ILLINOIS POLLUTION CONTROL BOARD
July 1, 1993

EUGENE DALY, JANE SCHMIT, CARL WILLIAMS, SOUTH COOK COUNTY ENVIRONMENTAL ACTION COALITION, Petitioner, v. VILLAGE OF ROBBINS, AND THE ROBBINS RESOURCE RECOVERY COMPANY, Respondent.	)	PCB 93-52 (Landfill Siting Review)

CITIZENS FOR A BETTER ENVIRONMENT, Petitioner, v. VILLAGE OF ROBBINS, AND THE ROBBINS RESOURCE RECOVERY COMPANY, Respondent.	)	PCB 93-54 (Landfill Siting Review)

KENNETH P. DOBBS, ESQ. APPEARED ON BEHALF OF THE SOUTH COOK COUNTY ENVIRONMENTAL ACTION COALITION;

KEITH I. HARLEY, CHICAGO LEGAL CLINIC, APPEARED ON BEHALF OF JANE SCHMIT, EUGENE DALY, AND THE SOUTH COOK ENVIRONMENTAL ACTION COALITION;

KEVIN GREENE APPEARED ON BEHALF OF CITIZENS FOR BETTER ENVIROMENT;

JAMES T. HARRINGTON, ROSS & HARDIES, APPEARED ON BEHALF OF THE ROBBINS RESOURCE RECOVERY COMPANY;

MARK SARGIS, WINSTON & STRAWN, APPEARED ON BEHALF OF THE ROBBINS RESOURCE RECOVERY COMPANY;

MARK STERK, ODELSON & STERK, APPEARED ON BEHALF OF THE VILLAGE OF ROBBINS.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

This matter is before the Board on third-party appeals of a decision granting site location suitability approval to a new regional pollution control facility. These appeals are filed pursuant to Section 40.1(b) of the Environmental Protection Act (Act) (415 ILCS 5/1 et seq.(1992)). The Board's responsibility in this matter arises from Section 40.1 of the Act. (415 ILCS 5/40.1 (1992).) The Board is charged, by the Act, with a broad range of adjudicatory duties. Among these is adjudication of contested decisions made pursuant to the local siting approval provision for new regional pollution control facilities, set forth in Section 39.2 of the Act. More generally, the Board's functions are based on the series of checks and balances integral to Illinois' environmental system: the Board has responsibility for rulemaking and principal adjudicatory functions, while the Board's sister agency, the Illinois Environmental Protection Agency (Agency) is responsible for carrying out the principal administrative duties, inspections, and permitting. The Agency does not have a statutorily-prescribed role in the local siting approval process under Sections 39.2 and 40.1, but would make decisions on permit applications submitted if local siting approval is granted and upheld.

Eugene Daly, Jane Schmit, Carl Williams and Cook County Environmental Action Coalition (CCEAC) filed their appeal on March 12, 1993, and Citizens for A Better Environment (CBE) filed its appeal on March 15, 1993. On March 25, 1993, the Board consolidated both appeals because Eugene Daly, Jane Schmit, Carl Williams, CCEAC, and CBE (petitioners) all seek review of the decision of the Village of Robbins (Village) granting site location suitability approval to the Robbins Resource Recovery Company (RRRC). Hearings were held on May 11, 1993, and May 12, 1993, in Robbins, Cook County, Illinois, which were attended by members of the public.

BACKGROUND

RRRC originally requested (1988 Application) local siting approval from the Village in June 1988 for a facility to recover recyclable materials and energy from municipal solid waste. (C000019.[1]) The Village approved siting of the proposed facility

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[1]The Village record will be cited as "C__". Village exhibits will be cited as "V. Exh. __". Applicant's exhibits contained in the Village record will be cited as "Appl. Exh. __". The PCB hearing transcript will be cited as "Tr. at __". References to the Robbins public hearing on December 22, 1992, will be cited as "Pr. Vol. __ at __". Petitioner's Brief in PCB93-52 will be cited as "Daly Br. at __". Petitioner's Reply Brief in PCB93-52 will be cited as "Daly Rep. Br. at __". Petitioners Brief in PCB93-54 will be cited as "CBE Br. at __".

on October 25, 1988. (C000019.) There was no appeal of that local siting decision. (C000020.)

On July 19, 1989, RRRC submitted coordinated permit applications to the Illinois Environmental Protection Agency (IEPA) for the facility. (C000019.) On June 11, 1990, IEPA issued a Construction Permit/PSD Approval (air permit), Development Permit (solid waste) and a Water Pollution Control Permit. (C000019 and C000102 A-Z.) On July 9, 1990, CBE requested of the United States Environmental Protection Agency (USEPA) an administrative review of the Prevention of Significant Deterioration (PSD) approval. Additionally, on July 16, 1990, the Illinois Attorney General also filed a request for administrative review. (C000019.)

On July 31, 1991, USEPA denied the Attorney General's petition, "indicating that the petition for review had failed to identify either a clear error of fact or law, or an important policy or exercise of discretion that warrants review". (C000019.) CBE's petition for review was denied on August 27, 1991, by USEPA on a similar ground. (C000019.)

In 1991, three and a half years after the original siting approval by the Village, the Illinois Attorney General challenged the siting approval in the Circuit Court of Cook County. The Circuit Court found that the Village of Robbins had not sufficiently complied with the notice requirements set forth in Section 39.2 of the Act and thus held that the Village had no jurisdiction to grant local siting approval. (C000020.) RRRC filed a motion for reconsideration with the court. (C000020.) The issue was resolved by a Consent Decree addressing environmental issues entered on April 12, 1993, (People of the State of Illinois v. Robbins Resource Recovery Company, No. 91CH11956, Circuit Court, Chancery Division, Cook County, Illinois (1993)) together with a Court Order finding that the Motion for Reconsideration was mooted by the second siting hearing. (RRRC Br. at 3.)

Robbins Recovery submitted the second request for siting approval of a regional pollution control facility (Application) to the Village on September 21, 1992. (C000002-000467.) The Application details that the proposed facility would be located on an approximately 16.11 acre (C000174) vacant site in the Village of Robbins in southern Cook County. (C000020.) The

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There are briefs from two respondent's in PCB93-52. Brief of the Village of Robbins will be cited as "Robbins Br. at __". Brief of RRRC will be cited "RRRC PCB93-52 Br. at __". Reply Brief of RRRC will be cited as "RRRC PCB93-52 Rep. Br. at __". In PCB93-54, RRRC Brief will be cited as "RRRC Br. at __", and RRRC Reply Brief will be cited as "RRRC Rep. Br. at __".

facility is designed to recover recyclable materials and energy from 1,600 tons per day of non-hazardous municipal solid waste. (C000024.) At full design capacity, the facility could process 584,000 tons per year of municipal solid waste. (C000024.) The facility will include two materials recovery and fuel preparation processing lines, two refuse-derived, fuel-fired circulating fluidized bed combustion systems, two "state-of-the-art" air pollution control systems and a single steam-driven turbine generator designed to produce approximately 40,000 KW net output of electric power. (C000024.) The facility is designed to recover recyclable materials comprising at least 25 percent of the municipal solid waste stream prior to combustion. (C000029.)

