ILLINOIS POLLUTION CONTROL BOARD
March 21, 1984

TOWN OF ST. CHARLES, Petitioner, v. KANE COUNTY BOARD AND ELGIN SANITARY DISTRICT, Respondents.	)	PCB 83-228
CITY OF AURORA, Petitioner, v. KANE COUNTY BOARD AND ELGIN SANITARY DISTRICT, Respondents.	)	PCB 83-229
THE KANE COUNTY DEFENDERS, INC., ET AL. Petitioners, v. KANE COUNTY BOARD AND ELGIN SANITARY DISTRICT, Respondents.	)	PCB 83-230

MR. EUGENE W. BEELER, JR., OF BEELER, SCHAD & DIAMOND, AND MR. ROBERT F. FOSTER OF WINSTON & STRAWN, APPEARED ON BEHALF OF PETITIONERS TOWN OF ST. CHARLES AND KANE COUNTY DEFENDERS, INC., ET AL.

MR. STEVEN L. KADDEN APPEARED ON BEHALF OF PETITIONER CITY OF AURORA.

HONORABLE ROBERT J. MORROW, STATE'S ATTORNEY OF KANE COUNTY, ILLINOIS BY MR. DAVID AKEMANN, ASSISTANT STATE'S ATTORNEY OF KANE COUNTY APPEARED ON BEHALF OF RESPONDENT KANE COUNTY BOARD.

MR. RICHARD J. KISSEL AND MR. FREDERICK MOORE, OF MARTIN, CRAIG, CHESTER & SONNENSCHEIN AND MR. LYLE C. BROWN OF GEISTER, SCHNELL, RICHARDS & BROWN APPEARED ON BEHALF OF RESPONDENT ELGIN SANITARY DISTRICT.

OPINION AND ORDER OF THE BOARD (by J. Marlin):

This matter comes before the Board on appeals timely filed pursuant to Section 40.1 of the Environmental Protection Act (ACT) by the Town of St. Charles (Township), the City of Aurora, and the Kane County Defenders, Inc., et al (Defenders). The petitions contest the findings of the Kane County Board (County) granting Section 39.2 approval of site location suitability to a new regional pollution control facility, a non-hazardous sludge landfill of the Elgin Sanitary District (ESD).

The proposed sludge disposal site covers 79 acres at a quarry that has been excavated to a depth of twenty-five feet below grade. The pit itself is 31 acres in area (CR at 75)[1]. It is located northeast of the intersection of McClean Boulevard and Route 31 in unincorporated Kane County (not to be confused with an ongoing gravel pit operation across McLean Boulevard and directly west of the site). The Fox River is south of the quarry. The project is part of Elgin Sanitary District's proposed four step pollution control plan required under the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq). The overall planning area under consideration is approximately 82 square miles with a 1980 population of 132,000 people (Pet. Exh. 9 at 3-1 to 3-3). The area has many industrial waste contributors to its sewage system and a variety of chemicals are expected to be found in the resulting sludge produced by the pollution control process (Pet. Exh. 9 at 3-5, 3-4, 3-7). Approximately 750,000 cubic yards of sludge are expected to be landfilled during the estimated 20 year life of the site (CR at 218).

The ESD proposes to pipe treated sludge to the landfill. The sludge will be dewatered in a building on site and then trucked to the active portion of the landfill where it will be mixed with soil. At the end of each day the sludge will be covered with soil. A leachate collection system will be used to collect any free liquids in the landfill. The leachate and liquids from the dewatering process will be piped back to the treatment plant. After the landfill is full, it will be covered and turned over to the Forest Preserve District. Leachate collection will continue after closure.

Procedural History

The District filed its application request for site approval on August 11, 1983. On September 8 and 12 the supporting technical documents were filed. A public hearing was held before the Executive Committee of the County on

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[1] Reference to the County Record denoted (CR). Reference to the Pollution Control Board Record denoted (PCBR).

September 14. On November 3, they voted to recommend siting approval to the full County Board. Siting approval was granted November 8 by the full County Board by Resolution 83-157. Nine conditions were placed on the approval by the County. On December 9 the Defenders filed a request that the County reopen the record and appeared before the County on December 13 to reiterate their request. The County refused to reopen the record. Petitioners appealed to the Pollution Control Board (Board). These appeals were consolidated by Order dated December 15, 1983. Because of time constraints, oral arguments concerning discovery was permitted at the February 9, 1984 meeting of the Board. Hearings by the Board were held on February 16 and 23, 1984. Applicant waived the decision period until March 21, 1984.

