ILLINOIS POLLUTION CONTROL BOARD
March 21, 1996

SPILL, MADISON COUNTY CONSERVATION ALLIANCE, SIERRA CLUB, NAMEOKI TOWNSHIP CLERK HELEN HAWKINS, KATHY ANDRIA, SHIRLEY CRAIN, GLENDA FULKERSON, JOHN GALL, THELMA ORR, RON SHAW, AND PEARL STOGSDILL,	)	
Petitioner,	)	
v.	)	PCB 96-91 (Pollution Control Facility Siting Appeal)
CITY OF MADISON, AND METRO-EAST, LLC,	)	
Respondents.	)	

KATHY ANDRIA APPEARED ON BEHALF OF PETITIONER SPILL AND ON HER OWN BEHALF;

JIM BENSMAN APPEARED ON BEHALF OF PETITIONER SIERRA CLUB;

JOHN T. PAPA, CALLIS, PAPA, JENSEN, JACKSTADT & HALLORAN, P.C., APPEARED ON BEHALF OF RESPONDENT METRO-EAST, LLC;

CASPER NIGHOHOSSIAN, CITY ATTORNEY FOR THE CITY OF MADISON, APPEARED ON BEHALF OF RESPONDENT THE CITY OF MADISON.

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This matter is before the Board on a petition for review filed by petitioners SPILL, Madison County Conservation Alliance, Sierra Club, Nameoki Township Clerk Helen Hawkins, Kathy Andria, Shirley Crain, Glenda Fulkerson, John Gall, Thelma Orr, Ron Shaw, and Pearl Stogsdill (Petitioners). The petitioners seek review of a September 21, 1995 order issued by the City Council of the City of Madison, granting site location suitability approval to Metro-East, LLC (Metro-East) for the construction of a regional pollution control facility; the facility in this case is an incinerator. Petitioners filed their appeal pursuant to Section 40.1 (b) of the Environmental Protection Act (Act) (415 ILCS 5/40.1(b) (1994)). Petitioners filed their initial

appeal on October 30, 1995. Pursuant to a Board order dated November 2, 1995, petitioners filed an amended petition on November 20, 1995 in order to cure deficiencies in the initial petition.

A hearing was held in this matter on January 8, 1996, before Chief Hearing Officer Michael Wallace, which members of the public attended. Petitioners filed their post-hearing brief on January 31, 1996, accompanied by a motion to file instanter. Respondent Metro-East filed its post-hearing brief on February 13, 1996. Respondent City of Madison filed its post-hearing brief on February 27, 1996, wherein the City of Madison adopted Metro-East's brief and made additional arguments. Also on February 27, 1996, petitioners filed a response to respondents' post-hearing brief, as well as a motion to supplement the record in response to respondents' post-hearing briefs and a list of citations missing from their post-hearing brief and response, accompanied by a motion to file instanter. On March 4, 1996, respondent Metro-East filed a motion to strike petitioner's February 27, 1996 response to respondents' post-hearing briefs. On March 11, 1996, respondent filed a response to petitioners' March 1, 1996 filing.

Petitioners challenge the siting approval granted by the City of Madison to Metro-East on a multitude of grounds, including the following: 1) the City of Madison lacked jurisdiction to grant siting since Metro-East filed an incomplete siting application; 2) the siting proceeding was fundamentally unfair because Metro-East filed an incomplete application; 3) the unavailability of the hearing transcript rendered the proceeding fundamentally unfair; 4) a site visit to several of the applicant's facilities by four of the City Council aldermen rendered the proceedings fundamentally unfair; 5) the hearing was conducted in a manner which was fundamentally unfair; 6) the applicant failed to demonstrate that the facility was necessary to accommodate the waste needs of the area intended to be served; 7) the applicant failed to demonstrate that the proposed facility is designed, located, and proposed to be operated in a manner that will assure that the public health, safety, and welfare will be protected; 8) the site is located within the 100-year floodplain. For the reasons set forth below, the Board finds that the proceedings before the City of Madison were fundamentally unfair, and the Board therefore reverses the City of Madison's decision granting site location suitability approval to Metro-East.