A public hearing on the Application before the Village was held December 22, 1992, which included both transcribed testimony and sworn statements (presented in the records as three volumes of proceedings). On February 9, 1993, the Village Board of Trustees unanimously adopted an ordinance (C005330-005336) which found that the Application was in conformity with the provisions of the Act, including the applicable criteria in Section 39.2 of the Act, and granted siting approval.

On appeal before the Board, Daly et al. (PCB 93-52) allege that the proceedings before the Village were fundamentally unfair and ask that the matter be remanded for a new hearing and new decision. CBE alleges (PCB 93-54) that the Village's findings: that the facility is necessary to accommodate the waste needs of the intended service area (Section 39.2(a)(1)); that the facility is located outside the boundary of the 100 year flood plain or is flood-proofed (Section 39.2(a)(4)); and that the plan of operation for the facility is designed to minimize danger in the surrounding area (Section 39.2(a)(5)) are against the manifest weight of the evidence.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. Section 39.2(a) 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. Only if the local body finds that all applicable criteria have been met by the applicant can siting approval be granted. The Village found that RRRC met its burden on all the criteria. (C005330-005336.) CBE challenges the Village's findings on criteria #1, #4, and #5.

When reviewing a local decision on the criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26 McLean

County.) Additionally, the Board must 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 (E & E Hauling).)

Additionally, the Board must 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. (415 ILCS 5/40.1 (1992); E & E Hauling, 451 N.E.2d at 562.) While no jurisdictional issues are presented, Daly et al. raises a fundamental fairness issue.

FUNDAMENTAL FAIRNESS

Section 40.1 of the Act requires the Board to review the proceedings before the local siting authority to assure fundamental fairness. In E & E Hauling, Inc. v. IPCB (2d Dist. 1983), 116 Ill.App.3d 586, 594, 451 N.E.2d 555, 564, aff'd in part (1985), 107 Ill.2d 33, 481 N.E.2d 664, 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, 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. IPCB (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.)

Petitioners allege that the Village of Robbins violated the fundamental fairness requirement of Section 40.1(a) of the Act while conducting the public hearing on December 22, 1992. (Daly Br. at 20.) Specifically, petitioners allege that the hearing failed to attain the minimum requirements of fundamental fairness in at least four ways:

1. the ground rules established by the Village for the conduct of the hearing were violated and were not consistently applied or enforced;

2. in design and execution, the entire proceedings were characterized by unnecessary haste;

3. the proceedings were not conducted in a manner consistent with the requirements of an adjudicatory proceeding;

4. the manner in which the public hearing was conducted prevented public participation necessary to create a complete record.

(Daly Br. at 20.)

The Trustees of the Village of Robbins (Robbins Trustees) passed Resolution 12-2-92 on December 2, 1992, which established the date and rules for the public hearing on the RRRC application. (C001804-001814.) The public hearing was scheduled for December 22, 1992, and was scheduled to begin at 6:30 p.m. The Hearing Officer appointed by the Village was Mark Sterk, from the firm of Odelson and Sterk, Ltd., the firm also serves as attorneys for the Village of Robbins. (Tr. at 222-223.)

The public hearing was held in the Robbins Recreation Training Center in Robbins, Illinois. The hearing commenced at approximately 6:40 p.m. (Pr. Vol. I at 6; Tr. at 32, 73, 166, 167.) From 6:00 p.m. to 6:40 p.m., a "rally" was staged in the Training Center by the Independent Study Commission supporting RRRC. (Tr. 25-32, 70-75, 162-168, 344-345.)

Were The Public Hearing Ground Rules Violated?

The first allegation by petitioners is that ground rules established by the Village for conduct of the hearing were violated and were not consistently applied or enforced.[2] Petitioners offered three alleged examples to make their case: (1) a pre-hearing "rally" permitted supporters of RRRC to testify first during the proceedings; (2) Hearing Officer Sterk's repeated comment during the hearing that written comments be sworn; and (3) Mr. Sterk's "arbitrary enforcement of the five minute rule". (Daly Br. at 20-23.) These three examples will be explored in the discussion below.

Petitioners allege that the pre-hearing "rally" permitted RRRC supporters to testify first during the proceedings. (Daly Br. at 20-21.) Petitioners maintain that this is a violation of the rules established by Robbins for conduct of this hearing. (C001807-001814.) Basically, petitioners argue that since the

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[2] The Board has previously held that we only review local ordinances (rules) to determine whether fundamental fairness was violated. (Gallatin, (PCB 91-256); Laidlaw, (PCB 91-89,90).)

"rally" was held in the same hall, immediately prior to the hearing, that it should have been governed by the rules established for the hearing.

Respondents replied that the "rally" was not part of the public hearing. (RRRC PCB93-52 Rep. Br. at 6.) Respondents acknowledged that "certain proponents of the proposed facility held a public meeting prior to the public hearing". (RRRC PCB93-52 Br. at 9.) This "rally" was organized by Mr. Rudy Bouie, Chairman of an independent Study Commission. (Tr. at 26-27, 46-48, 70; RRRC PCB93-52 Br. at 9.)

The nature of the "rally" and its relationship to an adjudicatory proceeding such as a local landfill siting hearing, will be discussed in more depth later. On the issue of whether the "rally" violated the ground rules established by the Village for conduct of the hearing, the Board finds that nothing in the Board's hearing transcript or the Village record indicates that the "rally" was part of the landfill siting hearing, and therefore, activities at the "rally" were not governed by the Village hearing rules. Further, the Board finds that the "rally" occurring before the hearing is not a violation of the Village hearing rules.

According to petitioners, the second violation of the Robbins rules was the reported statements by Hearing Officer Sterk that written comments be sworn. (Daly Br. at 7, 21-23, 34.) Respondents properly note that Section 39.2(c) of the Act imposes no requirement for written comments to be sworn when submitted within 30 days following the hearing. The Robbins' hearing rules likewise state that any written comment postmarked during the 30 day post-hearing comment period would be considered. (C001811.)

