would qualify before July 1.) State aid, therefore, is not dependent on federal grants made after July 1, 1967.

Since this last answer depends in some degree on an interpretation, or at least a presumed understanding, of the provisions of the Clean Water Restoration Act of 1966, it is subject to a contrary interpretation by federal authorities. If the requirements which must be met by a water pollution control project to be qualified for some federal aid under the 1966 Act differ from the requirements of the Federal Water Pollution Control Act as it existed before its amendment by the 1966 Act, then a new application for federal aid and a new approval may be a prerequisite to state aid under the 1967 General Appropriation Act.

OFFICIAL OPINION NO. 64

December 29, 1967

OFFICERS, COUNTY—County Commissioners As Having Power To Promulgate County Air Pollution Ordinance.

Opinion Requested by Dr. A. C. Offutt, State Health Commissioner.

I am in receipt of your letter containing this request:

> "An official opinion is respectfully requested as to whether a county may promulgate an air pollution control ordinance."

Article 6, § 10, of the Indiana Constitution provides:

> "The General Assembly may confer upon the boards doing county business in the several counties, powers of a local, administrative character."

The powers of counties under this provision was discussed by the court in *K. G. Horton & Sons, Inc. v. Board of Zoning Appeals,* 235 Ind. 510, 513, 514, 135 N.E. 2d 243 (1956):

> " 'Counties are involuntary political or civil divisions of the State created by general laws to aid in the administration of the State government. Their powers are created and defined by statute. The powers of the board of commissioners are limited and for any act done by them not within the scope of their powers, the county is not liable. 1 Dillon Municipal Corp., section 25; *Potts v. Henderson,* 2 Ind. 327; *Campbell v. Brackenridge,* 8 Blackf. 471; *McCabe v. Board, etc.,* 46 Ind. 380; *Board, etc., v. Ross,* 46 Ind. 404; *Board, etc., v. Barnes,* 123 Ind. on pp. 406, 407, and cases cited; *Board, etc., v. Allman, Admr.* 142 Ind. 573; *Trustees M. E. Church of Hoboken v. Mayor, etc.* 33 N.J.L. 13 (19), 97 Am. Dec. 696 (700); *Stephens v. St. Mary's Training School,* 144 Ill. 336, on p. 344 (18 L.R.A. 832), and cases cited; 36 Am. Rep. 438, and note on p. 452.
>
> " 'Considered with respect to their corporate powers, counties rank low down in the scale of corporate existence, and are frequently termed *quasi* corporations. [Citing authorities.]' *State ex rel. Scott v. Hart* (1896), 144 Ind. 107, 108, 109, 43 N.E. 7, 33 L.R.A. 118.
>
> "Section 10 of Article 6 of the Constitution, which provides 'The General Assembly may confer upon the boards doing county business in the several counties, powers of a local, administrative character,' is not self-executing. It is well settled by many decisions that the boards of county commissioners have only such powers as may be granted expressly by statute, or those necessarily implied to execute some expressed power. Where a statute provides the manner in which a power is to be exercised, the statutory directions must be followed to give validity to the act. *Myers v. Gibson* (1897), 147 Ind. 452, 454, 46 N.E. 914; *State ex rel. Wyman v. Hall* (1921), 191

> Ind. 271, 280, 131 N.E. 821; *Cincinnati, Indianapolis & Western R. Co. v. Bd. of Commrs. of Fayette County* (1922), 192 Ind. 1, 6, 134 N.E. 782; *Applegate, County Auditor v. State ex rel. Pettijohn* (1933), 205 Ind. 122, 125, 185 N.E. 911; *Board of Commrs. of Vanderburgh Co. v. Sanders* (1940), 218 Ind. 43, 53, 30 N.E. 2d 713; *Eads v. Kumley* (1918), 67 Ind. App. 361, 367, 119 N.E. 219."