FUNDAMENTAL FAIRNESS

A number of issues were raised in this case which speak to the legislative mandate that the Board consider the fundamental fairness of the proceedings at the County level (Act, Section 40.1(a)). The issues will be discussed sequentially. The public hearing and decision by the County is an adjudicative process and adjudicative due process prevails. E & E Hauling, et al v. Pollution Control Board, et al, 116 Ill. App. 3d 586, 451 NE 2d 555 (2d Dist. 1983), slip op. at 13, 14. The Act provides a standard of fundamental fairness. Act, Section 40.1 (a) (b). Petitioners must also show a resultant prejudice. E & E Hauling, slip op. at 26.

Petitioners claim that the notice requirement of Section 39.2(b) of the Act, requiring public notice identifying the site be published not less than 14 days prior to the filing of the request, was not met. The notice was published on August 10, one day before the request was filed (SDE Exh. 4). This section also requires written notice to be served on all property owners within 250 feet of the site and on the members of the General Assembly who are from that legislative district. Written notice was sent on July 20. While the Board frowns on late notice to the public, the effect of the late published notice was mitigated by the timely written notices that were sent. The public was well aware of the site and its intended use because of the ongoing Facilities Planning and the recent hearing concerning the Elgin plan under federal law. The petitioners and the public were not prejudiced as to the late notice.

Secondly, petitioners essentially allege that the request to be filed under Section 39.2(c) should include the application and all exhibits and supporting documents. Section 39.2(c)

provides "An applicant shall file a copy of its request with the county board of the county or the governing body of the municipality in which the proposed site is located. Such copy shall be made available for public inspection and may be copied upon payment of the actual cost of reproduction."

The word request is also used in Section 39.2(b) which provides that [n]o later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served..." Furthermore, "[s]uch [published] notice shall state...the date when the request for site approval will be submitted to the county board, and a description of the right of persons to comment on such request as hereafter provided." Request is found in Section 39(d): "At least one public hearing is to be held by the county board...within 60 days of receipt of the request for site approval..." and it "shall develop a record sufficient to form the basis of appeal of the decision..."

The Act and judicial decisions are silent as to the definition of the word request. The applicant has relied on the plain meaning of the word and filed only a 2 page document entitled a request. Subsequently, supporting documents were filed 2-6 days before the hearing.

The County has the responsibility to conduct SB 172 proceedings and develop procedures to be followed during the process. The County chose to accept the two page document as an acceptable request, although it could have required much more documentation. No one at the public hearing complained that inadequate information had been filed prior to the hearing, that more time was required to study documents or that another hearing was needed. In addition, numerous documents relating to the project were on file with ESD and were available for public inspection. The published notice stated that additional information was available from ESD (SDE Exh 4). In fact, Defenders obtained documents from ESD prior to the hearing. The Board acknowledges that a potential problem exists as to how much information a request should contain, but holds that the County should make such determinations consistent with the development of "a record sufficient to form the basis of appeal of the decision." (Act, § 39.2(d))[2] If only the two page request had been filed and access to substantial additional information addressing the six criteria had been denied to the public for study prior to the close of the hearing process, the Board would be inclined to remand the case to the County.

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[2]The Board notes that in Waste Management v. Lake County Board, 50 PCB 189 (Dec. 30, 1982) the County had passed a resolution requiring certain documents to be filed initially.

The 30 day written comment provision of Section 39.2(c) provides "Any person may file written comment with the county board or governing body of the municipality concerning the appropriateness of the proposed site for its intended purpose. The county board or governing body of the municipality shall consider any comment received or postmarked not later than 30 days from the date of receipt of the request in making its final determination."

At the County level ESD objected to the admissibility of municipal resolutions and 7,513 signatures because they were filed after 30 days of the request filing. Petitioners assert that the decision of the County to prohibit any comments after 30 days was improper. The policy of the County was to consider written comments submitted both within the 30 day period and at the public hearing (County Brief at 4-5). Section 39.2(d) of the Act provides that a public hearing must be held within 60 days of the filing of the request. Petitioners are correct in stating that the 30 day period is a minimum, not a maximum, and that written comments filed after the 30 day period may be considered by the County at its discretion. Browning Ferris Industries v. Lake County Board et al, 50 PCB 66 (Dec. 2, 1982). The constraint is on the County to give at least a 30 day written public comment period. Although the County held to the statutory minimum number of days, a better course of action might have been to hold the public comment period open at least until the public hearing. The County has committed no error. While some written comments may not have been received, there appears to have been no fundamental unfairness.