Because we find that the failure to make the transcript available for public inspection and the site visit taken by four of the eight aldermen rendered the siting proceeding fundamentally unfair, we will not address petitioners' challenges concerning the siting criteria. Furthermore, we will not address those challenges to the siting decision which were raised in the petition for review, but for which no argument was submitted in petitioners' filings.

Preliminary motions.

As a preliminary matter, we will address the outstanding motions. First, on January 31, 1996, petitioners filed a motion to file their post-hearing brief instanter. Pursuant to the hearing officer's January 12, 1996 scheduling order, petitioners' post-hearing brief was due January 29, 1996. The motion is granted, and petitioners' post-hearing brief is accepted.

Second, on February 27, 1996, petitioners filed "Petitioners' Response to Respondents' Post-Hearing Brief." This filing seeks to respond to the allegations in respondents' post-hearing brief, and is properly characterized as petitioners' reply brief. Pursuant to the hearing officer's

January 12, 1996 scheduling order, petitioners' reply brief was due to be filed on February 20, 1996. On March 4, 1996 respondent Metro-East filed a motion to strike petitioner's reply brief. Petitioners filed a response to the motion to strike on March 5, 1996. Metro-East also filed a reply to petitioner's response to the motion to strike on March 11, 1996.

In its March 4, 1996 motion to strike, Metro-East points out that petitioners' reply brief was due February 20, 1996, and that the proof of service attached to petitioner's reply brief shows that it was mailed on February 21, 1996. Metro-East further asserts that the reply brief contains numerous references to materials outside the record, and at least twenty instances where no page number is given for a claimed record reference. In their March 5, 1996 response to the motion to strike, petitioners assert that they were confused as to the date their brief was due, and assert a variety of hardships which prevented the timely filing of their brief. Metro-East's March 11, 1996 reply asserts that a party which chooses to proceed *pro se* must comply with the same rules of proceedings as an attorney, and recites case authority to support this assertion.

While it is true that *pro se* parties must comply with the same rules as an attorney, we find that petitioners' filing of their brief one day late has not caused prejudice to respondents, since this was the final filing before close of the record. We further find that accepting petitioners' reply brief will contribute to a complete resolution of the issues in this matter. Accordingly, we deny Metro East's March 4, 1996 motion to strike and accept petitioners' February 27, 1996 reply brief.

Also on February 27, 1996, petitioners filed a "Motion to Supplement the Record in Response to Respondents' Post-Hearing Briefs and Citations Missing from Petitioners' Post-Hearing Brief and Response" (Motion to Supplement), accompanied by a motion to file instanter. In the Motion to Supplement, petitioners seek to respond to "inaccurate statements" in respondents' post-hearing briefs, and to add citations to the record for their post-hearing brief and reply brief. Respondents have not responded to this filing. This filing is, in essence, a second reply brief by petitioners, and there was no provision for this filing in the hearing officer's January 12, 1996 scheduling order. Therefore, the motion to file instanter is denied, and the motion to supplement is rejected.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. Section 39.2 provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. These statutory criteria are the only issues which can be considered when ruling on an application for siting approval. In this case, the City of Madison found that all of the applicable criteria had been satisfied, and therefore granted siting approval to Metro-East.

When reviewing a local authority's siting decision the Board is authorized to review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, 562, *aff'd in part* (1985) 107 Ill.2d 33, 481 N.E.2d 664.) In this

case the petitioners have raised both jurisdictional and fundamental fairness challenges, in addition to challenges based on failure to satisfy the siting criteria.

When reviewing a local authority's decision on the criteria, the Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26,29; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1987). 160 Ill.App.3d 434, 513 N.E.2d 592, E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, *aff'd in part* (1985) 107 Ill.2d 33, 481 N.E.2d 664.)

BACKGROUND

Metro-East, LLC, a Connecticut Limited Liability Company (Siting Application, City of Madison Record (Rec.) at C01951), filed its application for siting approval for a "New Pollution Control Facility to Generate Electricity from the Combustion of Waste Fuel" with the City Madison on March 27, 1995. (Siting Application, Rec. at C01949.) Metro-East also provided the City of Madison with 100 courtesy copies of the application that did not include the large or bulky exhibits. The application was put on file at the Madison City Hall. A complete copy of the application was also put on file at the Madison Public Library.

