified that statements for taxes from the County were sent to the First National Bank and that when he went to the courthouse, he discovered that the County tax records showed the property to be in the care of First National Bank (R.3

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1. For this opinion, the transcripts from the County Board meetings of April 28, April 29 and May 9 will be referred to as "R.1". The transcripts from the County Board hearing of June 28 and June 29 will be referred to as "R.2". The transcripts from the hearing before the Illinois Pollution Control Board on October 28, 1988 will be referred to as "R.3". Information from the application will be referred to as "App."

at 10). Because Mr. Buchanan's name did not appear on the authentic tax records of the County at the time notice was required, the applicant was not required to notify him of the County Board hearing. As a result, the Board finds no conflict with 39.2(b) in the matter.

The final jurisdictional issue raised by the petitioners involves the property owned by Ernest Phillips in Lawrence County. In its post-hearing brief the petitioner maintains that Mr. Phillips was not notified of the County Board hearing. In support of this argument the petitioner notes that at the April 28, 1988 hearing, the applicant entered into evidence the certified mail receipts for those individuals who received notice of the refiled application. A receipt for Mr. Phillips was not included. However, at the hearings before the Board, the petitioner has failed to show that Mr. Phillips was listed as the owner of the property on the authentic tax record of the County. At the hearing before the Board, the burden of proof is on the petitioner. In this matter, the failure of the petitioner to show that Mr. Phillips was due notice of the hearing results in a failure to carry its burden of proof. Consequently, the Board cannot find a violation of the notice requirement as to Mr. Phillips or any other property owner. Therefore, the Board finds that the Commissioners had jurisdiction to proceed with the landfill citing hearings in this application.

FUNDAMENTAL FAIRNESS

The threshold issue the Board must evaluate is whether the procedures used by the Commissioners in seeking its decision were fundamentally fair pursuant to Section 40.1 of the Act.

Ill. Rev. Stat. 1987 ch. 111½ par. 1040.1 requires that this Board review the proceedings before the Commissioners to assure fundamental fairness. In E&E Hauling, the first case construing Section 40.1, the Appellate Court for the Second District interpreted statutory "fundamental fairness" as requiring application of standards of adjudicative due process. (E&E Hauling, Inc. v. Illinois Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E. 2d 555 (2nd Dist. 1983), aff'd in part 107 Ill. 2d 33, 481 N.E. 2d 664 (1985)). A decisionmaker may be disqualified for bias or prejudice if "a disinterested observer might conclude that he, or it, had in some measure adjudged the facts as well as the law of the case in advance of hearing it" (Id., 451 N.E. 2d at 565). It is also important to note that in an analysis of bias or prejudgment elected officials are presumed to be objective and to act without bias. The Illinois Appellate Court discussed this issue in Citizens for a Better Environment v. Illinois Pollution Control Board, 152 Ill. App. 3d 105, 504 N.E. 2d 166 (1st Dist. 1987)

In addressing this issue, we note that it

> is presumed that an administrative official is objective and "capable of judging a particular controversy fairly on the basis of its own circumstances." (United States v. Morgan (1941), 313 U.S. 409, 421, 85L. Ed. 1429, 1435, 61 S. Ct. 999, 1004). The mere fact that the official has taken a public position or expressed strong views on the issues involved does not serve to overcome that presumption. (Hortonville Joint School District No. 1 v. Hortonville Educational Association (1976), 426, U.S. 482, 49 L. Ed. 2d 1, 96 S. Ct. 2308). Nor is it sufficient to show that the official's alleged predisposition resulted from his participation in earlier proceedings on the matter of dispute. (Federal Trade Commission v. Cement Institute (1948), 33 U.S. 693, 92 L. Ed. 1010, 68 S. Ct. 793).
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> 504 N.E.2d at 171.

A decision must be reversed, or vacated and remanded, where "as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect" (E&E Hauling, Inc., 451 N.E.2d at 571). Finally, adjudicatory due process requires that decisionmakers properly "hear" the case and that those who do not attend hearings in a given case base their determinations on the evidence contained in the transcribed record of such hearings, Id., 451 N.E.2d at 569).

The Water Drinkers contended that the process by which the Commissioners considered and ruled on K/C's application was fundamentally unfair at only one point during the proceeding. The complaint was made by William Trimble during his testimony before the Board on October 28, 1988 (R.3 at 13, 14). Mr. Trimble maintained that the County Board built a case for the landfill rather than considering the taxpayers who had signed petitions and written letters in opposition to approving (Id.) the application. Mr. Trimble also stated that some of the testimony before the County Board was rushed by the Commissioners and some of the witnesses were biased (R.3 16-18).