Petitioners next allege that they were denied fundamental fairness because of the procedures used at the hearing. The witnesses for ESD were allowed to testify and cross-examination was allowed after all ESD witnesses were finished. Petitioners misquote from the County Record at 20, 21 when they imply that the hearing officer's ruling "that the testimony of any witnesses not in attendance during the entire proceeding would be stricken" (Pet. Brief at 20). This was a ruling to ensure that once all ESD witnesses had testified, that they would be available for cross-examination. In light of the absence of witnesses for the other side it appears there was no fundamental unfairness as to this procedure. Procedurally, another question was raised as to whether anyone had been prevented from testifying. At the PCB Hearings, no one gave testimony that they were so prevented. In fact, petitioners had hired a consultant who was present at the county hearing with a prepared report (PCBR at 73-75, 387). This report was never introduced by petitioners.

Newly discovered evidence is claimed by petitioners to have been discovered, necessitating the County to reopen the hearing, and that the denial to reopen resulted in fundamental unfairness. The State Water Survey Report (Report see Pet. Exh. #3 at PCB level) is alleged to be newly discovered evidence. It is well settled that "newly discovered evidence must be evidence in existence of which a party was inexcusably ignorant, discovered after trial. In addition, facts imply reasonable diligence must be provided by the movant. The evidence must be material, and not cumulative or impeaching and it must be such as to require a different result." NLRB v. Jacob E. Decker & Sons, 569 F. 2d 357, 363-4 (5th Cir. 1978). See also Village of Western Springs v. Pollution Control Board, 107 Ill. App. 3d 864, 438 N.E. 2d 458 (1st Dist. 1982). Petitioner cites the above decisions yet fails to note that the conclusion of the Report as read into the hearing record by an official of one of the petitioners, the City of Aurora (CR at 141). In fact, the predecessors of the Kane County Defenders, Inc., a petitioner herein, were the Fox Valley Residents Against the Sludge Dump (FVR), who not only were at the public hearing, but were represented by counsel (PCBR at 430). One of the members testified at the PCB hearings that she knew of the Survey Report on September 2, but did not ask for a copy until after the County hearing (PCBR at 394). The Report was not newly discovered evidence. There was no motion to introduce it as an exhibit into the county record and no motion to continue the hearing. The Aurora city official was asked to introduce the Report but he declined. The authors of the Report were present at the County hearing and identified themselves, but they did not introduce it. The claim espoused by the petitioners is in the nature of a self-inflicted wound. The Offer of Proof as to this issue is rejected. There was no need to reopen the hearing. There was no denial of fundamental fairness.

Concurrently, the allegation that the Report was withheld by ESD and/or the County must be discussed, and whether there was a duty on one or more of them to introduce the Report. As mentioned before this is an adjudicative proceeding, and adjudicative due process is required. E & E Hauling, supra. ESD was a party in an adjudicative proceeding before an adjudicative tribunal, the County. In a judicial forum, there is no general duty on a party to disclose negative information. There is no difference in this proceeding. The County is the decision-maker, not a party, and has no duty to submit documents for a party in an adjudicative proceeding. Petitioners further allege that the Director of the Kane County Environmental Department, for whom the Report was prepared, was neither part of the County Board nor part of its staff, citing Heller v. Jackson County Board,

71 Ill. App. 3d 31 (5th Dist. 1979), and therefore, had a duty to submit the Report. The Director is appointed by and acts as assistant to the County Board. The Director serves on a County Board committee with the County Board members (PCBR at 639). In Heller, the official was an appointed assessor, whose office and duties are separate and apart from the County Board. Therefore, the Director is considered staff of the County Board and has no duty, as part of an adjudicative tribunal, to submit the Report. The relation of the Director to alleged ex parte contacts will be discussed below.