Respondents argue that there was no testimony that anyone was confused by Hearing Officer Sterk's remarks, or failed to submit written comments because they were unable to submit "sworn" testimony. Second, respondents maintain that Mr. Sterk's instructions "were inadvertent because he had prepared the ordinance...and did not recall even giving an instruction that written comments be sworn". (RRRC PCB93-52 Rep. Br. at 12; Tr. at 268-269.) Third, any and all written comments received by the Village were incorporated into the record, in accordance with Rule 6. (Tr. at 255.) Finally, none of the written submissions received during the 30 day comment period were "sworn". (RRRC PCB93-52 Rep. Br. at 13.)

The Board notes that Mr. Sterk made numerous references during the hearing about citizens making statements for the record in this case. (Pr. Vol. 1 at 33, 59, 91, 106, 133, 140, 168.) In some instances, he did specify "sworn statements". (Pr. Vol. 1 at 33, 59, 91, 168.) In other cases, he mentioned

the word "statement", without adding the qualifier "sworn". (Pr. Vol. 1 at 106, 133, 140.) Based on the record in this case, the Board finds that Mr. Sterk's use of the term "sworn statement" did not materially affect opponents' opportunities or abilities to provide written comments concerning RRRC.

According to petitioners, the "third and most significant violation was Mr. Sterk's arbitrary enforcement of the five minute rule". (Daly Br. at 23.) Petitioners cite the testimony of opponent Kevin Greene, who refused to be cut off after five minutes. Mr. Greene's testimony covers 15 pages. (Pr. Vol. 1 at 275-290.) By contrast, petitioners cite three opponents who were cut off: Carl Williams after 3 1/2 pages (Pr. Vol. 1 at 263-266); Dr. Ginsburg after 5 pages (Pr. Vol. 1 at 170-175); and Joseph Dangel after 4 pages (Pr. Vol. 1 at 181-184). Petitioners also allege inconsistencies in Mr. Sterk's enforcement time-keeping mechanisms. (Daly Br. at 24.)

Respondents do not believe that the Village rules or the conduct of the hearing which held opponent's comments to an initial five minute period were unfair. (RRRC PCB93-52 Rep. Br. at 14, 15.) Respondents maintain that both supporters and opponents were subject to the five minute rule; both opponents and supporters were allowed the opportunity to make statements after everyone had an initial five minute period; there was no limit on the number of citizens testifying; and the applicants' ten witnesses were limited to a total of 2 hours. (RRRC PCB93-52 Rep. Br. at 15-16.)

The Board finds that the record and testimony does not support Petitioner's allegations that limiting citizen comments to five minutes was unfair in design or execution. Mr. Sterk testified that he did not try to enforce this limit in a harsh or unreasonable manner. (Tr. at 284.) The record supports this conclusion. Petitioner's assertion that their case is proved by opponent Kevin Greene's adamant refusal to relinquish the floor after five minutes would lead any opponent to adopt this tactic to disrupt future landfill siting hearings. The five minute rule in this case balanced the individual's interest with society's interest in effective and efficient governmental operation, especially since individuals had the opportunity to continue public testimony after everyone had an initial five minute opportunity. (Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1989), 187 Ill.App.3d 79, 543 N.E.2d 505, 507.)

Were The Proceedings Characterized By Undue Haste?

Petitioners argue that several features of the proceedings were characterized by undue haste which discouraged public participation. Petitioners allege that several events support their contentions: scheduling the public hearing on December 22,

1992; holding only one public hearing; beginning the public hearing at 6:30 p.m.; limiting opponents' testimony to five minutes; and beginning opponents' testimony at 11:45 p.m. (Daly Br. 15, 25-30.)

Petitioners argue that the Village conducted the entire proceedings with undue haste. (Daly Br. at 25.) To support their claim, petitioners note that under Section 39.2 of the Act, the hearing must be held at any time between the 90th and 120th day after submission of the application. In this case, the hearing could have been held anytime from December 20 through January 19. Petitioners maintain that scheduling the hearing on December 22, three days before Christmas, limited opponents' participation and ability to procure expert testimony for the public hearing, because of impending holiday obligations. (Daly Br. at 25, 26.) Petitioners also allege that compressing testimony into a single evening and starting at 6:30 p.m. were evidence of undue haste. (Daly Br. at 26, and other cites.)

Respondents argue that petitioners cite no statute, rule, or case law that additional hearings are required. (RRRC PCB93-52 Br. at 12.) Respondents maintain that December 22, 1992, was a business day with the opportunity to carry the hearing over to the next day. (RRRC PCB93-52 Br. at 12-13.) Respondents also label as "disingenuous" the assertion by petitioners that they could not secure the testimony of desired experts on the date, since they were aware of the Application filing on September 21, 1992. (RRRC PCB93-52 Br. at 13.)

Petitioners argue that compressing the public hearing into a single evening, beginning at 6:30 p.m. with opponents' testimony placed tenth on the agenda, effectively undermined and frustrated public participation. The main thrust of petitioners' argument was that pushing opposing citizens' testimony into the late night and earlier mourning hours to finish a public hearing was fundamentally unfair. Petitioners cited a prior Board decision where a similar issue arose.[3] In Casner Township v. Jefferson County (Casner Township v. Jefferson County, (April 4, 1985) PCB 84-175, 84-176, 61 PCB 357, 366 (Casner) the public hearing concluded at 2 a.m. and the Board characterized the proceedings as the "exhaustion approach".

Respondents argue that Casner can be distinguished from the present circumstance because in Casner, the hearing continued past midnight until 2:00 a.m. based on the vote of the village board and not the consent of the parties. (Casner at 373.) Also in Casner, one project opponent was represented by an attorney,

[3] Petitioner also cited Hediger (PCB 90-163, (December 20, 1990)) to support their case, but the Board notes that Hediger did not involve or discuss fundamental fairness.

yet his rights to participate as counsel were abridged. (Casner at 374-375.) Respondents note that no one filed an appearance as attorney for opponents in the Robbins hearing. (Pr. Vol. 1 at 168.) Respondents also maintain that until Mr. Greene's comments toward the end of the public hearing (Pr. Vol. 1 at 275-279), there was no protest of hearing procedures.[4]

After considering the record and testimony in this case, the Board finds that the proceedings were not characterized by undue haste. Scheduling the hearing on December 22, 1992, did not lead to a fundamentally unfair proceeding. Both opponents and supporters of the project would be equally affected by impending holiday obligations. The record indicates that Hearing Officer Sterk was willing to continue the hearing until all citizens had an opportunity to speak. (Pr. Vol. 1 at 203; Tr. at 252-253.) Although initially limited to five minutes, citizens were offered the opportunity to continue testifying in five minute blocks as long as necessary. (Pr. Vol. 1 at 259.) The Board notes that 67 opponents filled out cards indicating a desire to testify. (Pr. Vol. 1 at 186.) Given the large number of potential testifiers, the five minute limit on initial testimony was a reasonable way to allow large numbers of people the opportunity to speak.