A review of the transcripts of the hearings before the County Board does not support Mr. Trimble's contention. The County Board held a number of hearings at which anyone was welcome to speak and present evidence. The record does not indicate that any person was prevented from testifying or that any testimony was rushed.

After the hearings were completed, the Board announced when the comment period would be closed and when the County Board would meet to deliberate on the decision. The deliberations were also open to the public. The transcripts of the deliberation indicates that the County Board considered numerous points brought out at the hearings.

The Board believes that Mr. Trimble's allegations do not overcome the presumption that the County acted on the merits of the application without prejudging the law or facts. The record indicates that on remand from this Board, the Commissioners had sufficient time to consider the record before it and that they were properly instructed to consider that record. The Board, therefore, finds that the County reached its decision on the applicant's landfill siting application in a fundamentally fair manner.

REGULATORY CRITERIA

Section 39(c) of the Act provides that "no permit for the development or construction of a new regional pollution control facility may be granted by the [Environmental Protection] Agency unless the applicant submits proof to the Agency that the location of said facility has been approved by the County Board of the county if in an unincorporated area *** in accordance with Section 39.2 of this Act." The six applicable criteria [2] set forth in Section 39.2(c) are, in pertinent part:

> (a) The county board *** shall approve the site location suitability for such new regional pollution control facility only in accordance with the following criteria:
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> 1. The facility is necessary to accomodate the waste needs of the area it is intended to serve;
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> 2. the facility is so designed, located and proposed to be operated that the public

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2. Criterion #7, which applies to facilities that will accept hazardous waste, did not apply in the instant situation since K/C's proposed facility would not accept hazardous waste. Criterion #8 was added by P.A. 85-863 which became effective on September 24, 1987. This criterion concerns "regulated recharge areas" which are yet to be determined by the Board pursuant to Section 17.4 of the Act. In addition, the Board notes that another criterion was added by P.A. 85-945; however, that provision which concerns solid waste management plans, did not become effective until July 1, 1988 -- after the application review process of the Commissioners had been completed.

health, safety and welfare will be protected;

3. the facility is located so as to minimize incompatibility with the character of the surrounding area and minimize the effect on the value of the surrounding property;

4. the facility is located outside the boundary of the 100 year flood plain, or the site is flood proofed;

5. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills or other operational accidents; and

6. the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows.

Section 40.1 of the Act charges this Board with reviewing the Commissioners's decision. Specifically, this Board must determine whether the Commissioners' decision was contrary to the manifest weight of the evidence. E&E Hauling, Inc., 116 Ill. App. 3d 586, 451 N.E. 2d 555 (2nd Dist. 1983), aff'd in part 107 Ill. 2d 33, 481 N.E. 2d 664 (1985); City of Rockford v. IPCB, 125 Ill. App. 3d 384, 386, 465 N.E. 2d 996 (1984); Waste Management of Illinois, Inc. v. IPCB, 122 Ill. App. 3d 639, 461 N.E. 2d 542 (1984). The standard of manifest weight of the evidence is:

> A verdict is ... against the manifest weight of the evidence where it is palpably erroneous, wholly unwarranted, clearly the result of passion or prejudice, or appears to be arbitrary, unreasonable, and not based upon the evidence. A verdict cannot be set aside merely because the jury [County Board] could have drawn different inferences and conclusions from conflicting testimony or because a reviewing court [IPCB] would have reached a different conclusion ... when considering whether the verdict was contrary to the manifest weight of the evidence, a reviewing court [IPCB] must view the evidence in the light most favorable to the appellee.
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> Sternberg v. Petra, 139 Ill. App. 3d 503, 508 (1986).

Consequently, if after reviewing the record, this Board finds that the Commissioners could have reasonably reached their conclusion, the Commissioners' decision must be affirmed. That a different conclusion might also be reasonable is insufficient; the opposite conclusion must be evident (see Willowbrook Motel v. IPCB, 135 Ill. App. 3d 343, 481 N.E. 2d 1032 [1985]).

The Water Drinkers maintain that the Commissioners'

conclusions as to all of the criteria under Section 39.2(a) are against the manifest weight of the evidence presented at the hearings. As a result, it maintains that the Commissioners' decision should be reversed and the site location should be disapproved. The Commissioners' decision will be reviewed with respect to each criteria individually.