Ex parte

Another aspect of whether there was fundamental unfairness in a proceeding is determining if there was any ex parte contacts. These contacts have been defined many times and in varying ways. Essentially, they are those unnecessary and avoidable contacts that take place without notice and outside the record between one in a decision-making role and a party before that tribunal E & E Hauling, supra, slip op. at 29; Town of Ottawa, et al v. LaSalle County Board, et al PCB #83-135/136 (Opinion and Order January 26, 1984 at 6), on appeal Town of Ottawa, et al v. Pollution Control Board (Petition for Review filed February 29, 1984). Ex parte contacts are frowned upon because they (1) violate statutory requirements of public hearings, and concomitant rights of the public to participate in the hearings, (2) may frustrate judicial review of agency decisions, and (3) may violate due process and fundamental fairness rights to a hearing. The impropriety of ex parte contacts in administrative adjudication is well established. E & E Hauling, supra, slip op. at 29, citing: U. S. Lines v. Federal Maritime Commission, 584 F. 2d 519, 536-42 (D.C. Cir. 1978); PATCO v. Federal Labor Relations Authority, 685 F. 2d 547, 564-66 (D.C. Cir. 1982); Sangamon Valley Televisions Corp. v. United States, 106 U.S. App. D.C. 30, 33, 269 F 2d 514, 520 (1962); Fender v. School Dist. No. 25, 37 Ill. App. 3d 736, 745 (1976).

Essentially, there were many contacts before and after the hearing of September 14.

Before the Hearing

The first contact alleged is a restaurant meeting on September 1 between ESD and approximately 6 of the 26 County Board members. ESD made a presentation as to what their filed request was about regarding the sludge disposal facility (PCBR at 660). There was no notice to Petitioners (Pet. Brief at 7). One County Board member testified that she

did not recall what technical materials were there, but that there were drawings used which were subsequently used at the September 14 hearing (PCBR at 663). General questions about the plan were asked and answered (PCBR at 663). It has been stated that this is an adjudicative proceeding, E & E Hauling, supra which necessarily begins at the time of filing of the request for approval. Petitioners claim that because these contacts were after the request filing and there was no notice to them, that these were ex parte contacts. ESD states that the County was not shown the documentary exhibits which were later filed prior to the hearing and there was no new evidence presented September 1 that was not presented at the hearing (Resp Reply Brief at 15). Respondent ESD asserts the following:

1) that all the discussion at the restaurant meeting was repeated at the hearings; and thus no denial of opportunity to cross-examine;

2) the E & E Hauling opinion declaring the site location suitability process adjudicative had only recently been filed and was not generally known;

3) the meeting was held in good faith; and

4) "that the County is primarily a legislative body which ha[d] been thrust into an unusual adjudicatory role." (Resp. Brief at 16).

The Board notes that E & E Hauling was filed on June 15, 1983. Pursuant to that holding, the site location suitability process is adjudicatory from the time the request was filed until the decision date. Thus, where a party before an adjudicative tribunal presented evidence off the record with no notice to the other interested parties, and the contact was unnecessary and avoidable, the contact, as here, was ex parte. Although the process at the local level has no other formal "party" to give notice to, the applicant should know better than to meet with the adjudicative tribunal before the hearing.

The next question would be whether these ex parte contacts irrevocably tainted the proceedings so as to require reversal of the decision ofthe County. E & E Hauling followed the PATCO standard and stated that a court must consider

> "whether, 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 obligated to protect. In making this determination, a number of considerations may be relevant: the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose. Since the principal concerns of the court are the integrity of the process and the fairness of the result, mechanical rules have little place in a judicial decision whether to vacate a voidable agency proceeding. Instead, any such decision must of necessity be an exercise of equitable discretion." PATCO v. Federal Labor Relations Authority, 685 F. 2d 547, 564-65 (D.C. Cir. 1982).

A court will not reverse an agency's decision because of improper ex parte contacts without a showing that the complaining party suffered prejudice from these contacts. Fender v. School Dist. No. 25, 37 Ill. App. 3d 736, 745.