Several other factors mitigate against a finding of fundamental unfairness. Hearing Officer Sterk offered to continue the public hearing until 10:00 a.m. on December 23. (Pr. Vol. 1 at 186.) He continued the hearing into the mourning hours of December 23, after talking on informal poll of those wishing to testify. (Pr. Vol. 1 at 204.) The Hearing Officer also changed the order of events to allow opponents to testify before supporters (Pr. Vol. 1 at 169), even though the Village rules (see #9 and #10, C000018) stated that opponents would testify after supporters.

Were The Proceedings Consistent With Requirements For An Adjudicatory Proceeding?

Petitioners maintain that the December 22 public hearing did not meet the requirements of an adjudicatory proceeding in two key aspects. (Daly Br. at 31.) The alleged contrasts arose from: the pre-hearing "rally"; the layout of the hearing room; and the conduct of the hearing officer.

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[4]The Board notes that although Mr. Greene presented a more thorough list of alleged procedural grievances, another testifier did raise procedural issues on the record. Alderman Virginia Rugai, 19th Ward, questioned the starting time of 6:30 p.m. and scheduling the hearing on December 22, 1992. (Pr. Vol. 1 at 200.)

As discussed previously, petitioners maintain that the pre-hearing "rally" should be considered part of the public hearing on the RRRC Application, because it was held in the same location (Robbins Recreation Training Center) as the public hearing, and overlapped the published starting time of the public hearing by about 10 minutes. The Board found that the "rally" was not part of the RRRC public hearing, and the rules for conduct of the public hearing did not apply to the "rally". (See within, p. 7.) However, the location and timing of the "rally" make it a proper area of inquiry in relation to the fundamental fairness of the instant case.

The "rally" was staged by an independent study commission, chaired by Mr. Rudy Bouie. (Tr. at 26-27, 46-48, 70; RRRC PCB93-52 Br. at 9.) The "rally" commenced at 6:00 p.m. in the same auditorium where the public hearing was scheduled to take place at 6:30 p.m. Informational handouts, buttons, and hats supporting the RRRC facility were handed out from a table by the door where citizens entered the auditorium. (Tr. at 25, 59-60, 69, 108-110, 147, 156-157, 165, 188.) At another table, food and drinks were available, courtesy of the proponents. (Tr. at 146-147, 238.)

After introducing the "rally" and making remarks about the benefits that RRRC would bring to the community, Chairman Bouie introduced three speakers in turn: State Senator-elect William Shaw; Representative Murphy; and a local minister. These individuals gave remarks supporting the RRRC facility until approximately 6:40 p.m. when Hearing Officer Sterk began the public hearing. (Pr. Vol. 1 at 6.) Mr. Sterk had originally arrived about 6:10 p.m., placed his briefcase at his station, then went outside to have a cigarette. (Tr. at 229.)

Several RRRC opponents arrived early for the public hearing. (Tr. at 24, 66, 161.) According to these opponents, the "rally" speakers essentially stated that the RRRC would be a financial boom to the community, and made racist remarks directed toward the opponents. (Tr. at 28, 30, 72.) Opponents maintain that the Mayor and some of the Trustees were present during the "rally". (Tr. at 31, 164, 165.) The opponents testified that they were shocked, amazed, appalled, intimidated, or confused by the nature of the proceedings. (Tr. at 23, 32, 70, 74, 164.)

Respondent's argue that the "rally" was not sponsored by the Village and was not part of the RRRC public hearing. (RRRC PCB93-52 Br. at 9-11; RRRC PCB93-52 Rep. Br. at 6-7.) They maintain that there is no proof that Village officials may have been involved in the "rally". They do admit that testimony of three opponents (Tr. at 31, 73, 89, 90) indicates that Mayor Brodie may have been present at the "rally". (RRRC PCB93-52 Br. at 10.) However, respondents maintain that testimony shows that there was a clear delineation between the "rally" and the public

hearing (Tr. at 32, 75-76, 89, 167, 185), and that opponents acknowledged hearing the Hearing Officer's call to order and instructions for the public hearing. (Tr. at 33, 75, 169, 185.) Respondents further point to Mayor Brodie's opening remarks as a clear indication that the public hearing had opened. (Pr. Vol. 1 at 7-8.)

After reviewing the testimony in this case, the Board agrees with the petitioners that the "rally" did not bear the hallmarks of an adjudicatory proceeding. This Board is dismayed by the testimony that public officials made racist remarks while citizens were entering the auditorium prior to the start of the hearing. The remarks as reported were insensitive, unwarranted, and inflammatory. However, the record in this case offers no proof that the Village of Robbins was involved in the "rally". Although the "rally" was insensitive to the feelings of the opponents, there is no showing in the record that opponents' opportunity to be heard in the public meeting were abrogated. Therefore, the Board finds that the "rally" in itself does not lead to a finding of fundamental unfairness given the circumstances of the instant case.

Petitioners also allege that the layout of the hearing room did not meet the "value-neutral" requirements of an adjudicatory proceeding. (Daly Br. at 33.) As evidence they offer two lines of evidence: the position of tables encountered by citizens upon entering the hearing room (V. Exh. 1); and the location of the room on the second floor where citizens could testify before a second court reporter. (Daly Br. at 33.)

Petitioners took issue with the proponents distributing pro-incinerator literature from the same table that held the cross-question and statement forms for all participants. (Daly Br. at 33; Tr. at 188-189.) They also maintain that the tables containing proponent paraphernalia (Tr. at 108) and dispensing free food and drinks (V. Exh. 1) were not "value-neutral". Petitioners cited a previous Board opinion (Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163, 117 PCB 117) to support their contention that layout of the hearing room can be a critical issue in determining fundamental fairness of a proceeding.

Respondents note that Hediger did not directly address the issue of hearing room layout. Instead, respondents cite City of Columbia ((April 3, 1986) PCB 83-177, 85-220, 85-223, 69 PCB 1) which dealt with seating capacity in a hearing room. Respondents properly state that the Board has previously ruled that lack of adequate seating could lead to a ruling of fundamental unfairness in a public hearing. The Board has not previously ruled that the placement of informational tables can determine a fundamental fairness question. Furthermore, respondents note that incinerator opponent, Jeff Tangel, was also permitted to place

opposing literature on the informational table. (Tr. at 188, 189.)

The placement of the second court reporter in a second floor room, separated from the main hearing room, is also an element of petitioner's allegation that the hearing was fundamentally unfair. As noted earlier, a second court reporter was made available so that individuals could make sworn statements for the record. (Pr. Vol. 1 at 11.) Citizens wishing to testify before the auxillary court reporter exited the hearing room and went upstairs to the second floor. Opponents testified that they were not able to hear speakers in the auditorium while they waited to give testimony, or while giving their testimony to the secondary court reporter. (Tr. at 40.) Petitioners further maintain that opponents were encouraged to leave the hearing to testify before the secondary court reporter. (Daly Br. at 8-10, 27, 37-38.)