The application states that the proposed facility would "provide resource recovery to the region through the collection and processing of wood waste and recovery of waste coal." The proposed facility would "clean" burn the processed wood waste and recovered waste coal using proven technology. The proposed facility would be located in the City of Madison, approximately one mile north of the intersection of Route 203 and I-55/70, directly behind Old Nickel Plate Yard Road. (Siting Application, Rec. at C01952.) The site consists of two parcels of land constituting approximately 47 acres of land. The site is currently used as a source for clay and soil material, and is zoned for industrial operations. The site abuts the Cloverleaf section of Madison County, a residential area.

The application states that the proposed facility's primary purpose is to serve the region's wood waste disposal needs. The primary service area for the facility is Madison County, while a secondary service area for the facility would include all municipalities and counties within a seventy-five mile radius. (Siting Application, Rec. at C01958.) On average, the project would convert 865 tons per day of wood waste and 370 tons per day of recovered waste coal to electricity. Annually, this translates to approximately 300,000 tons of wood and 130,000 tons of coal.

The wood waste would include tree trimmings, stumps, sander dust, pallets, boxes, timbers from old homes, railroad ties and telephone poles. Sources of this wood waste would include manufacturers, municipalities, land clearing operators, construction and demolition companies, commercial and institutional operations, individuals, utilities, and railroad companies. Recovered coal waste will originate from abandoned land and current coal operations.

The main components of the facility would include: 1) waste-fuel receipt, screening and storage areas; 2) a fluidized bed boiler; 3) a steam turbine generator; 4) air pollution control equipment; 5) ash handling equipment; and 6) auxiliary equipment, such as a cooling tower, storage tanks, fire protection equipment, and an electrical switchyard. (Siting Application, Rec. at C01953.) The waste-fuel boilers will have a steam generating capacity of approximately 630,000 pounds per hour and a maximum heat input of 720 million BTU/hr. (Siting Application, Rec. at C01955.) The facility itself would consume approximately 6 MW of electricity, and would sell the balance (approximately 60 MW) to the Illinois Power Company. (Siting Application, Rec. at C01955.)

In accordance with the requirements of Section 39.2(d) of the Act, the City of Madison held a public hearing on the siting application. On July 5, 1995 Madison had adopted Ordinance No. 1258 setting forth the rules to be followed in the siting hearing. As required by Section 39.2(d), notices for the July siting hearing were published in the Granite City Journal/Press Record, distributed to Cloverleaf residents, and posted at different locations in Cloverleaf. The hearing covered the four-day period from July 25, 1995 through July 28, 1995, with over 49 hours of testimony. The hearing transcript consisted of approximately 1,800 pages.

Following the hearing there was a 30-day comment period. During the 30-day comment period, four Madison aldermen made a two-day trip (Board Transcript (Tr.) at 367) to Michigan in order to observe waste wood burning facilities similar to the proposed facility (Tr. at 359). The facilities were located in the following cities: Filer City, Cadillac, and Traverse, Michigan. (Tr. at 358.) The facilities in Filer City and Traverse belonged to the applicant and/or its associates. (Tr. at 359.) The trip was arranged by Alderman John Hamm through Go Travel. (Tr. at 358, 382.) The city subsequently reimbursed Hamm and the other aldermen for the cost of the trip. (Tr. at 308-309.) Alderman Hamm did not contact the applicant's representative in the hearings before the City of Madison to arrange any plant tours, but instead personally called some of the plants prior to leaving on the trip. (Tr. at 383, 386.) The aldermen who went on the trip subsequently made a report to the City Council about the trip at the August 29, 1995 City Council meeting, where Alderwoman Lux presented three rolls of film, five samples, and 3 packets of pictures from the site visits (Pet. Exh. #2 at p. 3.) Pictures and videos from the trip were not made part of the public hearing files. (Id.)

The Madison City Council met on September 18, 1995 to consider the application and begin deliberations. An ordinance approving the siting application and adopting the findings of fact made by the hearing officer was adopted unanimously on September 21, 1995.