Criterion #1

Section 39.2(a)(1) of the Act requires that the applicant establish that "the facility is necessary to accomodate the waste needs of the area it is intended to serve". Relevant case law from the Second District Appellate Court provides guidance on the applicable analysis of this criterion:

> Although a petitioner need not show absolute necessity, it must demonstrate an urgent need for the new facility as well as the reasonable convenience of establishing a new or expanding an existing landfill. ... The petition must show that the landfill is reasonably required by the waste needs of the area, including consideration of its waste production and disposal capabilities.
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> Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 530 N.E. 2d 682 (2nd Dist. 1988); citing Waste Management of Illinois, Inc. v. Pollution Control Board, 123 Ill. App. 3d 1075, 463 N.E. 2d 969 (1984).

In support of its contention that the decision of the Commissioners is against the manifest weight of the evidence, the Water Drinkers argue that there are landfills in surrounding counties accepting or willing to accept waste hauled from Wabash County. The Water Drinkers point to the testimony of Gary Simmons, the operator of a landfill near Wabash County. Mr. Simmons says his landfill could handle the waste from Wabash County for ten years and that his landfill is suitable for expansion. Mr. Simmons testified that he had offered a contract to K/C to accept Wabash County waste hauled by K/C (T.2 at 182-192).

The Water Drinkers also noted the fact that prior to K/C receiving the contract for waste hauling in Wabash County, Dowty Disposal collected Wabash County waste and disposed of it in a landfill owned by Dowty in Lawrence County. The petitioner also cited evidence that there is a proposed landfill in White County that could also accommodate Wabash County waste as proof that

there is not a present need or a reasonably foreseeable need for a regional landfill to accommodate the waste needs of Wabash County. As a result, the petitioner contends that the Commissioners' decision is against the manifest weight of the evidence for the first criterion.

In its deliberations, the County Board's Mr. Effland stated that in this matter, criterion one may be the most important consideration (R.3 at 79). Mr. Effland expressed an interest in increased recycling but stated that it was not the total solution at this time (R.3 at 79). Further, Mr. Effland stated that his visits to landfills in the area allowed him to see how poorly they were operated. This information and the cost of disposing of Wabash County's waste convinced him that a landfill was necessary (R.3 at 80). Mr. Dossett of the County Board also cited the poor operation of the Lawrence County landfill as a reason why a new landfill was needed in the region (R.3 at 82 and 83).

As is the case with all of the statutory criteria, the burden of proof is on the petitioner to show that the decision of the County Board is against the manifest weight of the evidence presented at hearing. This burden is not carried lightly. If, as appears to be the situation before us, the County Board finds that a landfill is required in the region to ensure that the county's waste will be disposed of in an environmentally sound and cost efficient manner, it is well within the County Board's power under 39.2 of the Act to do so. The Commissioners considered a number of factors, in determining there was a need for a landfill in the area. The information in the record before the Commissioners is sufficient to support their finding that the proposed landfill is necessary to accommodate the waste needs of the area. The petitioner has failed to show that this decision was against the manifest weight of the evidence. The Board finds that the petitioners have failed to show that Commissioners' decision as to the need for the facility is against the manifest weight of the evidence and consequently upholds the Commissioners' decision on Criterion 1.

Criterion #2

Section 39.2(a)(2) of the Act requires that the applicant establish that "the facility is so designed, located and proposed to be operated so that the public health, safety and welfare will be protected".

Criterion #2 encompasses, by its nature, a wide variety of location, design, and operational issues, of varying nontechnical and technical nature. Among locational issues is the matter of whether the landfill is proposed to be located at a physically suitable site, in consideration of at least local geology and hydrogeology. Design elements relate to protective features of the landfill design, such as a landfill liner, leachate system,

groundwater monitoring system, and surface water control system. Also encompassed in criterion #2 are a variety of proposed operational elements, including type and frequency of monitoring of air, land, and water, daily operational plans and closure and post-closure maintenance.

