ILLINOIS POLLUTION CONTROL BOARD
October 16, 1992

STEPHEN A. SMITH, d/b/a ABC SANITARY HAULING, JOHN APPL, d/b/a APPL SANITARY SERVICE, LAWRENCE W. BOLLER II, d/b/a AREA GARBAGE SERVICE, CHARLES H. MILLER, d/b/a C.H. MILLER SANITARY, CHRIS JOHNSON, d/b/a CHRIS'S SERVICE CO., EDDIE L. COOK, SR., d/b/a COOK'S SANITARY HAULING, DON CORY, d/b/a CORY SANITARY HAULING, RONALD E. HAYDEN, d/b/a HAYDEN SANITARY SERVICE, GORDON FICKLIN, d/b/a ILLINI SANITARY SERVICE, CHRIS YAGER, d/b/a KLEAN-WAY DISPOSAL, GEORGE McLAUGHLIN, d/b/a McLAUGHLIN SANITARY, CHERYL MANUEL, d/b/a ROLLAWAY WASTE, RONALD W. MANUEL, d/b/a RON MANUEL SANITARY, RUSSELL SHAFFER, d/b/a SHAFFER SANITARY CO., WILLIAM C. UDEN, d/b/a UDEN & SONS SANITARY HAULING, and WILLIS SANITARY HAULING, INC.,	)	PCB 92-55 (Landfill Siting Review)
Petitioners,	)	
v.	)	
CITY OF CHAMPAIGN, ILLINOIS, INTERGOVERNMENTAL SOLID WASTE DISPOSAL ASSOCIATION, and XL DISPOSAL CORPORATION,	)	
Respondents.	)	

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on two motions. On September 16, 1992, petitioners Steven A. Smith, d/b/a ABC Sanitary Hauling, et al. (collectively, petitioners) filed a motion for reconsideration of the Board's August 13, 1992 decision in this matter. Respondent the City of Champaign (Champaign) filed a response in opposition to that motion on September 29, 1992. On September 30, 1992, respondent XL Disposal (XL) filed its response to the motion for reconsideration, along with the appearance of its substitute counsel. On October 1, 1992, Jeffrey W. Tock, attorney of record for XL and respondent Intergovernmental Solid Waste Disposal Association (ISWDA) filed a motion to withdraw as counsel for XL. That motion to withdraw is granted. ISWDA has not filed a

response to petitioners' motion for reconsideration.

Petitioners ask the Board to reconsider its August 13, 1992 opinion and order in this matter. In that August 13 decision, the Board found that the City of Champaign failed to take final action on the September 16, 1991 application for site approval filed by ISWDA and XL within 180 days of the filing of that application. Therefore, the Board concluded that, pursuant to Section 39.2(e) of the Environmental Protection Act (Act) (Ill.Rev.Stat. 1991, ch. 111½, par. 1039.2(e)), the application is deemed approved. Petitioners raise several arguments in support of its request for reconsideration. So that the Board may address those claims, the motion for reconsideration is granted.

Initially, the Board notes that Champaign argues that the Board has no jurisdiction to consider motions for reconsideration, beyond the Board's statutory 120-day decision deadline. Champaign contends that because the statute has no provision for extending the Board's decision deadline by the mechanism of a motion for reconsideration, the Board may not consider such motions. Champaign notes that the appellate court has previously addressed this issue, in Citizens Against the Randolph Landfill (CARL) v. Pollution Control Board (4th Dist. 1988), 178 Ill.App.3d 686, 533 N.E.2d 401, and held that the filing of a motion for reconsideration does stay the time for appeal. However, Champaign asserts that the CARL decision is not "well argued", because it allows a Board regulation to overrule a specific statutory time limit. Thus, Champaign urges the Board to find that it has no jurisdiction over the motion for reconsideration.

The Board finds that it does have jurisdiction to rule upon the instant motion for reconsideration. The CARL decision clearly holds that where a statute or rule permits the filing of motions for reconsideration which extend the time period in which to request judicial review, such motions are part of the administrative review process. Thus, the filing of such motions does not affect the finality of the Board's opinion and order in the case. (CARL, 533 N.E.2d at 405.) Two other appellate court decisions reject contentions that the Board may not hear motions for reconsideration after a decision deadline has passed. (Mathers v. Pollution Control Board (3d Dist. 1982), 107 Ill.App.3d 729, 438 N.E.2d 213, 221; Modine Manufacturing Co. v. Pollution Control Board (2d Dist. 1976), 40 Ill.App.3d 498, 351 N.E.2d 875, 877-878; cf. Waste Management of Illinois v. Pollution Control Board (1991), 145 Ill.2d 345, 585 N.E.2d 606.) Therefore, the Board reaffirms its earlier finding that it may consider a motion for reconsideration after the expiration of a statutory decision deadline. (McLean County Disposal Company, Inc. v. County of McLean (March 10, 1988), PCB 87-133, 87 PCB 13, aff'd CARL v. Pollution Control Board (4th Dist. 1988), 178

Ill.App.3d 686, 533 N.E.2d 401.)