Herein, the County Board members that represented Elgin's service area were invited (Resp Brief at 16, ftn. 7) and 6 members attended. The question becomes whether the decision-making process of the agency has been shown to be irrevocably tainted. It appears no evidence was presented at this meeting that was not later introduced at the public hearing. The presentation was of a general nature. Petitioners had an opportunity to respond to the evidence, albeit two weeks later at the hearing. The County Board members that attended the restaurant meeting are listed on the PCB Hearing Record at 661. Referring to the County Resolution 83-157, all 6 Elgin service area members voted for siting approval. Final vote was 16 to 9 for approval. The City of Elgin was for the facility and introduced a resolution into the County record (SDE Exh. 20). It appears that these 6 members would have voted affirmatively anyway. There has not been a sufficient showing by petitioners that the decision-making process has been irrevocably tainted, therefore, there has been no undue prejudice. While the Board does not condone such contacts, there will be no reversal here. Fender, supra.

As to the contact between the County Board member and a member of the Board of Trustees of Elgin this occurred during the pendency of an adjudicative proceeding, off the record without notice to interested parties, and was an unnecessary and avoidable contact. The Trustee asked the County Board member to vote for siting approval. This was an ex parte contact, but there has been no irrevocable taint shown of the decision-making process or undue prejudice. This County Board member voted to deny siting approval (Co. Resolution 83-157).

Petitioners allege that the phone conversations betwee a County Board member and the general manager of ESD were ex parte. The County Board member questioned whether the site would pollute the Fox River (PCBR at 632-5). Again, these are ex parte contacts for the reasons discussed above, although there is no showing of irrevocable taint of the decision-making process.

There is an allegation that the Director of the Environmental Department was engaged in ex parte contacts with the County Board members. As the Board has noted before in this opinion, the Director is considered staff of the Bounty Board and therefore, there have been no ex parte contacts between them. Where the County, normally sitting as a legislative body, has entered the adjudicative arena, the subject matter necessarily dictates that the County members be able to consult with others such as the Director for direction.

After the Hearing

The ex parte doctrine normally focuses on looking at contacts between a party and a member of an adjudicative tribunal. E & E Hauling, Ottawa/Naplate, supra. Herein, there were contacts in the parking lot between the County Board member, State Water Survey (Survey) employees, and the Director of the County Environmental Department. The applicant was not present. The ex parte doctrine now switches focus to look at the contacts between a member of the adjudicative tribunal and one not technically a party, where the Contacts relate to the substance of a pending adjudicative case. The discussions did relate to the substance of the pending case and occurred without notice and outside the record. Although the County Board member did ask questions relating to the substance of the matter, the concern appeared also to be procedural--whether to reopen the hearing (PCBR at 642-4). This testimony was in an Offer of Proof beginning at 642. As far as the Offer concerns conversations between the County Board member and the Survey people, it will be admitted. The Hearing Officer is correct in denying

admission of the conversation between the County board member and the Director of the Environmental Department of the County. This part of the Offer of Proof is denied as delving into the mental processes of the County Board members. Inquiry into the conversation between the Director and the Survey people is proper. One of the Survey people testified that the conversation did take place, although the substance of the conversation was properly not allowed as it related to the position of the Survey as to the sludge facility (PCBR at 543-4). The other Survey representative also stated that the parking lot discussion took place (PCBR at 589-91). The Director testified that he questioned the Survey representatives as to why they did not submit the Report at the public hearing. All four participants seem to differ as to what was said. With the Director, it appeared to be a procedural problem (PCBR at 223). As to the conversation between the County Board member and the Director this is clearly impermissible as infringing on the mental processes of the County (PCBR at 225). In summary, based upon the record, the parking lot incident was an ex parte contact. The County Board member knew about the ex parte contraints (PCBR at 643) and the evidence in the record demonstrates that conversations were had concerning the substance of the pending case. There has been insufficient proof to show any irrevocable taint of the decision-making process.

Respondent alleges ex parte contacts by petitioners occurred on numercus occasions (Resp. Brief at 20). One of the petitioners' members telephoned two different County Board members between the hearing and the date of decision and expressed his view (PCBR at 86-7). This is ex parte because although not technically a party at the County level, he had rights which he subsequently exercised to become a party on appeal. His inquiry dealt directly with the substance of a pending matter before the adjudicative tribunal and with the members of that tribunal without notice and off the record. Although the two County members voted to deny siting approval (Resolution 83-157), there is insufficient evidence to show that this contact irrevocably tainted the decision-making process since the majority of the County Board voted to approve the site location suitability.