JURISDICTION

A. "Missing" Notices

The notice requirements of Section 39.2(b) of the Act are jurisdictional prerequisites to the local siting authority's power to hear a pollution control facility siting proposal. Petitioners assert that the applicant failed to satisfy the jurisdictional requirements, since it failed to include Exhibit G with the application, which was documentation of notice to adjacent property owners. Metro-East subsequently entered Exhibit G as an exhibit on the third day of hearing. Petitioners

assert that the applicant's failure to introduce Exhibit G with its application at the beginning of the public hearing violated the jurisdictional requirements of Section 39.2(b).

In response, Metro-East points out that petitioners do not allege that the 39.2(b) notices were not given as required by statute. Metro-East asserts that the evidence shows that it complied with all the notice requirements. Metro-East further asserts that neither the statute nor the caselaw require an applicant to file proof of compliance with the notice provisions of Section 39.2(b). Finally, Metro-East asserts that Exhibit G was included in the initial application on file with the City.

Section 39.2(c) sets forth the requirements for what must be included in a complete application for siting approval. It states:

> An applicant shall file a copy of its request, with the . . . governing body of the municipality in which the proposed facility is to be located. The request shall include (1) the substance of the applicant's proposal and (2) all documents, if any, submitted as of that date to the Agency pertaining to the proposed facility. . . .

(415 ILCS 5/39.2(c) (1994) .)

We agree with the applicant that there is no jurisdictional requirement that proof of compliance with the notice provisions be included with the initial siting application. While the applicant must comply with the notice provisions of Section 39.2(b) in order for the siting authority to have jurisdiction to rule on a siting application, and while the applicant must submit sufficient evidence to allow the siting authority to determine such compliance before the siting authority renders its decision, such proof need not be included in the initial application. It is sufficient if such notice is introduced at the local hearing. Furthermore, Metro-East had apparently included such information in its initial application filed with the City on March 27, 1995. (City of Madison Hrg. Tr., Rec. at C01332-33; C01429-32.) We find that Metro-East's failure to submit Exhibit G with its application on the first day of hearing does not constitute a jurisdictional defect.

B. Incomplete Copies of Application

Petitioners next assert that Metro-East's failure to include certain exhibits in the copies of the application it provided for distribution constituted a jurisdictional defect. The exhibits included the following: 1) Exhibit A, the legal description of the site; 2) Exhibit D, a copy of the floodplain map; 3) Exhibit E, a letter from the Madison County Environmental Department; 4) Exhibit F, a letter from the Illinois Environmental Protection Agency stating the site was not in a recharge area; and 5) Exhibit G, the documentation of notice to adjacent property owners. These exhibits were included in the application filed with the City, but were not included with the copies of the application that Metro-East provided for distribution. Petitioners seek to rely on Section 39.2(c) of the Act, which requires the applicant to include with its application the substance of the proposal, and all documents, if any, submitted to the Agency pertaining to the proposed facility. (Section 39.2(c) of the Act). Petitioners assert that failure to include these exhibits in the copies they received constituted a jurisdictional defect.

In response, Metro-East asserts that all the documents at issue were on file at City Hall since the time it filed its initial application on March 27, 1995. Metro-East, relying on Tate v. Pollution Control Board (Ill.App. 4 Dist. 1989), 136 Ill.Dec. 401, 544 N.E.2d 1176, further asserts that the petitioners failed to show any prejudice due to the claimed error, and that any error is therefore harmless. (Metro-East Br. at 23.)

We find that the failure to include the identified exhibits in the 100 courtesy copies of the application made available for public distribution did not constitute a jurisdictional defect. There is no requirement that the applicant provide any extra copies of the application for public distribution, with or without all exhibits attached to the official application. Section 39.2(c) requires that the official copy of the application include the substance of its proposal, and all documentation, if any, submitted to the Agency. It further requires that all such documents and other materials submitted to the local governing body be available for public inspection and copying. Both the City Clerk and Comptroller testified at the City of Madison's hearing that the identified documents were included in the application on file at City Hall; this is all that is required by the Act. (Metro-East Br. at 1-2; City of Madison Hrg. Tr., Rec. at C01429-32, C01341-43.) The provision of courtesy copies of the application at no charge, albeit without all attached exhibits, exceeded the requirements of Section 39.2.