Respondents argue that the second court reporter was presented as a service to the participants (RRRC PCB93-52 Br. at 15) and participants were never asked or coerced to leave the hearing room. (RRRC PCB93-52 Br. at 19.) Use of the second court reporter was not compulsory. (Pr. Vol. 1 at 11-12, 91-92, 168-169; Tr. at 305.) Respondents maintain that the provision of a second court reporter made it easier for participants to make statements into the record. (RRRC PCB93-52 Rep. Br. at 19.)

After examining the record, the Board finds that the layout of the hearing room does not rise to a showing of fundamental unfairness. The Board can find no evidence in the record that participants were coerced into using the second court reporter. Approximately 60 opponents and 11 proponents presented testimony before the second court reporter. (Pr. Vol. 2 at 2-140.)

The lack of compulsion or coercion to use the second court reporter is a key point in the Board's consideration here of fundamental fairness issues. Case law has established that the public hearing is a critical component of the landfill siting application before the local government. (Kane County Defendeers v. Illinois Pollution Control Board, (2nd Dist. 1985) 487 N.E.2d 743.) Citizens must have the opportunity to express their views in a public forum as a necessary component of the record to be considered by local officials charged with the decision. (Kane County Defendeers v. Illinois Pollution Control Board, (2nd Dist. 1985) 487 N.E.2d 743.) The Board does not consider the provision of a second court reporter as a replacement for public testimony at hearing.[5]

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[5]The Board notes that opportunity to provide written comments in a landfill siting appeal cannot be substituted for opportunity by citizens to testify at a public hearing. (Kane County Defendeers v. Illinois Pollution Control Board, (2nd Dist.

Petitioner's final line of argument that the public hearing was not consistent with an adjudicatory proceeding is based on the activities of the Hearing Officer, Mr. Sterk. According to petitioner, the Hearing Officer did not conduct the proceeding in "a competent, impartial, even-headed manner, consistent with an adjudicatory proceeding". (Daly Br. at 34.) Petitioners list several alleged mistakes. For example, petitioners note that the Hearing Officer did not appear in the hearing room at the scheduled 6:30 p.m. starting time, which allowed the "rally" to continue until about 6:40 p.m. Petitioners allege that Mr. Sterk's references to the necessity for sworn statements[6] was at the expense of project opponents, as well as his failure to clear the hearing room of pro-incinerator paraphernalia. Petitioners also offer as evidence Mr. Sterk's refusal to answer a question about whether or not opponents would lose their rights to appeal by testifying before the second court reporter (see Tr. at 84, 85). Other complaints include not being aware that the second court reporter had left, no transcription of the audience poll when he suggested recess until 10 a.m., December 23, and impatience with the proceedings. (Daly Br. at 35.)

Respondents argue that the hearing officer's conduct was "fair, impartial, and reasonable". (RRRC PCB93-52 Rep. Br. at 11.) They maintain that a delay of ten minutes is not unusual for the start of a public meeting, and cite Mr. Sterk's testimony to that effect. (Tr. at 237-238.) Respondents also cite Mr. Sterk's testimony (Tr. at 275-277, 301) that he had no knowledge of responsibility for the "rally" as a defense for not stopping the event. Respondents maintain that it was proper for Mr. Sterk, as the Hearing Officer, and as an agent of the Village, not to answer the question from the citizen concerning his standing to appeal. (RRRC PCB93-52 Br. at 19.)

Upon review of the record the Board finds that the Hearing Officer's conduct did not abrogate the opportunities of the public to be heard in the matter and was not improper. As Hearing Officer, Mr. Sterk, properly declined to answer a citizen's question about legal standing. (Tr. at 84, 85.) There is no evidence of a pattern of impartiality in Mr. Sterk's behavior toward opponents. The Board notes, that in the one instance where Mr. Sterk used his authority as Hearing Officer to alter the Village rules for conduct of the hearing, it was to the

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1985) 487 N.E.2d 743.) In the instant case, if opponents had been required or coerced to testify before the second court reporter, the Board may have ruled that the proceedings were fundamentally unfair.

[6]The Board discussed this issue on pages 7 & 8, and did not find that the Hearing Officer's use of the term sworn statement contributes to a finding of fundamental unfairness.

benefit of opponents at the expense of project supporters. Mr. Sterk changed the order of presentation to allow opponents to testify before supporters. (Pr. Vol. 1 at 169.) The record also shows that as midnight on December 22 approached Mr. Sterk offered the opportunity to continue the hearing until 10 a.m., December 23. (Pr. Vol. 1 at 186.) He acceded to the wishes of opponents and continued the hearing until its conclusion at approximately 3 a.m., December 23, 1992.

Was The Public Hearing Conducted In A Manner Which Prevented The Public Participation Necessary To Create A Complete Record?

Petitioners allege that the manner in which the Robbins public hearing was held defeated the public participation necessary to create a complete record in three ways. (Daly Br. 36-39.) First, petitioners allege that appropriate public participation was defeated because opponents did not begin testifying until after 11 p.m. The second allegation is that the Hearing Officer managed to effectively remove from the public hearing many participants who wished to testify. Third, petitioners allege that the five minute testimony rule was imposed only on opponents and was arbitrarily enforced. Finally, petitioners maintain that the Hearing Officer arbitrarily discarded cross-questions.

Petitioners cited Casner as authority for the proposition that starting opponents testimony late in the proceedings could be evidence of an "exhaustion approach" thwarting adequate public participation. The Board has distinguished the current case from Casner (see within at 9) and does finds that the facts of the instant case do not lead to a finding of fundamental unfairness.

Second, petitioners allege that the Hearing Officer effectively removed citizens from the hearing room by: repeatedly warning citizens that their opportunity to testify would be late in the evening; and directing citizens to testify before a second court reporter on the second floor where testimony in the public hearing could not be heard. (Daly Br. at 8-10, 27, 37-38.) Respondents counter that opponents were never asked or coerced to leave to give testimony on the second floor before the second court reporter. (RRRC PCB93-52 Br. at 19.) Respondents maintain that the hearing procedures and conduct made it easier for participants to ask their questions and make statements into the record. (RRRC PCB93-52 Rep. Br. at 19.) As final evidence that public participation was not abridged, respondents note that approximately 60 cross-questions were submitted and more than 100 public statements were made at the public hearing. (RRRC PCB93-52 Rep. Br. at 20, Exhibit A1-8.) After examining the record, the Board finds that public participation was not thwarted by the Hearing Officers comments that: citizen testimony would be late in the evening; or citizens could testify on the second floor before a second court

reporter. The Board has also discussed this issue on page 9 and 10.