MANIFEST WEIGHT

The legislature has mandated in Section 39.2(a) that the County or local governing body consider six criteria when decid ng to grant or deny site location suitability of any new regional pollution control facility and give reasons therefore:

"The County Board...shall approve the site location suitability for such new regional pollution control facilities only in accordance with the following criteria:

(I) the facility is necessary to accommodate the waste needs of the area it is intended to serve;

(II) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

(III) 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;

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

(V) 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

(VI) the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows."

Section 40.1(b) in conjuction with Section 40.1(a) provides that the burden of proof as to each of the criteria in on the petitioner. The Pollution Control Board hearing is to be based exclusively on the record developed before the County. The standard of evidence to be used by this Board is the manifest weight of the evidence standard. The decisions of the County are to be reversed only if they are against the manifest weight of the evidence. City of East Peoria, et al., v. Pollution Control Board, et al., 117 Ill. App. 3d 673, 452 N.E. 2d 1378 (3rd Dist 1983) citing Landfill, Inc., v. Pollution Control Board, 74 Ill. 2d 541, 387 N.E. 2d 258 (1978) and Mathers v. Pollution Control Board, 107 Ill. App. 3d 729, 438 N.E. 2d 213 (1982). Accord, E & E Hauling, supra, citing, inter alia, Wells Mfg. Co. v. Pollution Control Board, 73 Ill. 2d 226 (1978).

Criterion #1

ESD is seeking a method for disposing of its sewage sludge. Currently the sludge is stockpiled at its west and south regional plants (Pet. Exh. 9 at 3-10). Several alternate disposal methods were studied by ESD including incineration, land application, transporting it out of the area, and landfill burial (Pet. Exh. 9, Sec. 5; Pet. Exh. 10). Most alternatives to landfilling were determined to be too costly and several presented greater operational, reliability, and environmental problems (Pet. Exh. 9 at Sec. 4; Pet. Exh. 10 - Landfill need). Since 1975 ESD has been planning under the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq) to define the overall wastewater treatment and disposal needs of the area through a four-step pollution control program called Facilities Planning (Pet. Exh. 9 at 1-1). The purposes are twofold: to attain the national objectives of clean water and to receive grant eligibility status (Id.). The overall planning area under consideration is approximately 82 square miles with a 1980 population of 132,000 people (Pet. Exh. 9 at 3-3).

The Second District Appellate Court recently interpreted criterion #1 in E & E Hauling v. Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E. 2d 555 (2nd Dist. 1983). In that case the Village of Hanover Park had claimed that E & E Hauling did not prove to the DuPage County Board that the facility was necessary. In evaluating this claim the Second District stated:

> On this record the County was not in error in finding that petitioners met their burden to show that the facility was necessary to accommodate the waste needs of the area. The use of "necessary" in the statute does not require applicants to show that a proposed facility is necessary in absolute terms, but only that the proposed facility is "expedient" or "reasonably convenient" vis-vis the area's waste needs. (Foster & Kleiser v. Zoning Bd. of Appeals, 38 Ill. App. 3d 50, 53 (1976), Illinois Bell Telephone Co. v. Fox, 402 Ill. 617, 631 (1949)). It would be unreasonable to require petitioners to prove that every other potential landfill site in the region is unsuitable; such a construction would prevent any landfill development if more than one suitable site could be found. This construction of the statute should be avoided as unworkable and implausible. Illinois Bell Telephone Co. v. Fox, 402 Ill. 2d 617, 631 (Slip Op. at 35).

Clearly, ESD has shown not only that the site is expedient and reasonably convenient to satisfy the waste needs of the area, but they have shown that it is necessary to accommodate the waste needs of the 82 square mile area studied under federal Facilities Planning.

Recently the Appellate Third District has decided the issue also. Waste Management of Illinois, Inc. v. Pollution Control Board, et al, and Board of Trustees of Joliet Township v. Waste Management of Illinois, Inc., et al, No. 3-83-0325 and 3-83-0339, consolidated (3d Dist., March 9, 1984). The Third District would limit the Second District's language in E & E Hauling of expedient or reasonably convenient to the facts of that case alone and distinguishes E & E Hauling because the applicant showed a real need for the facility. Waste Management, slip op.at 7, 8. Waste Management states that the applicant must show that landfills

> "must be shown to be reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capabilities, along with any other relevant factors." Id. at 8.