Numerous cases other than those cited in *Horton* could be advanced to support the proposition that a board of county commissioners can exercise only those powers granted either expressly by necessary implication. However, the proposition is so well described in *Horton* and so sufficiently established in Indiana law as to make further citation of authority only cumulative.

Boards of county commissioners were given certain powers to adopt health ordinances by Acts 1953, ch. 80, the same being Burns §§ 26-2601 through 26-2606, entitled:

> "AN ACT authorizing the board of commissioners of any county to adopt ordinances for the protection of public health."

This Act, however, grants the authority to enact ordinances only in relation to the operation of food establishments, sewage disposal, and the disposal of garbage and rubbish.

The power to regulate the disposal of garbage and rubbish is contained in the fourth section of the Act, Burns § 26-2604, which reads:

> "For the protection of public health, the board of commissioners of any county, in addition to its other powers, shall have the power and authority to adopt and enact ordinances regulating the public disposal of garbage and rubbish on any land which is situated outside the corporate limits of any city or town. Such ordinances shall provide that any person, firm or corporation who shall violate any provision of the ordinace shall be guilty of a misdemeanor, and, on con-

> viction, the violator shall be punished for the first offense by a fine of not more than five hundred dollars; for the second offense by a fine of not more than one thousand dollars; and for the third and each subsequent offense by a fine of not more than one thousand dollars to which may be added imprisonment for any determinate period not exceeding ninety days, and each day after the expiration of the time limit for abating insanitary conditions and completing improvements to abate such conditions as ordered by the county board of health, or by the duly appointed health officer of the county, shall constitute a distinct and separate offense."

The extremely limited power granted by the above section is further limited by the definition of rubbish contained in the first section of the Act, Burns § 26-2601:

> "(b) The term 'rubbish' shall mean and include such matter as ashes, cans, metal ware, broken glass, crockery, dirt, sweetings, boxes, wood, grass, weeds or litter of any kind."

Thus, the 1953 Act appears to grant only the power to regualte the operation of public dumps located outside cities or towns. While the boards of commissioners unquestionably have the authority to require such dumps to be operated in such a manner as to not contribute to the pollution of the atmosphere, no general power to adopt ordinances in relation to air pollution can be inferred.

No other statutes conferring the power to enact health ordinances can be found.

The only legislation dealing specifically with air pollution is contained in Acts 1961, ch. 171, the same being Burns §§ 35-4601 through 35-4608. That Act created the Air Pollution Control Board, and granted that board certain specific powers in relation to the control of air pollution, including the power to conduct hearings concerning alleged violations and to issue and enforce the proper curative orders subsequent to such hearings. (See 1966 O.A.G., p. 221.) The first

section of the Air Pollution Control Act, Burns § 35-4601, describes the intent and purpose of the Act, and provides in part:

> ". . . It is the intention of this Act that primary responsibility for the control of the emission of air contaminants into the atmosphere shall rest with the responsible local governmental agency and that affirmative, remedial action by this State shall be taken only in those areas of this State where no local air pollution law or regulation consistent with the provisions of this Act is now, or hereafter, in effect or where, after hearing, the Control Board determines that the local law or regulation is not being enforced adequately and, in the opinion of the Control Board, it is not intended that it be so enforced."

In accord with that express purpose, § 8 of the Act, Burns § 35-4608, provides:

> "Nothing in this Act shall prevent towns, cities or counties from enacting ordinances with respect to air pollution which will not conflict with the provisions of this Act and which are designed to effectuate the general intent and purpose expressed in this Act."

While the Act thus expressly refrains from placing limitations on the power of local governmental units, including counties, to adopt air pollution control ordinances, it also refrains from granting any local governmental unit the power to adopt such ordinances. Absent any positive language vesting such authority in the boards of commissioners, the Act cannot be construed as increasing the powers of the commissioners in this area.

Therefore, I reluctantly conclude that under present legislation counties lack the authority to enact air pollution control ordinances.