The issues addressed by the Water Drinkers under criterion two included the permeability of the site, the design of the leachate collection system and the possible contamination of the areas groundwater and of Raccoon Creek. The applicant presented a report that included both field tests and laboratory tests to determine permeability of the proposed site (App. Ex. A). The author of the report, Mr. Rauf Piskin, a consulting hydrogeologist, testified at the hearing on May 11, 1987 that the land surface of the proposed landfill was covered by a "loess" with an underlying silt material. Below the silt is a "till" with an underlying layer of weathered bedrock. Below the bedrock is a bed of solid shale that is at least 1000 feet thick. Dr. Piskin testified that laboratory tests performed on the shale indicated that it is more impermeable than required by Agency standards.

In an effort to refute Dr. Piskin's report, the petitioner had Dr. Kirk Brown, a Professor of Soil Science, at Texas A&M University testify with respect to Dr. Piskin's report and the suitability of the proposed site for use as a landfill. Dr. Brown testified that the laboratory tests relied on by Dr. Piskin do not accurately simulate field conditions. Dr. Brown noted that the field test results indicated that the water flow ratio would be 100 to 1000 times faster than the laboratory test results had indicated. Dr. Brown stated that the field test results for permeability which were performed at the Wabash County location were much higher than the Agency's standard. Based on those results alone, Dr. Brown stated that the proposed location would not be acceptable. Dr. Brown's testimony as to the accuracy of laboratory tests for permeability was supported by Dr. Yaron Sternberg, a Professor of Civil Engineering, at the University of Maryland who also was called to testify by the Water Drinkers.

With respect to the leachate collection system, Dr. Piskin's report recommends that a leachate collection system should be installed to prevent development of a hydraulic head in the landfill and that the leachate level should be monitored (App. Ex. A, p. 54-55). Dr. Brown disagreed with the reports assessment that the movement of leachate would not be a problem at the site. Dr. Brown stated that if the waste were to be placed at the proposed location and at the depths suggested, the waste would be within the normal water table and would actually be setting in water once the system came to equilibrium. Dr. Brown testified that the applicant greatly underestimated the rate at which leachate will migrate out of the proposed location. With respect to abandoned oil wells on the proposed location, Dr. Brown testified that leachate can readily flow into

a well, escape and flow outward and result in the contamination of drinking water.

Dr. Brown further testified that the proposed leachate collection system was not properly designed and did not meet the requirements of the Agency. He doubted that there is enough slope in the collection system to allow the leachate to flow to the proposed extraction wells. On cross-examination, David Beck, who designed the leachate collection system, admitted that no calculation had been performed to determine how much leachate would be produced and that he had not prepared a proposal for removing the leachate from the location.

Dr. Sternberg testified that the application and design failed to address the issues of what volumes of leachate per unit of time are to be removed from the landfill, what is going to be done with the leachate once it is collected or what effect a leachate collection system would have on groundwater in the immediate vicinity. He testified that there was not enough information in the application to intelligently evaluate whether the leachate collection system would be effective.

As to the issue of the effect the landfill will have on the areas drinking water and on Raccoon Creek, the report prepared by Dr. Piskin stated that all of the drinking water wells in the area were deep wells. He did not believe that the proposed landfill would have an adverse effect on the deep wells or on the public water supply wells for the town of Allendale. Dr. Piskin also testified that he did not believe the proposed landfill would cause any health problems.

Dr. Brown disagreed with Dr. Piskin's report by noting the presence of abandoned oil wells on the property that could transport leachate into the drinking water. Both Dr. Brown and Dr. Sternberg noted the problems inherent with placing a proposed landfill within a water table and the lack of significant amounts of clay at the proposed location. Dr. Brown also noted that two of the borings performed on the site did not encounter shale, even though the application proposed using shale as a base for the landfill. Dr. Brown further testified that he did not think it would be possible to recompact the soil at the site to sufficient permeability to act as a base for the landfill. Dr. Brown testified that he believed that the discharge from the proposed landfill would migrate towards the Raccoon Creek. Dr. Sternberg stated that he would not under any circumstances site a landfill at the proposed location.

The Board finds that the Commissioner's decision on criterion #2 is not against the manifest weight of the evidence. Given the conflicting testimony presented, it is not against the manifest weight of the evidence that the Commissioners found in favor of the applicant. The witnesses presented different but viable views concerning the site permeability, leachate collection system and possibility of

contamination. The analysis of these criterion #2 factors is dispositive and must be decided by the Commissioners. The Board finds that the Water Drinkers have failed to show that the decision is against the manifest weight of the evidence. Consequently, the Board upholds the Commissioners' decision on criterion #2.