Nevertheless, ESD herein has not only produced enough evidence showing that the site is expedient and reasonably convenient, but has shown that the site is needed to accomplish the national objective of clean water under federal law. The Board cannot say that the decision of the County as to Criterion 1 was against the manifest weight of the evidence.

Criterion #2

ESD presented 3 different experts who testified to the geological features of the quarry area, hydrology of the area, and the effect of blasting on the area. Fourteen borings were taken in the area. It was found that the quarry floor consists of 4 to 5 feet of dolomite over 50 feet of shale (CR at 38), which includes Brainard shale. The Brainard shale is an aquitard impermeable to vertical ground water movement (Pet. Exh. 11 at 5). Beneath the shale is another limestone formation which is a shallow aquifer used by residents in the area (CR at 38). Through permeability testing, which measuresthe rate of flow of fluid through a soil, the soil permeability was shown to be 1×10^{-8} cm/sec (CR at 41). If a leak in the liner did occur, the leachate, under normal circumstances, might travel 0.1 inch/year. The requirement of the Illinois Environmental Protection Agency is 1×10^{-7} cm/sec, and if this was the case, the leachate might travel 0.1 foot/year. The sides of the quarry must be lined to prevent leachate from leaving the site. The needed sidewall liners can be constructed to the desired permeability (CR at 42).

There is an artesian well in the floor of the quarry. This upward water pressure will reduce the ability of leachate to migrate vertically through the liner (CR at 44). The

dewatered nature of the sludge will further decrease the potential for migration. It also must be remembered that as a condition to the granting of site approval a leachate collection system and monitoring wells must be constructed (Pet. Exh. 10 ISSUE LANDFILL NEED at 3, CR at 44, 115, all as incorporated into Resolution 83-157, Kane County Board, Condition #9).

A matter of the utmost concern is the presence of the shallow dolomite aquifer which area residents use as their water supply. The hydrology expert testified that even if any leachate did escape notwithstanding the protection delineated above, that the leachate would not move into the aquifer (CR at 55). If there is leakage at the north or west sides of the quarry, the flow would be into the Kankakee dolomite formation, west under McLean Boulevard into the active quarry. If leakage occurs at the south or east of the quarry, the flow would be into the glacial drift material and then into the Fox River (CR at 55, 56). Leakage, if any, is not expected to contaminate wells in the Newark Valley (CR at 59). In the event that any well is contaminated, the County has required ESD to provide potable water to affected homes.

Quarry blasting was another factor considered. An engineer for ESD testified that there would be no damage to clay embankments, the drainage system, or the structures (Pet. Exh. 17 at 2, 3; CR at 65-67). It must be noted that two residents testified that they had been paid for damage to their property caused by past blasting at the site (CR at 162-165).

Further concern was voiced about the industrial constituents of the sludge; several being carcinogens (CR at 194, 195). Many of these chemicals were expected to be found in the sludge (Pet. Exh. 9 at 3-4). Their presence was subsequently confirmed (Pet. Exh. 9 at 3-7, 3-10). It must be remembered that municipal sludge is not classified as hazardous waste.

In summary as to criterion 2, the experts have testified as to the soil permeability, site design, water flow, effects of blasting, and so forth. The Board cannot say that the decision of the County as to Criterion 2 was against the manifest weight of the evidence.

Criterion #3

A real estate appraiser testified as to three different aspects regarding his study (Pet. Exh. 21): physical, economic, and market feasibility of the subject property. Directly north of the site is a 100 foot right-of-way for the Illinois Central railroad track. West across McLean Boulevard is an ongoing gravel operation. To the south is Route 31, Five Island Park Subdivision and then the

Fox River. The Fox flows east to west at this point before turning to flow south. There is fencing, berming, and trees screening the site. In the southeast corner is a hardwood forest. This site has been mined for the past 40 to 50 years (CR at 75). Therefore, the expert concluded that the surrounding properties to the north/northeast and west were "inharmonious with any form of residential land use..." (CR at 76). Looking at Petitioner's Exhibit #22 (map), the expert spoke of the 14 subdivisions developed prior to 1979 that were in a 5 mile radius of the site (CR at 78). He stated that within these subdivisions enough property was available for commercial, industrial and residential uses. If an investor had a choice of developing the gravel pit or the other available sites, the other properties would be chosen (CR at 80). Based on the above, the expert concluded that the sludge operation would be "the highest and best use" (CR at 80, defined in Pet. Exh. 21 at 10).

