ILLINOIS POLLUTION CONTROL BOARD
September 13, 1989

WASTE MANAGEMENT OF ILLINOIS, INC., a Delaware Corporation,	)	
Petitioner,	)	
v.	)	PCB 89-28
VILLAGE OF BENSENVILLE, a municipal corporation,	)	
Respondent.	)	

ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board upon an August 25, 1989 motion to reconsider filed by the Petitioner, Waste Management of Illinois, Inc., ("WMI"). Although the Board has not as yet received a response to the motion from the Respondent, the Board will proceed today to deny WMI's motion; this will result in no prejudice to the Respondent.

WMI has moved the Board to reconsider and vacate its decision of July 13, 1989 affirming the denial of WMI's application for site location approval of a solid waste transfer station by the Village of Bensenville. In support of its motion, WMI requests that the site location be deemed approved as a result of the Board's "failure to take final action on this appeal pursuant to Ill. Rev. Stat. ch. 111-1/2, Sec. 1040.1(a)," or in alternative, reverse the Village's decision on criterion one because it is against the manifest weight of the evidence.

In support of its first argument, WMI argues that the test for determining the finality of an administrative order is (1) whether rights or obligations have been determined or legal consequences will flow from the Agency's action and (2) whether the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly progress of adjudication. WMI notes that the Board's decision appears to have met the first prong of this test, but argues that the second prong has not been met.

WMI argues first that because the Board stated in its July 13, 1989 Order that the Opinion would be issued on August 10, 1989 and that the time period for reconsideration would begin to run on that date, the Board did not intend its Order to have a

legal effect until the August 10, 1989 Opinion was entered. Such is not the case. The Board intended its July 13 Order to fully satisfy the "final action" requirement of Section 40.1(a) of the Environmental Protection Act (Act). The Board's July 13, 1989 Order is "final action" in that it is the official document affirming the decision of the Village of Bensenville. This Order was entered in a timely fashion and constitutes an appealable decision. That the Board's Opinion explaining this Order was entered later does not detract from the finality of this Order. Under normal circumstances, Board Opinions and Orders are issued simultaneously. However, certain situations arise wherein the Board is unable to publish the reasons for its decision at the same time as the decision. In these exceptional situations, the Board's longstanding practice has been to adopt the final decision and then publish the reasons for that decision at its next scheduled Board meeting.[1] The Board firmly believes that this practice is consistent with the Act's mandate of a 120 day decision. Moreover, that the July 13, 1989 Order states that the reconsideration period would not run until after August 10, 1989 likewise does not render the July 13, 1989 Order nonfinal. That statement was added to the Board's decision simply to clarify that if the Petitioner chose to file a motion to reconsider, which would thereby extend the time for the filing of a petition for review with the appellate court,[2] the Board would consider such a motion timely if filed prior to 35 days from the date of the Opinion. This was done specifically to afford the Petitioner sufficient time to formulate its arguments for reconsideration. This statement was in no way intended to extend the date by which the Board was required to take final action.

WMI argues next that had it filed a notice of appeal immediately after the July 13, 1989 Order, subject matter jurisdiction of the application would have vested in the appellate court leaving the Board without the authority to enter its subsequent opinion. Consequently, WMI argues that judicial review of the July 13, 1989 order would have disrupted the Board's administrative decision-making process. The Board does not agree. The Board's decision-making process was completed on July 13, 1989--its administrative decision-making process had reached the stage where judicial review would not disrupt the

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[1]Because the Board's July 13, 1989 decision was adopted by a 4-3 vote and because one of the majority voters was on a long-scheduled vacation during the next scheduled Board meeting, the Opinion following the July 13, 1989 decision could not be confirmed until August 10, 1989.

[2]See Citizens Against the Randolph Landfill (CARL) v. Illinois Pollution Control Board, the County of McLean, and McLean County Disposal Company (4th Dist., 1988), 127 Ill.Dec. 259, 533 N.E.2nd 401.

orderly progress of adjudication. The Board's decision was timely entered on July 13, 1989. The Board's August 10, 1989 Opinion simply explains the reasons leading to the July 13, 1989 decision--it was the mechanical compilation and publication of those reasons that warranted the additional time. The Board's decision was not in any way changed or modified, nor could it have been. Thus, judicial review could have been had on the July 13, 1989 Order without disruption to the orderly progress of adjudication.

Also, the Board must note that WMI did not file a notice of appeal; therefore, this argument is speculative, at best. The Board notes further that WMI has in this argument misstated the second prong of the test for determining finality of an Order. The second prong is whether the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly progress of adjudication. In this case, the Board issued the Opinion at the next Board meeting at which it was able. The Opinion was issued during the 35 day time period in which the Petitioner could file a motion to reconsider or a petition for review with the appellate court. Thus, adjudication of the application could have continued in an orderly fashion, and no party would have been prejudiced.