Criterion #3

Section 39.2(a)(3) of the Act requires that the applicant establish that the proposed facility is located so as to minimize incompatibility with the surrounding area and to minimize the effect on the value of the surrounding property. Criterion #3 calls for the facility to be located so as to "minimize" incompatibility -- but does not allow for rejection simply because there might be some reduction in value. ARF Landfill, Inc. v. Lake County, PCB 87-51, Slip Op. 10/1/87 at 24; citing Watts Trucking Service, Inc. v. City of Rock Island. More is required of an applicant than a de minimus effort at minimizing the facility's impact. An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. Waste Management of Illinois, Inc. v. IPCB, 123 Ill. App. 3d 1075, 1090 (2nd Dist. 1984).

Gordon Kirkman, the County Superintendent of Highways in Wabash and Edwards Counties, testified that the proposed location was suitable for a landfill. The testimony in opposition to the landfill under criterion #3 centered around the loss of property value as a result of contamination of the water supply for surrounding property. The opposition testimony was from the owners and residents of the neighboring properties voicing concern about the potential loss of value of the property. No testimony of experts in property valuation was presented at the hearing.

In its review of this criterion, the Commissioners correctly noted the plan must be designed to minimize the adverse compatability. Mr. Dossett stated that he did not know what else could be done to minimize incompatability. Therefore, the Commissioners upheld the application with regard to the third criterion (R.3 at 75).

The Board finds that the Commissioners' finding on criterion #3 is not against the manifest weight of the evidence. There was little testimony entered at hearing concerning criterion #3. However, the testimony presented was sufficient to allow the Commissioners to review the requirement and determine that compatability was considered and minimized. Again, the petitioners have failed to meet the burden of proving that the Commissioners' decision was against the manifest weight of the evidence.

Criterion #4

The fourth criterion set forth in Section 39.2 requires the applicant to show that the facility is located outside the boundary of the 100 year flood plain or the site is flood proofed. In Tate, et al v. Macon County Board, the Board held that Section 39.2(a)(4) does not require the County Board to conclusively determine the current boundary of a flood plain. Rather, the Board is required to thoughtfully consider the issue until it is satisfied with the level of proof before it. Tate, PCB 88-126, Dec. 15, 1988 at 25.

In the application, the applicants referred to the Flood Insurance Rate Maps provided by the Illinois Department of Transportation to show that no landfill activity will occur in the 100-year flood plain (App. at 3). The petitioners agree that the 45 acres that have been proposed as the beginning landfill site is outside the 100-year flood plain. However, they argue that part of the 172 acre property on which the landfill will be developed is within the flood plain. They further note that the movement of leachate would be to areas within the 100-year flood plain and could eventually result in the contamination of the Raccoon Creek.

In its deliberation, the Commissioners noted a letter from the Army Corps of Engineers stating that the site was not in the flood plain. Commissioner Effland stated that based on that letter and other evidence the Commissioners were satisfied that the site meets the requirements of criterion #4. The Board holds that the petitioners have not met their burden of proving that the decision of the Commissioners was against the manifest weight of the evidence criterion #4.

Criterion #5

For criterion #5, the Commissioners determined whether K/C had proposed a plan of operation which is "designed to minimize the danger to the surrounding area from fire, spills or other operational accidents." The applicants maintain that because the site will only accept general municipal waste and because of the isolated location of the landfill the opportunity for operational accidents will be minimal (App. at 4). In its brief of December 2, 1988, the Water Drinkers maintain that the application was insufficient to demonstrate that K/C is prepared to handle dangers of fires, spills or other accidents. The petitioner also noted that a previous fire had occurred at the site when it was being operated as a recycling center by K/C. It maintains that this fire was not properly controlled and spread to surrounding corn fields before being extinguished.

At the hearing on April 28, 1988, the Commissioners asked a number of questions concerning the planned operation of the proposed landfill. The Commissioners apparently were satisfied

that the applicants do have plans and that the plans appear to be reasonably safe (R.2 at 73). Consequently, the Commissioners ruled that the applicant had met the requirements of criterion #5. The Board, in review of the Commissioners' decision, finds that the petitioner has not been able to show that the decision of the Commissioners was not against the manifest weight of the evidence and the decision is upheld for criterion #5.

