ILLINOIS POLLUTION CONTROL BOARD
April 4, 1985

BOARD OF TRUSTEES OF CASNER TOWNSHIP, JEFFERSON COUNTY ILLINOIS; CITIZENS AGAINST WOODLAWN AREA LANDFILLS; CYNTHIA CARPENTER; ERNEST CARPENTER; HATIE HALL; BYRON KIRKLAND; PATRICIA KIRKLAND; PEG O'DANIELL; RONALD O'DANIELL; DENNIS SHROYER; and PATRICIA SHROYER,	)	
Petitioners,	)	
v.	)	PCB 84-175
COUNTY OF JEFFERSON and SOUTHERN ILLINOIS LANDFILL INC.,	)	
Respondents.	)	
JOHN PRIOR,	)	
Petitioner,	)	
v.	)	PCB 84-176 (Consolidated)
COUNTY OF JEFFERSON and SOUTHERN ILLINOIS LANDFILL, INC.,	)	
Respondents.	)	

DISSENTING OPINION (by B. Forcade):

I share the concerns of the majority regarding certain actions of the Jefferson County Board in this proceeding. However, on two issues I disagree with the majority and, therefore, I dissent. The first issue is the conflict of interest argument regarding Mr. Miller; the second is the 100 year flood plain issue.

The majority finds that Mr. Miller's activities did not reach the level of a disqualifying conflict of interest and even if it did, the conflict was cured by the language of his voting. On both points, I reach an opposite conclusion. The majority has quoted general legal principals from a portion of In Re: Heirich, 140 N.E.2d 825 (1956), the most relevant Illinois Supreme Court case on conflict of interest. While those are

important considerations, a more important issue is the actual decisive utterance in Heirich.

The Heirich Court held that on the facts demonstrated, the adjudicating commissioner had a sufficient connection with one of the participants in the proceeding to constitute a conflict of interest. That connection was described by the Court. The adjudicating commissioner was a member of a law firm, his law firm represented several railroads, the railroads were members of an association, and the association financed and directed the prosecution of the proceedings. The facts before this Board show a far more direct connection between the adjudicator Miller and the applicant. Mr. Miller was employed or retained by Southern, during the pendancy of the adjudication, to perform work on the site in question, which would help develop information regarding site suitability, on which he would vote. I believe that facts show a more direct connection than that found to be a conflict in Heirich, and I would find a conflict here.

I believe the majority's focus on the minimal and transitory nature of the conection to be misdirected. If $150 is too small, what about $300 or $500? This Board should not be establishing the "going rate" for elected officials. If the appropriate connection is established, the amount of the fee is irrelevant.

The Court in Heirich states that:

> It is classical principle of jurisprudence that no man who has a personal interest in the subject matter of decision in a case may sit in judgment on that case.
>
> The principle is as applicable to administrative agents, commissioners, referees, masters in chancery, or other arbiters of questions of law or fact not holding judicial office as it is to those who are technically judges in the full sense of the word. Id. at 838.

The Court goes on to say that:

> For the guidance of this court's commissioners in future cases and of all other persons required to find facts or apply law in adversary proceedings, judicial or administrative, we hold that when such an arbiter has a financial interest in the subject matter, even though he personally be a man of the most fastidious probity, it is his duty to recuse himself. He must do so if challenged (Emphasis added). Id. at 839.

Miller was an "arbiter" in an adversary proceeding. He had a clear financial interest in the subject matter and was challenged on that issue during the vote. I would find a conflict of interest.

The reason courts draw such a "bright line" in these situations is it is nearly impossible to probe an adjudicator's mind, after the fact, as to whether he was unfairly influenced by a conflict of interest. As the Illinois Supreme Court and U.S. Supreme Court have stated, Naperville v. Wehrle, 173 N.E. 165 (1930) at 167, quoting Crawford v. US, 212 U.S. 183:

> Modern methods of doing business and modern complications resulting therefrom have not wrought any change in human nature itself, and therefore have not lessened or altered the general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

In Naperville, the Supreme Court succinctly stated the disposition of an adjudicated case involving an interested adjudicator:

> Appellants contend that Myers was not a competent and disinterested commissioner. If he was not, his participation infects the action of the whole body and makes it voidable. Rock Island & Alton Railroad Co. v. Lynch, 23 Ill. 645; State v. Crane, 36 N.J. Law 394.

Neither can I agree with the majority view that any hypothetical conflict was cured by changing his vote from "no" to "pass." That, to an unconscionable degree, elevates form over substance.

At the County Board meeting to vote on landfill suitability, upon motion to deny approval, Mr. Miller responded to the prompt of the Clerk by voting no. However, the roll call was interrupted as follows (PCB Ex. 15; tape recording of County Board Meeting):

Person A:	Point of order.
Gene Wells:	Yes.
Person A:	It's 13. With one more vote, it would be a tie - change the outcome - possibly.
Person B:	A tie vote means "no."
Gene Wells:	There are 14 people present. 14 people being present, the majority of 14 is 8. Mr. Miller, there are some questions on conflict of interest. Do you want the public to disclose if you feel that you are in any nature in conflict on this?
Mr. Miller:	I do not feel that I am in any conflict whatever. I would not be reluctant to make my vote a pass under the circumstances. It would be the same.
Gene Wells:	Mr. Miller wishes to abstain.