The Board has already discussed the Village's five minute testimony rule in relation to fundamental unfairness. (See within, p. 8.) The Board finds that limiting citizen comments to five minutes was not unfair in design or execution. (See within, p. 8.)

The final allegation by petitioners is that a complete record was defeated by the Hearing Officer's arbitrary jettisoning of cross-questions. As an example, petitioners point to a question by Gloria Scott that the Hearing Officer refused to read. Petitioners characterized the question as pertaining to "affirmative action and racial matters". (Daly Br. at 38.)

RRRC responds by describing the manner in which Mr. Sterk handled cross-questions. (RRRC PCB93-52 Br. at 19-20.) Cross-question forms were marked and numbered in the order received and were asked in the same order. (Tr. at 253-254.) Mr. Sterk informed participants that duplicative or irrelevant questions would not be asked (Pr. Vol. 1 at 10-11, 108), and wrote the reason for not asking the question on the form. (See C003007-003066.) Any questions not asked were more fully explained in supplemental information supplied to the Village. (C004156-004159.)

In reviewing the cross-question submitted by Ms. Gloria Scott (C003046), the Board finds no basis for reversing the Hearing Officer's ruling that the question was irrelevant. The Board also finds nothing in the record which demonstrated that any cross-questions were handled improperly by the Hearing Officer. Therefore, the Board finds that public participation was not thwarted by improper Hearing Officer's behavior in handling the cross-questioning segment of the public hearing.

Conclusion

The fundamental fairness questions raised by petitioners primarily related to the manner in which the hearing was conducted and to the opportunity for citizens to be heard. In reviewing the facts of the case in relation to the appropriate statutes and case law, the Board finds that no individual event, or the cumulative total, rises to a showing of fundamental unfairness in this proceeding. Therefore, the Board finds that the proceedings conducted by Robbins were not fundamentally unfair.

THE CHALLENGED CRITERIA OF SECTION 39.2(a) OF THE ACT

When reviewing a local decision on the nine criteria found in Section 39.2(a) of the Act, this 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.) A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. (Harris v. Day (4th Dist. 1983), 115 Ill.App.3d 762, 451 N.E.2d 262, 265.)

The Board, on review, is not to reweigh the evidence. Where there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. (Fairview Area Citizens Taskforce v. Pollution Control Board (3d Dist. 1990), 198 Ill.App.3d 541, 555 N.E.2d 1178, 1184; Tate v. pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176, 1195; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1989), 187 Ill.App.3d 79, 543 N.E.2d 505, 507.) Merely because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the local government's findings. (File v. D & L Landfill, Inc. (August 30, 1990), PCB 90-94 , aff'd; File v. D & L Landfill, Inc. (5th Dist. 1991), 219 Ill.App.3d 897, 579 N.E.2d 1228.)

On February 9, 1993, the Village Board of Robbins unanimously enacted an ordinance (C005330-005336) finding that all applicable siting criteria from Section 39.2 of the Act had been satisfied, and approving the RRRC siting application. As previously stated, CBE alleges that the Village acted against the manifest weight of the evidence in relation to criteria #1, #4 and #5 in granting local siting approval for the family.

Criteria #1, #4 and #5 can be found at Section 39.2(a)(1)(4)(5) of the Act:

a. The county board of the county or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, shall approve or disapprove the request for local siting approval for each regional pollution control facility which is subject to such review. An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if the

> proposed facility meets the following criteria:
>
> 1. the facility is necessary to accommodate the waste needs of the area it is intended to serve;
>
> * * *
>
> 4. the facility is located outside the boundary of the 100 year flood plain or the site is flood-proofed;
>
> 5. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents...

Criteria #1: Waste Needs Of The Area.

CBE alleges that "[n]o demonstrated need exists for the proposed Robbins facility based upon existing and projected waste disposal capacity that will be capable of serving the intended service area prior to operation of this facility". (CBE Br. at 2.) CBE believes that the manifest weight of the evidence indicates the following points:

1. the applicant's needs assessment did not properly account for out-of-state waste shipments and recycling plans in the intended service area;

2. existing and new landfill capacity will be sufficient to handle the projected capacity shortfall and dispose of the waste of the intended service area prior to the operation of the proposed Robbins facility;

3. the intended service area was overstated with major counties and sub-county areas within Cook County planning to use alternative facilities;

4. only 18 of the 38 communities in the Cook County solid waste planning area that includes the proposed Robbins facility are even considering this facility;

5. the 18 south suburban municipalities don't [sic] generate enough waste to meet the facility's design needs and they are

considering alternative waste disposal facilities which can meet their needs as well;

[6]. a number of communities in the intended service [area] have expressed opposition to the Robbins project and don't intended [sic] to use this facility; and

[7]. private haulers in the City of Chicago are making plans to build huge waste transfer stations and use downstate landfills.

(CBE Br. at 16-17.)

RRRC argues that there is ample evidence in the record to support the Village's finding in favor of the application. RRRC maintains that CBE is misrepresenting the needs of the service area contemplated by the Act. RRRC argues that CBE supports its allegation by reference to solid waste management plans (some of which are only in draft form), community resolutions, speculative recycling, source reduction goals, and proposed disposal facilities. (RRRC Br. at 12.)

First, the Board will note that some of CBE's contentions seem to dispute the definition of the service area by RRRC. These include: the intended service area was overstated; only 18 of 38 communities in the Cook County solid waste planning area are considering this facility; and many communities have expressed opposition to the facility. Case law clearly establishes that the applicant defines the service area. (Citizens Against Regional Landfill v. The County Board of Whiteside County (February 25, 1993), PCB 92-156, __ PCB __; Metropolitan Waste Systems v. IPCB, (3d Dist. 1990), 201 Ill.App.3d 51, 55, 558 N.E.2d 785, 787, cert. denied, 135 Ill.2d 558, 564 N.E.2d 839 (1990). See also Citizens for a Better Environment v. Village of McCook (March 25, 1993), PCB 92-198, 92-210, pp. 7-8, __ PCB __.)

RRRC has defined the service area as the nine counties designated by the IEPA as the Chicago Metropolitan Solid Waste Management Region. (C000040.) The Application maintains that the facility is easily accessible and within a 50-mile haul distance of most of the service area. (C000040-41.) The Board notes that the service area is clearly defined and the Board will not examine further the determination of RRRC of the service area.

The RRRC Application needs assessment is found at C000040-000048. RRRC estimated that in 1997, the first planned year of facility operation, the service area would generate 24,000 tons per day (tpd) of processible municipal solid waste (msw).