WMI next points out that Section 33(a) of the Act requires that the Board state the facts and reasons leading to its decision. Section 33(a) states:

> In all such matters that Board shall file and publish a written opinion stating the facts and reasons leading to its decision.

WMI argues that this section is expressly incorporated into Section 40.1(a) of the Act which governs this appeal. WMI argues apparently that the Board's July 1, 1989 Order does not fulfill this requirement. As a preliminary matter, the Board notes that the incorporation of Section 33(a) into Section 40.1(a) is as follows:

> ***At such hearing the rules prescribed in Section 32 and 33(a) of this Act shall apply, and the burden of proof shall be on the petitioner; however, no new or additional evidence in support of or in opposition to any finding, order, determination or decision of the appropriate county board or governing body of the municipality shall be heard by the Board.***(Emphasis added).

The Board notes that this incorporation of Section 33(a) relates to the hearing before the Board, not to the Board's decision. The Section 40.1(a) language relating to the Board's decision is as follows:

> ***In making its orders and determination under this Section, the Board shall include ion its consideration the written decision of the county board or the governing body of the municipality, the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision. *** If there is no final action by the Board within 120 days, petitioner may deem the site location approved;***

The Board notes that this legislative directive is much less clear in the siting approval ("SB172") (P.A. 82-682, eff. Nov. 12, 1981) cases than in other adjudicative cases before the Board. The Board believes this is so because the records in SB172 cases are often voluminous and involve many complicated issues. 120 days is a short time period in which to review this type of decision of the county board or governing body of a local unit of government. This time period has been shortened all the more by recent appellate court decisions with which the Board must obey. In E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E.2nd 555 (2nd Dist. 1983), the court held that the county board or governing body of a local government need only indicate which of the criteria, in its view, have or have not been met. In cases such as this where the Board has no indication of what persuaded the county board or governing body of a local government, the Board's review of the decision is frustrated and requires more time. Further, a recent appellate court decision, Waste Management of Illinois v. Illinois Pollution Control Board and Lake County Board, 175 Ill. App. 3d 1023, 530 N.E.2nd 682 (2nd Dist. 1988), requires the Board not only to give reasons for its decisions but also to address each and every criterion in issue. This requirement proves useful in appellate review of SB172 cases but also adds additional issues which must be considered in the short time period after delivery of th last brief[3] in which the Board must review an SB172 case.

WMI argues last that if the Board may unilaterally extend its authority to enter a ruling after the statutory decision period, the Board would be allowed to circumvent the timing

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[3]In a typical situation, the Board will have from 15 to 35 business days from the filing of the last brief until the decision must be voted on; here we had 35 business days. That is a short time frame for complicated cases with records of the size common in this type of proceeding. In that period of time the Board Member assigned to the proceeding must complete a draft opinion and order, and circulate that document to determine whether it represents a majority position and what changes must be made to secure majority votes.

provision of the Act to the prejudice of the Applicant. The Board does not dispute this in theory. However, in this case, the Board did not extend its authority to enter a ruling after the statutory decision period expired. The Board entered its decision on July 13, 1989, which is within the required period. There was, thus, no unilateral extension of authority. The Board notes, finally, that WMI cites the case of Illinois Power v. Illinois Pollution Control Board, 137 Ill. App. 3d 449, 484 N.E.2nd 898 (4th Dist. 1985), as it relates to the issuance of a permit by operation of law. The Board has discussed this case in the past and believes that this discussion is applicable here. In A.R.F. Landfill Corporation v. Village of Round Lake Park and Lake County, PCB 87-34, July 16, 1987, the Board distinguished Illinois Power by noting that the Board had clearly admitted that it had not taken final action within the statutory period. Id. at 9. Here, the Board makes no such admission; rather, the Board took its action on July 13, 1989 deciding the case specifically to comply with the decision deadline requirement.

For all of the foregoing reasons, the Board's decision was issued within the required time period. The Board believes that its July 13, 1989 Order satisfies the second prong of WMI's test; on that date the process of administrative decision-making had reached a stage where judicial review would not disrupt the orderly progress of adjudication. WMI's "deemed approved" argument fails. WMI's motion to reconsider is denied as far as this argument is concerned.

WMI's alternate argument, that the Village's decision is against the manifest weight of the evidence, offers no persuasive insights into the record or the Board's decision. Therefore, the Board declines to reverse its decision on this basis.

As a result, WMI's motion for reconsideration is denied.

IT IS SO ORDERED

Board Member J. Anderson dissented and Board Members J. Marlin and J. Theodore Meyer concurred.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985, ch. 111-12, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois established filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 13th day of September, 1989 by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board