Criterion #6

For criterion #6, the Commissioners determined whether the applicant proposed a plan in which "the traffic patterns to or from the facility are so designed to minimize the impact on existing traffic flows." The proposed site is located approximately three-quarter miles from Illinois Route 1 on a gravel road currently serving area residents, farm activities and oil field maintenance vehicles. The typical volume of vehicles to the landfill will be in the range of ten vehicles per day (App. at 4). At the prior hearings before the Commissioners there was testimony by the County Highway Superintendent that the landfill would not impact on existing traffic flows. The Water Drinkers maintain that the application does not propose making any improvements in the existing gravel roads or establishing any new access routes to the proposed landfill. Therefore, it maintains the traffic patterns are not designed to minimize impact on existing traffic flows.

The Commissioners reviewed this issue at its June 29, 1988 meeting. Commissioner Effland stated that he felt that the traffic patterns at the facility are designed to minimize impact. Commissioner Dossett stated that he would give weight to the Road District Commissioner and to the County Superintendent of Highways and would agree that criterion six had been satisfied (R.2 at 73). Again, the Water Drinkers have not shown that the Commissioners' decision was against the manifest weight of the evidence and the Board upholds the decision of the Commissioners.

CORPORATE STANDING

The final argument advanced by the Water Drinkers is that K/C should not be granted authority to site a regional pollution control facility because the corporation has been designated as not in good standing by the Secretary of State. K/C failed to file a annual report and failed to pay franchise taxes for 1987 and as a result was not in good standing from December 1, 1987 until it was dissolved by Administrative Dissolution in May of 1988 (R.2 at 54). The Water Drinkers maintain that because K/C was dissolved by administrative dissolution during the application approval process under Ill. Rev. Stat., Chap. 32, Section 12.40, K/C should not have been allowed to file the application for the landfill. K/C says that once it was aware it was delinquent in paying the franchise fee and annual report it

acted diligently to correct the situation. Further, they maintain that the K/C was not dissolved until after April 28, 1988.

The petitioner does not attempt to argue that the applicant's status of "not in good standing" during the application review period affects the Commissioners' jurisdiction or the fundamental fairness of the hearings. Instead, it argues that it is against public policy to grant such an entity the authority and responsibility associated with siting a regional pollution control facility. The Board is not empowered to review the Commissioners' decision on public policy issues that are not elaborated by the Act. Therefore, the Board maintains it is not required to address the issue of corporate standing in this opinion. However, had the Board determined that it should make a finding on this issue, it would have found in favor or the applicant.

Ill. Rev. Stat., Chapter 32, Section 12.40(c) sets forth the consequences of a dissolution:

> "12.40 Procedure for administrative disolution.
>
> (c) The administrative dissolution of a corporation terminates its corporate existence and such a dissolved corporation shall not thereafter carry on any business, provided however, that such a dissolved corporation may take all action authorized under Section 12.75 or necessary to wind up and liquidate its business and affairs under Section 12.30."

In this matter, the corporation had not been dissolved by the Secretary of State by April 28, when the County Board hearings were concluded. K/C was listed as "not in good standing" during part of the application period, however, this status would not prevent K/C from pursuing the application and participating at hearing before the Board.

In the alternative, Chapter 32, Section 17.45, which involves reinstatement after administrative dissolution, states in pertinent part:

> (c) When a dissolved corporation has complied with the provisions of this Section, the Secretary of State shall issue a certificate of reinstatement.
>
> (d) Upon the issuance of the certificate of reinstatement, the corporate existence shall be deemed to have continued without

> interruption from the date of the issuance of the certificate of dissolution, and the corporation shall stand revived with such powers, duties and obligations as if it had not been dissolved; and all acts and proceedings of its officers, directors and shareholders, acting or purporting to act as such, which would have been legal and valid but for such dissolution, shall stand ratified and confirmed.

A certificate of reinstatement was issued for K/C on June 14, 1988. The final decision of the Commissioners was made after K/C's corporate status was reinstated. As a result, the actions with respect to the approval of the application for a landfill would be ratified and confirmed for any period during which the corporation was dissolved.

Having found that the Commissioners had jurisdiction, held hearings that were fundamentally fair and that the decision on the criteria under 39.2 of the Act was not against the manifest weight of the evidence, the Board must affirm the Commissioners' decision to approve K/C's application. The Water Drinkers' petition to reverse or remand the Commissioners' decision is denied.

ORDER

The June 29, 1988 decision of the Wabash County Board of Commissioners granting site-suitability approval to K/C Reclamation, Inc., for the applicant's proposed landfill is hereby affirmed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111½, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 24th day of May, 1989, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk,
Illinois Pollution Control Board