(C000042.) RRRC assumes that source reduction/recycling of 25 percent will reduce this figure to 18,000 tpd. (C000043.) RRRC then subtracts 1,000 tpd processed by the Chicago Northwest Waste-to-Energy Facility (C000045), reducing the potential need to 17,000 tpd of MSW, which is ten times the capacity of RRRC. RRRC estimates are based on figures obtained from the U.S. Census Bureau, the Illinois Bureau of the Budget, the Northern Illinois Planning Commission, and the IEPA. (C000040.)

The RRRC Application also bases its calculation of service area needs on the IEPA's October 1991 annual disposal capacity report. (C003162-003269.) The report states that the Chicago metropolitan region's solid waste disposal capacity is likely to be exhausted between 1997 and 1999, assuming current disposal rates and no additional capacity. (C003199.) IEPA's disposal report projects that only six existing landfills in the service area will be operating after 1997 (C003199), when RRRC plans to commence operations. The combined capacity of these six landfills is presently 9,000 tpd (C000047), which leaves a potential need shortfall of 8,000 tpd (by subtracting 9,000 tpd from the projected need of 17,000 tpd).

Finally, RRRC maintains that its needs assessments are determined in conformance with Illinois state policy. RRRC cites to the Illinois Solid Waste Management Act (415 ILCS 20/2(b)) which states:

> b. It is the purpose of this Act to reduce reliance on land disposal of solid waste, to encourage and promote alternative means of managing solid waste, and to assist local governments with solid waste planning and management. In furtherance of those aims, while recognizing that landfills will continue to be necessary, this Act establishes the following waste management hierarchy, in descending order of preference, as State policy:
>
> 1. volume reduction at the source;
>
> 2. recycling and reuse;
>
> 3. combustion with energy recovery;
>
> 4. combustion for volume reduction;
>
> 5. disposal in landfill facilities.

Illinois state policy clearly states that combustion with energy recovery is preferred over disposal in landfill facilities. In addition, RRRC's assumption of a 25 percent recycling rate is

consistent with the Illinois state 25 percent recycling goal found in the Solid Waste Planning and Recycling Act. (415 ILCS 15/6(3).)

First, CBE contends that the applicant's needs assessments did not properly account for out-of-state waste shipments and recycling plans. CBE notes that according to the IEPA, 10 percent of the waste in the intended service area is exported out of the regime for disposal. (C003199.) CBE maintains (CBE Br. at 7) that this is equivalent to 1,800 tpd, based on RRRC's projection that need is 18,000 tpd. (C000044.) RRRC responds that there is nothing in the record to support the assumption that the 10 percent export rate will continue in the future. (RRRC Br. at 16.) Additionally, RRRC notes that even if the 1,800 tpd is exported, it does not fully take care of the RRRC projection that there will exist a 8,000 tpd shortfall in existing landfill capacity. (RRRC Br. at 16.)

CBE next argues that RRRC "did not properly account for the recycling programs that are being developed pursuant to the adopted solid waste plans in the intended service area". (CBE Br. at 7.) CBE observes that several communities and counties in the service area have adopted higher waste reduction goals than the state goal of 25 percent. These higher goals range from 30 to 47 percent. (C004996, 004997, 005013, 005029, 005035, 005041, 005093, 005087.) CBE argues (CBE Br. at 8) that pilot programs indicate that as much as 70 percent of the waste stream can be diverted from landfills.

RRRC counters CBE's argument by noting that, according to the IEPA, less than 13 percent of the non-hazardous solid waste in Illinois was recycled and composted in 1991. (C000040, 003164.) RRRC argues that there is nothing in the record to indicate that waste stream diversion rates beyond the 25 percent state goal, and approaching the 70 percent diversion posited by CBE, can be attained. (RRRC Br. at 16.)

Second, CBE contends that existing and new landfill capacity will be sufficient to handle the projected capacity shortfall. (CBE Br. at 16.) CBE maintains that several landfills are either under construction or in the planning stages[7] which were not

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[7]The Board notes that CBE appears to counter its own argument that other landfills that are proposed or under construction should have been considered in need calculations. CBE states that it "opposes these facilities because, like the proposed Robbins incinerator, they are environmentally-unsound and a threat to safer waste prevention and recycling methods...". CBE goes on to say that regardless of their opposition, the Board must consider these proposed facilities in determining whether or not RRRC's calculations were against the manifest weight of the

properly reflected in RRRC's calculations. (CBE Br. at 8-10.) CBE contends that two DuPage County landfills, which will continue to operate under court order (C005055-005056) until 2001, remove the sense of urgency implied by the RRRC application. (CBE Br. at 11.)

RRRC argues that there is nothing in the record to indicate that several of the landfills named by CBE as planned or under construction will receive all the permits they need to operate. (RRRC Br. at 17-19.) RRRC also notes that there is nothing in the record to indicate that the existing landfills of Christian County, Wayne County, and the Litchfield-Hillsboro Facility are presently accepting waste from the service area. RRRC points to an appellate decision which stated "it is not improper to consider facilities outside of the intended service area if those facilities are presently providing waste disposal to the county". (Waste Management v. IPCB (2d Dist. 1988 at 690), 175 Ill.App.3d 1075, 530 N.E.2d 682.) In relation to the DuPage County landfills, RRRC placed the final consent order in the record (C004470-004494) and included the capacities of those landfills in the 9,000 tpd available capacity calculation. (C000047; RRRC Br. at 16.)

Third, CBE contends that the intended service area was overstated since many areas plan to use alternative facilities. (CBE Br. at 16.) CBE cites several county and sub-county solid waste management plans (SWMP's) in draft or final stages that outline specific measures to meet their area waste disposal needs. (CBE Br. at 11-15.) CBE states that the Robbins facility "is not consistent with the planning recommendations of at least six of the major solid waste management plans that have been adopted in the intended service area...". (CBE Br. at 12.) CBE notes that the RRRC facility has been included as a service provider in the waste management plan for South Cook County (see alternative #5, C005023), which will eventually become part of the SWMP's for Cook County. (C003159.)

RRRC maintains that the "Village Board's decision regarding the need criterion is not against the manifest weight of the evidence simply because the SWMP's of the counties in the Service Area do not name the facility as a component of their plans". (RRRC Br. at 21.) RRRC contends that CBE's argument more properly relates to criterion #8 of Section 39.2(a) of the Act, that a proposed facility must be consistent with the adopted SWMP's of the county where it is located (but CBE did not challenge the eighth criterion). RRRC notes that none of the county plans specifically excludes use of the RRRC facility. (RRRC Br. at 21.) RRRC also notes that the majority of the SWMP's discuss waste-to-energy facilities as an option being

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evidence. (CBE Br. at 9.)

considered. (C005015, 005034, 005036, 005051-005052, 005063.) Finally, RRRC references Board precedent which stated that "the relevant inquiry is whether there is sufficient evidence in the record to support the Village's finding of need, not whether the [county SWMP's] or any other draft waste management plan specifically incorporates [the Facility]". (RRRC Br. at 21; Citizens for a Better Environment v. Village of McCook (March 25, 1993), PCB 92-198, 92-201, at p. 9 ___ PCB ___.)