FUNDAMENTAL FAIRNESS

Section 40.1 of the Act requires the Board to review the proceeding before the local siting authority to assure fundamental fairness. In E & E Hauling, Inc. v. Illinois Pollution Control Board (2d Dist. 1983), 116 Ill. App.3d 586, 594, 451 N.E.2d 555, 564, *aff'd in part* 107 Ill.2d 33, 481 N.E.2d 664 (1985), the appellate court found that although citizens before a local decision-maker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. *(See also* Industrial Fuels & Resources/Illinois, Inc. v. Illinois Pollution Control Board, 227 Ill. App.3d 533, 592 N.E.2d 148; Tate, 188 Ill.App.3d 994, 544 N.E.2d 1176.) Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. (Waste Management of Illinois, Inc. v. Illinois Pollution Control Board (2d Dist. 1989), 175 Ill. App.3d 1023, 530 N.E.2d 682.) The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. (Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163, 117 PCB 117.)

A. Incomplete Copies of Application

In asserting that the proceeding before the City of Madison was fundamentally unfair, petitioners reassert their arguments concerning the failure to include all exhibits in the 100 courtesy copies of the application made available for public distribution. Because we find that providing courtesy copies exceeded the requirements of Section 39.2 of the Act, we find that failure to include all exhibits in these copies did not render the proceeding fundamentally unfair.

B. Availability of the Local Hearing Transcript.

Petitioners next assert that the unavailability of the transcript of the local hearing for public inspection rendered the proceedings fundamentally unfair. Petitioners assert that the first two days of the transcript were certified by the court reporter on August 7, 1995, and the entire transcript was certified by the court reporter on August 14, 1995, yet no copy of the transcript was available in Madison City Hall. (Pet. Br. at 12.) Petitioner Thelma Orr testified that she called Madison City Hall on August 23, 1995, and was told that there was no copy of the transcript available. (Pet. Br. at 12; Tr. at 22.) Petitioner Kathy Andria testified that she called Madison City Hall on the last two days of the public comment period, August 24 and August 25, and received the same response. (Tr. at 326.)

Petitioners also assert that no copy of the transcript was available at the library. Petitioners assert that they were harmed by not having access to the transcript, and that the Madison County Conservation Alliance and Sierra Club did not file public comments because they had no access to a transcript. (Pet. Br. at 13.) At the Board's hearing, petitioner Kathy Andria testified that the hearings were lengthy, and that the other means they attempted to utilize to record it, including audio and video taping, were insufficient to allow her to adequately prepare her comments. (Tr. at 343 - 347.) She testified that she was prevented from submitting public comments which responded to or rebutted expert testimony presented at the hearing (Tr. at 343, *see also* Tr. at 327.)

In response, Metro-East does not concede any misconduct or wrongdoing associated with the preparation or provision of the transcript. It seeks to rely on Turlek v. Village of Summit, (May 5, 1994) PCB 94-19, in asserting that the Board should find no violation since petitioners can show no prejudice. Furthermore, Metro-East asserts that petitioners did not act responsibly or logically in attempting to review the transcript. Finally, Metro-East asserts that there is no requirement that it prepare a transcript until an appeal of the siting decision is filed.

The Board has addressed the issue of availability of the transcript before the local siting authority in Sierra Club v. City of Wood River (October 5, 1995), PCB 95-174. In that case, the Board held Section 39.2(c) of the Act requires that the local hearing transcript hearing be made available to the public, since the transcript is clearly a material on file with the local siting authority. The Board further stated that, unavailability of the transcript will render the siting proceedings fundamentally unfair only if such unavailability prejudiced petitioners. (*See also* Citizens Against Regional Landfill v. County Board of Whiteside County and Waste Management of Illinois, Inc. (1993) PCB 92-156.) In City of Wood River, the Board found that even if the transcript was unavailable, it could not find that this error had made the proceeding fundamentally unfair, since the petitioners failed to demonstrate prejudice.