Another real estate appraiser from the audience testified at the September 14 hearing. He stated that the limestone quarry was started 13 years ago, not 40 (CR at 174). He also stated that because of the sludge landfill, property values would go down (CR at 172-3), yet in answering a question from a County Board member, he opined that when the limestone quarry was started, property values did not go down (CR at 175).

Concern was voiced over the possible odor that would emanate from the site. An expert witness from ESD testified that because the sludge would be stabilized prior to piping, dewatered in a building at the site, and mixed with soil, that odors would be minimal (CR at 100, 101).

The County decided that the applicant met their burden as to Criterion 3. It should be noted that the statute does not say that the applicant show the proposed use of the site is the highest and best use, only that it is not incompatible with the surrounding area and that it minimize the effect on property values in the area. Blasting, dust, and noise will continue to the west of the site at the ongoing gravel operation. The berms and trees screen the site. The property values should not be overtly affected because, if anything, they were affected when the mining operation started years ago. As for criterion 3, the appellate court in E & E Hauling, supra, stated that "the third criterion would not seem to require proof that the applicants can assure the public of an odor-free landfill..." (slip op. at 43). The Board cannot say that the decision of the County as to criterion 3 was against the manifest weight of the evidence.

Criteria #4, 5, and 6

Testimony as to criterion 4 showed that the proposed facility was outside the 100 year flood plain (CR at 81, 113). As to minimizing the impact on traffic, criterion

6, an ESD witness stated that because the sludge was piped, there would be minimal impact on traffic, if not less traffic (CR at 82-83). The petitioner Defender's brief, in reference to criterion 5, alleges that ESD never showed how it would "avoid recurrence of blasting damage previously sustained by adjacent property owners...(Defender's Brief at 25). Apparently this is in reference to the likelihood of recovering what saleable materials are left in the pit before the shale layer is reached (Pet. Exh. 11 at 11). An ESD witness testified that the sludge was not toxic, hazardous, or combustible and that because it was transported by pipeline, operational dangers were minimal (CR at 82). Although the witness did not speak to the issue of material removal prior to the start of the sludge landfill, the County apparently felt that the sludge landfill, once operating, would minimize any danger. The Board cannot say that the decision of the County as to criteria 4, 5 and 6 was against the manifest weight of the evidence.

Conditions

Conditions 1-9 inclusive are found in the Order of Kane County Resolution 83-157. None of the conditions is contested by the parties. The conditions appear not to violate the Act or any Board or Agency rule or regulation. The Board notes that condition 9 holds ESD to any representations made at the September 14 hearing.

The Board's finding that the County acted properly in determining that the proposed landfill site of ESD met the six criteria is based on evidence in the record of the County hearing. The Board notes that this record is essentially devoid of technical testimony against the site. In its review of ESD's permit application the Illinois Environmental Protection Agency (Agency) will consider the technical advisability of disposing of sludge at this site. This opinion should in no way be construed as a recommendation of this site to the Agency. Likewise, the findings herein shall not in any way limit the Board's review of any future appeal of the Agency's action on the permit application for this site.

SUMMARY

In summary, E & E Hauling, supra, was filed on June 15, 1983. The public hearing was required to be viewed as an adjudicative hearing. The many ex parte contacts in this case, overall, did not unduly prejudice either party. There was an insufficient showing as to whether the decision-making process of the County was irrevocably tainted. The proceedings were fundamentally fair to all concerned.

As to the criteria, ESD introduced enough evidence to show that the proposed facility would satisfy the 6 criteria enumerated in Section 39.2(a) of the Act. The County Board with Resolution 83-157 has included its findings as to the proposed facility, citing the 6 criteria and explaining which conditions were designed to better achieve which criterion. The Board cannot say that the decision of the County to conditionally approve the site location suitability of this facility was against the manifest weight of the evidence.

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

ORDER

Upon the review of the November 8, 1983 decision of the Kane County Board conditionally approving the application of Elgin Sanitary District as to site location suitability, it is the Order of the Pollution Control Board that the decision of the Kane County Board be affirmed.

IT IS SO ORDERED.

Chairman Jacob D. Dumelle and Bill S. Forcade dissented.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 21st day of March, 1984 by a vote of 4-2.

Christan L. Moffett, Clerk
Illinois Pollution Control Board