Petitioners first contend that the Board erred in "refusing to conduct a factual review of the record relating to the nine statutory criteria", and that the Board incorrectly overruled that part of its earlier decision in Board of Trustees of Casner Township v. County of Jefferson (January 10, 1985 and April 4, 1985), PCB 84-175 and PCB 84-176 (Cons.) (Casner Township) which held that the Board would review the record in "deemed approved" cases using the manifest weight of the evidence standard. Petitioners contend that the Board denied them fundamental fairness and due process of law by sua sponte deciding not to conduct a factual review of the record "where no party in this case had argued that such a factual review was inappropriate, where the Board gave the parties absolutely no notice that it was considering such action, and where the parties were given no opportunity to brief the issue of whether a factual review should be provided." (Motion at 2.)

The Board, as an administrative agency charged with applying statutes and regulations, has the inherent authority and responsibility to review its past decisions for conformance with the law. Petitioners have not cited any authority, nor has the Board found any, for the contention that a sua sponte reversal of a prior Board decision somehow denies petitioners fundamental fairness and due process of law. Where the Board reviews a past decision and finds an error, the Board is under no obligation to repeat that error simply because none of the parties has raised the issue.[1]

Additionally, as we pointed out in our August 13 decision, the statements in Casner Township that the Board would review a deemed approved case on a manifest weight of the evidence standard was, in essence, dicta and not controlling law. The January 10, 1985 order in which that statement was made focused mainly on whether the Board had any authority to even consider an appeal of a deemed approved case. We found that the Board did have such authority. When making the final decision in the case, on April 4, 1985, the Board held that procedural irregularities at the local hearing rendered the proceedings fundamentally unfair, and remanded the case to the local decisionmaker. Thus, the Board was never actually faced with a decision whether to review the "factual record".

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[1] The Board also notes that even if we had felt it advisable, upon discovery of the question, for the parties to brief the issue, it would have been impossible to issue a briefing order, receive briefs, and render a final decision within the statutory deadline for Board decision.

In any event, petitioners have had the opportunity, in their motion for reconsideration, to raise their arguments in support of a Board review of the record. The Board is not persuaded by those contentions. Petitioners have not explained how it is possible to apply a manifest weight of the evidence review to a non-existent decision. (See the Board's August 13, 1992 opinion and order at page 10.) As Champaign points out, Section 40.1 provides for a review of the local decision, and for a review of jurisdiction and fundamental fairness, not for making an initial determination as to what the record shows. The statute and the accompanying case law are clear that this Board's function is to review the local decision, not to make an initial determination as to whether the applicable criteria of Section 39.2(a) have been met. (See, e.g., File v. D & L Landfill (5th Dist. 1991, 219 Ill.App.3d 897, 579 N.E.2d 1228; McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26.) Petitioners have continued to confuse a "deemed approved" situation, in which the legislature provided for an automatic "deemed approved" situation where final action is not taken within 180 days, with an actual decision on the merits by a local board. This confusion creates the instant situation, where petitioners argue for a "factual review", when petitioners are really asking the Board to make a de novo decision.

Petitioners also contend that the Board's decision not to review the factual record in deemed approved cases will "emasculate" the public's right to participate in the hearing process. Petitioners assert that because a local decisionmaker will be able to insulate itself from a factual review by refusing to make a timely decision, the hearings will be rendered meaningless. Again, this argument ignores the statutory scheme established by the legislature. Section 39.2(e) clearly provides that if a local decisionmaker fails to take final action within 180 days, the applicant may deem the request approved. "Deemed approved" is the result provided for by the legislature, and this Board cannot change that outcome.[2] As to petitioners' claim that the Board's decision has greatly increased the likelihood that the appellate court will be required to reverse and remand the matter to the Board for a factual review, the Board points out that the cases cited by petitioners involved situations where the local decisionmaker did take action in a timely manner. Therefore, those cases do not address the situation presented here. The Board finds no indication in those appellate decisions that an appellate court will require that the Board conduct a factual review and decision where a local government has failed to do so.

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[2] The Board notes that local decisionmakers, who are elected officials, will have to live with any failure to take final action within the decision deadline.

Next, petitioners state that they are aware of the Board's recent budget concerns, which were discussed in two issues (June 22, 1992 and July 8, 1992) of the Environmental Register, the Board's newsletter. Petitioners assert:

> It would appear that the Board's decision to abandon any factual review of the record in deemed approval [sic] cases is a convenient way of reducing its workload, and therefore addressing budget concerns. Obviously, petitioners are not in a position to know whether budgetary constraints were actually involved in this decision in any way, although the timing of events certainly leads to that inference. If budgetary matters were a factor, however, this Board should reconsider this issue completely apart from its own financial concerns. (Brief at 4.)