In this case, the entire transcript was certified by the court reporter by August 14, 1995, and should have been made available to petitioners at City Hall in accordance with Section 39.2(c) of the Act and City of Wood River. Petitioners assert that the Madison County Conservation Alliance and Sierra Club were unable to file comments due to the unavailability of the transcript, and petitioner Andria testified that she was prevented from submitting public

comments which responded to or rebutted expert testimony presented at the hearing. (Tr. at 343.)

All parties agree that the public hearing process was long and arduous, and the transcript of the forty-nine hours of hearing totaled over 1,800 pages. The transcript was certified by the court reporter fourteen days prior to the close of the public comment period. No valid explanation has been offered by respondents as to why the City of Madison did not make the transcript available for inspection at City Hall, although it had agreed to do so during the course of the public hearing. (City of Madison Hrg. Tr., Rec. at C01540.) We find that petitioners have demonstrated prejudice due to the unavailability of the transcript. Accordingly, the Board finds the City's failure to provide access to the transcript rendered the proceeding fundamentally unfair.

C. Site Visit

Petitioners allege that the site visit taken by four of the eight aldermen rendered the proceedings fundamentally unfair.[1] Petitioners assert that they were not given an opportunity to accompany the aldermen on their trip. They further assert that, while the four aldermen returned from the trip prior to the close of the public comment period, they gave a report to the City Council and the mayor the day after the comment period closed, but prior to the siting decision. Petitioners therefore assert that they were denied the opportunity to question the aldermen or present information to counter the information gathered and impressions formed by the aldermen from the site visits or the post-comment period report. Petitioners emphasize that the timing of the visit and the report precluded the opportunity for counter testimony, and therefore caused them prejudice. Petitioners rely on Southwest Energy Corporation v. Illinois Pollution Control Board (Ill.App. 4th Dist 1995), 655 N.E.2d 304, (hereinafter "Havana") in asserting that the site visit therefore rendered the siting proceeding fundamentally unfair.

In response Metro-East emphasizes that the report made to the City Council in no way differed from the testimony of the expert witnesses called by the Applicant. (Metro-East's Br. at 28.) Metro-East seeks to distinguish Havana, emphasizing that the site visit was not the only reason the court found the proceedings in that case to be fundamentally unfair. (Metro-East's Br. at 29.) Metro-East asserts that the direct involvement of the applicant in arranging, paying for, and accompanying members of the decisionmaking body on the trip was critical to the decision in Havana. (Id.) Metro-East emphasizes that in the present case, the applicant did not arrange, pay for, or accompany the aldermen on their trip. (Metro-East's Br. at 27.) Metro-East further asserts that there is no contention that the applicant effectively denied opponents information which the aldermen obtained, and asserts that both sides were given every opportunity to be heard. (Id.)

Alderman Hamm testified at the Board hearing that he did not rely on the information gained during the plant visits. (Tr. at 360.) He testified that the City Attorney advised the City Council aldermen to consider only the recommendations of the hearing officer when considering

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[1] In their petition for review, petitioners raise the issue of whether the site visit violated the Open Meetings Act, but they do not pursue this claim in their briefs before the Board, and we do not address it.

the siting application. (Tr. at 356, 358.) However, he also testified that the purpose of the trip was to learn more to help him in his decision-making, and that he obtained new information by observing a wood burning facility and how it operated. (Tr. at 385.)

In Havana, the court addressed the impact of a facility tour on the fundamental fairness of siting proceedings. In addition to affirming the Board's findings that a fee agreement and *ex parte* contacts between the hearing officer and the siting applicant rendered the proceedings fundamentally unfair, the court stated that the Board had correctly determined that a facility tour had rendered the proceeding fundamentally unfair. The trip had been arranged and paid for by the siting applicant, and no opportunity had been provided for siting opponents to participate in the trip. The court stated that the applicant had effectively denied opponents of the proposed facility knowledge of information which the trip participants obtained. The court stated that even if opponents of the proposed facility could have taken a facility tour at a later date, there is no guarantee they would have been exposed to the same information. (Havana, 655 N.E.2d at 407.)