Thus, at the time of voting, Mr. Miller's stated reason for changing his vote from "no" to "pass," was that it had the same effect as a no vote. Later in the meeting a converse vote was taken on a motion to approve the landfill. Mr. Miller voted yes. At the PCB hearing, Mr. Miller stated that he changed his vote on the denial motion from "no" to "present" because that was the same as a no vote (R. 70). Mr. Miller admitted that he changed the wording of his vote because it would not change the impact. Therefore, I cannot join the majority in finding that the change in wording cured any hypothetical conflict, that is directly contradicted by the only evidence before the Board.

It is absurd to say that Mr. Miller's semantic gymnastics could cure a conflict of interest. Whatever language was used he did participate in the voting. As he intended, his participation was counted as a vote in favor of the landfill, and that participation affected the outcome. It has frequently been held that the vote of a council member who is disqualified because of an interest in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action Saks & Co. v. Beverly Hills, 107 Cal App 2d 260, 237 P2d 32; Krueger v. Ramsey, 188 Iowa 861, 175 NW 1; Davis v. Jenkins, 314 Ky 870, 238 SW2d 475; Woodward v. Wakefield, 236 Mich 417, 210 NW 322; Meixell v. Borough Council of Hellertown, 370 Pa 420, 88 A2d 594; Smith v. Centralia, 55 Wash 573, 104 P 797.

100 Year Flood Plain

I also disagree with the majority regarding the 100 year flood plain. Under Section 39.2(a)(4) of the Act, site location suitability may only be approved if:

> 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.

At the County hearing Southern stated there is a creek along the west side of the landfill (CBR 29) and they have plans for a compensatory flood storage area (CBR 30). Southern testified that the facility is flood-proofed (CBR 43). On the issue of Department of Transportation ("DOT") determinations, three exhibits were entered (C.B. Record Nos.10, 11 and 49). C.B. Record Nos.10 and 11 appear to be a form letter from DOT to two different people, the salient portion of which states:

> Inasmuch as the site is located within a rural area and on a stream with a drainage area of less than ten square miles, an Illinois Department of Transportation, Division of Water Resources permit will not be required for the landfill.
>
> With regard to Section 39.1 of the Illinois Environmental Protection Act, this letter constitutes Illinois Department of Transportation approval upon your receipt of all appropriate Illinois Environmental Protection Agency approvals.

C.B. Record No. 49 (also called Citizen Exhibit 7), is a letter from the same DOT Chief Flood Plain Management Engineer, who wrote the language above, and provides in relevant part:

> As I pointed our during your visit, there is a stream running through the site so, obviously, a portion of the site is within the 100-year flood plain of that stream. However, no study has been completed by this Department to define the extent of such flood plain. Also, due to the fact that the stream drains less than ten square miles at the site, it is not within our regulatory authority and, therefore, a Department of Transportation, Divison of Water Resources permit is not required.

> I also advised you during our meeting that the Department of Transportation has no specific standards regarding flood-proofing of regional pollution control facilities. It is my understanding that the Illinois Environmental Protection Agency does. Therefore, if a proposed facility meets all of the requirements of the Illinois Environmental Protection Agency regarding flood-proofing, it is deemed to comply with the requirements of Chapter 111½, Section 39.1 insofar as the Department of Transportation is concerned.

The exhibits represent the best evidence on what DOT has determined regarding this facility and they develop a common theme:

1. At least a portion of the site is within a 100 year flood plain;

2. DOT has no standards and requirements regarding flood-proofing facilities; and

3. DOT will approve flood-proofing if a facility meets all Illinois Environmental Protection Agency requirements and is approved by them.

It is clear from the record below that there was no evidence that the facility is outside the 100 year flood plain as determined by DOT. Also, since there was no evidence of Illinois Environmental Protection Agency approval, there was no evidence the facility met flood-proofing requirements and was approved by DOT. Therefore, the facility did not meet Criteria No. 4.

I note, with some chagrin, that DOT's posture places flood plain facilities in a Catch-22 situation. For the facility to obtain IEPA approval, they must have County Board approval; to obtain County Board approval, they must obtain DOT approval; and, to obtain DOT approval they must have IEPA approval. The net effect is to absolutely preclude 100 year flood plain facilities until DOT changes its posture or the General Assembly changes the statutory language of Criterion No. 4. While I sympathize with Southern's dilemma, unlike the majority I cannot rewrite the clear language of Criterion No. 4 to allow this bootstrapping.I would have simply reversed Southern's "deemed approved" approval.

Bill Forcade
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 10th day of April, 1985.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board