The Board is appalled at this attack on its integrity. As in all cases decided by the Board, we took the action which we believe to be legally correct. The Board's decision was not influenced in any way by budget concerns or any other event outside the record in this case. We question whether petitioners would have made the same accusation to a court, even though the continuing financial concerns of the court system are also public record.

Petitioners next state that they rely on their post-hearing briefs to support all of the other issues raised by their motion for reconsider, with several additional comments. Because a motion for reconsideration, by its very nature, is the procedure by which petitioners are to argue how the Board's decision is erroneous, the Board will not address the issues not specifically argued in the motion for reconsideration.

As to the claim that Champaign improperly accepted and filed the application for site approval, petitioners contend that this Board "concluded that the petitioners could have presented proof that the application did not comply with the county solid waste management plan, regardless of what the city ordinance required from the county and regardless of the county's response." (Brief at 5.) Petitioners maintain that the Board overlooked the fact that the burden of proving compliance with the plan was on the applicants, and that the application relied on the self-serving determination of compliance made by ISWDA.

Petitioners have misconstrued the Board's decision on this issue. In their post-hearing briefs, petitioners contended that the application was improperly filed, alleging that ISWDA did not comply with a Champaign city ordinance requiring that the applicant include a statement that the applicant had presented the proposed site to the county for a determination of compliance with the solid waste management plan. In our August 13 opinion and order, this Board noted that we have previously held that we

cannot compel enforcement of a local ordinance, and that our review of the sufficiency of an application is limited to jurisdictional issues. (August 13 opinion and order at 4-5.) We also stated that where a petitioner contends that an alleged failure to comply with a local ordinance rendered a proceeding fundamentally unfair, the Board will review the alleged failure on that basis. Assuming that petitioners' statement that they were "misled" by the absence of Champaign County's imprimatur raised a fundamental fairness claim, the Board found that petitioners failed to demonstrate any prejudice from the absence of the statement. Only in that context did this Board point out that petitioners could have presented proof that the application did not comply with the county solid waste management plan. (August 13 opinion and order at 5.)

Petitioners also object to the Board's statement that it is the expiration of the 180-day deadline which had legal effect in this case, not the votes themselves. Petitioners contend that this statement creates serious problems for the future, since no vote will be conclusive until 180 days has passed because of the possibility of reconsideration. Petitioners claim that participants will be unsure as to when the time for filing an appeal begins, but do not explain how this problem renders the Board's August 13 decision erroneous. The Board simply notes that such a situation is no different than actions at the Board level or in the courts, where one may be unsure whether to file a motion for reconsideration or an appeal. The Board does point out that the filing of an appeal takes jurisdiction from the lower body.

Next, petitioners argue that the Board "basically ignored" the fundamental fairness issue presented by a circuit court decision voiding the contract between ISWDA and XL. Petitioners maintain that it is difficult to understand why the Board would want to "stamp its approval" on an application when it is obvious that if the site is ever used, neither the operator nor the facility was scrutinized. Petitioners conclude this argument by stating "[i]t appears that this Board either does not care what is going on or does not want to take the time to figure out what is going on." (Brief at 6.)

The Board rejects petitioners' assertions that we either do not care or do not want to take the time to "figure out" what is involved in a case before us. In regard to this issue, the Board found that this contention does not raise a fundamental fairness issue, because the Board is to review the fundamental fairness of the procedures used by the city council. The voiding of the contract between ISWDA and XL was in no way related to anything the Champaign city council did or did not do. (August 13 opinion and order at 8.) Petitioners have not pointed to any authority for this Board to review "fundamental fairness" of anything other than the local decisionmaker's procedures.

Finally, petitioners assert that "it is apparent that this Board did not understand the constitutional claims" raised by petitioners in their post-hearing briefs. (Brief at 6.) However, the Board continues to believe that its analysis of the constitutional issues was correct. Petitioners have not cited any authority for their contention that the existence of a local "flow control" ordinance creates a property interest that gives petitioners due process protections in a local siting proceeding. (August 13 opinion and order at 9.)

In sum, after considering the issues argued by petitioners in their motion for reconsideration, the Board reaffirms the conclusions in our August 13, 1992 opinion and order in this case.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill.Rev.Stat. 1991, ch. 111½ , par. 1041) provides for the appeal of final Board orders. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill.Adm.Code 101.246 "Motions for Reconsideration" and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437.)

B. Forcade dissented and J. Marlin abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 16th day of October, 1992, by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board