In Havana, the court emphasized that a local governing body may tour a facility without violating the fundamental fairness requirement, and encouraged such trips, stating that they can provide essential information. (Id.) However, the court stated that fundamental fairness requires that representatives of all parties to the siting proceeding be given an opportunity to accompany the local governing body when it takes such a tour. (Id.) Additionally, the court stated that it was irrelevant whether the tour caused the aldermen to prejudge the siting application. (Id.) The trip had rendered the proceeding fundamentally unfair because siting opponents were not given equal access to information obtained by the aldermen. (Id.)

Recently the Fourth District decided Southwest Energy Corporation v. Illinois Pollution Control Board (4th Dist. March 15, 1996), No. 4-95-0128) (hereinafter "Beardstown"). As in Havana, the Beardstown city council had taken a tour of the SEAMASS facility which had been paid for the siting applicant. Citing Havana extensively, the court affirmed the Board's decision to reverse the Beardstown siting based upon a finding that since the general public was excluded from the tour, "opponents of the siting application were prejudiced because they were unable to appropriately address all the impressions formed by council members who participated in the tour." (Beardstown slip op. at 3.) Specifically, the court found that the opponents of the Beardstown incinerator were prejudiced by the fact that the general public was excluded from the tour and "opponents were thereby not given equal access to information obtained from the tour by the participating council members." (Id. at 6.) For this reason alone, the court affirmed the Board's reversal of the Beardstown siting approval.

In the present case, the trip was arranged by a member of the City Council, not by the applicant, and the trip was ultimately paid for by the City of Madison, not the applicant. (Tr. at 308). Regardless, , it is the local siting authority that conducts the siting proceeding, and it is the local siting authority's responsibility to conduct the proceedings in a fundamentally fair manner. As in Havana, the opponents of the proposed facility in this case were denied access to information that was made available to the City Council. Opponents of the facility were not invited to accompany the City Council aldermen on the trip. Furthermore, the report to the full City Council was given on August 28, 1995, in a City Council meeting after the close of the

public comment period. (Pet. Exh. 2.) Petitioners were provided no opportunity to respond to the information gathered from the trip or the report. While it is arguably possible to cure such a defect by putting all information concerning the trip into the record and allowing for public response, no such opportunity was provided in this case. (*But see* Havana, 655 N.E.2d at 407, "even if opponents could have taken a [similar tour] at a later date, there is no guarantee they would have been exposed to the same information as the council;" *see also* Beardstown, slip op. at 6, "while such tours may serve an invaluable function..., there must be a *bona fide* effort to include representatives of those opposed to the siting application.") We find that this failure to provide public access to information available to the City Council rendered the siting proceedings fundamentally unfair.

We find that the assertion that the aldermen did not rely on the information from the trip does not cure the fundamental fairness defect. Alderman Hamm's testimony also shows that the aldermen did obtain evidence not otherwise available in the record which was relevant to the application. As the court stated in Havana, whether the City Council aldermen relied on the information gathered from the trip and subsequent report in deciding to grant siting is irrelevant. The Council's failure to include the information in the record and make it available to the public for comment or response rendered the process fundamentally unfair.

CONCLUSION

We find that the local siting process before the City of Madison was fundamentally unfair to petitioners. The City of Madison's failure to allow petitioners timely access to the transcript of the local hearing when such transcript was available and part of the siting record prejudiced petitioners by limiting their ability to prepare their public comments. Furthermore, we find that the facility tour taken by four of the eight City Council aldermen, and the report given thereon to the full City Council after the close of the public comment period, rendered the siting process fundamentally unfair by denying petitioners access to information which was available to the City Council aldermen. For these reasons, we reverse the decision of the City of Madison granting site location suitability approval to Metro-East.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

The September 21, 1995 decision of the City Council of the City of Madison granting siting approval to Metro-East, LLC is hereby reversed, and this docket is closed.

IT IS SO ORDERED.

Board member J. Theodore Meyer concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the

Supreme Court of Illinois establish filing requirements. (*See also* 35 Ill.Adm.Code 101.246 "Motions for Reconsideration".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of March, 1996, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board