Fourth and fifth, CBE contends that only 18 of the 38 communities in the Cook County solid waste planning area are considering the RRRC facility and they do not generate enough waste to supply the RRRC facility. (CBE Br. at 14-15.)

Sixth, in a contention related to points four and five, CBE notes that many communities in the service area have expressed opposition to the project and do not intend to use RRRC's facility. (C005144-005160; CBE Br. at 16.) CBE reports that the RRRC facility is included in the south Cook County solid waste plan and only 18 of the 38 communities have joined the South Suburban Solid Waste Agency. (C005170.) CBE argues that it is unclear whether these 18 communities will ever use the proposed RRRC community. (CBE Br. at 15.) CBE states that even if these 18 communities send their waste to RRRC, they will generate only 522 tpd, which is below the RRRC design capacity of 1,600 tpd. (CBE Br. at 15.)

RRRC argues that "[t]he disposal capacity shortage remains unaffected by any single community's decision not to use a particular facility, whether by suggested inference in a County plan or by local resolution not to send waste to the [F]acility". (RRRC Br. at 20.) RRRC contends that even if certain communities do not choose to use RRRC's facility, their waste would deplete existing landfill space, shortening that landfill's lifespan and decreasing the service area's remaining capacity. (See Fairview Area Citizens Taskforce (3d Dist. 1990), 198 Ill.App.3d 541, 552, N.E.2d 1178, 1185, cert. denied, 133 Ill.2d 554, 461 N.E.2d 689 (1990) (affirming the Board's finding of need for the proposed facility, the court explained that as one landfill closes "the life expectancies of the surrounding landfills could be considerably shortened...[S]tress on those landfills, as well as on the landfills in the...service area, could be considerably relieved by the proposed facility, thereby extending the life expectancies of the existing facilities".) RRRC noted that, according to IEPA projections, the service area's remaining capacity is low. (C003199.)

Seventh, CBE argues that private haulers in the City of Chicago are making plans to build huge transfer stations and use downstate landfills. (CBE Br. at 13.) CBE describes these huge waste sorting operations with capacities of 2,500 to 5,000 tpd and some recycling capabilities. (C005018-005019, 005126,

005135-005136.) Nonrecycled waste would be transported to downstate landfills by train. (CBE Br. at 10.,

RRRC notes that the only support CBE offers that these sites should be considered in calculations of need are newspaper articles. (See C005018-005019, 005126, 005135-005136.) RRRC argues that this is speculative information which is insufficient for the Village to use in determining need. (RRRC Br. at 20.)

After reviewing the record and the case law, the Board finds that the Village's finding that the RRRC facility is necessary to accommodate the waste needs of the service area is not against the manifest weight of the evidence. RRRC provided extensive information and expert testimony to calculate the projected waste disposal needs of the service area. Although, CBE challenges those calculations, RRRC presented sufficient evidence to support the Village's finding. The Board cannot engage in reweighing the evidence before the Village. (Tate v. Illinois Pollution Control Board (Ill.App.4 Dist. 1989), 544 N.E.2d 1176.)

Criteria #4: Flood-proofing.

The RRRC site lies within the designated 100-year floodplain for Midlothian Creek. (C000066.) CBE notes that Illinois statute (415 ILCS 5/39.2(a)(iv)) provides that approval for the RRRC facility can be granted only if the site is flood-proofed. CBE observes that the Village ordinance granting local siting approval states: "The Facility is designed to be flood-proofed." (CBE Br. at 18; C005336.) CBE then argues that since the language of the approval ordinance does not conform to the language of Section 39.2(a)(4) of the Act ("site is flood-proofed"), the ordinance does not evidence the strict compliance with the Act demanded by case law. (Citing to Waste Management v. Illinois Pollution Control Board (Ill.App.2 Dist. 1987), 513 N.E.2d 592, Clutts v. Beasley (Ill.App.5 Dist. 1989), 541 N.E.2d 844, Tate v. Illinois Pollution Control Board (4th Dist. 1989), 544 N.E.2d 1176.)

RRRC argues that CBE has incorrectly interpreted Section 39.2(a)(4) to require that the site be "flood-proofed" when the Village makes its decision about whether or not to grant local siting approval. RRRC maintains that CBE has detached the specific requirement at (a)(4) from the preceding clause at Section 39.2 which speaks in terms of a "proposed facility". RRRC interprets the statute to require only that the applicant demonstrate that the site will be flood-proofed when structures at the site are constructed. RRRC notes that floodproofing typically involves water detention areas and raising building elevations. RRRC argues that construction permits cannot be obtained without siting approval; therefore, the statute cannot be read to require floodproofing prior to seeking local siting approval. RRRC considers its position consistent with previous

Board and appellate court decisions. (Tate v. PCB (4th Dist. 1989), 188 Ill.App.3d 944, 1022-1023, 544 N.E.2d 1176, 1195, cert. denied, 129 Ill.2d 572, 550 N.E.2d 565 (1989) and Tate v. Macon County Board, (December 15, 1988), PCB 88-126, 94 PCB 103.) RRRC notes that demonstrations that the proposed facility will be flood-proofed are found in the record. (C000066-000067, 000085-000087, 000241-000257.)

The Board notes that CBE challenges the timing of the completion of RRRC's floodproofing proposal, not its adequacy. The Board agrees with RRRC's intrepretation of the statute. After careful review of the record, the Board finds that the Village's finding that the RRRC facility meets the criteria of 415 ILCS 5/39(a)(v) is not against the manifest weight of the evidence.

Criteria #5: Plan of Operations.

CBE argues (CBE Br. at 22-23) that the section of the RRRC application entitled "Plan of Operations" (C000068) lacks substance and credibility. CBE contends that the section does not contain specific provisions or policies detailing how the facility is actually designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. Instead, the application indicates that a plan "will be designed and implemented". (C000072.) Additionally, while CBE acknowledges that RRRC has submitted an example of a contingency plan into the record (C000333-000363), CBE maintains that it does not pertain to the Robbins facility. CBE then argues that "[T]he Village did not condition its approval on completion of a plan of operations, nor did it direct that RRRC must develop one. The mere unconditional, speculative promise of RRRC to design such a plan does not fulfill the strict statutory requirements of Section 39.2(a)(5)." (CBE Br. at 23.)

RRRC points out that there is Board precedent for affirming local siting approval where the application contained no formal plan of operations, yet the applicant presented testimony on pertinent issues and the application addressed operational plan aspects. (Gallatin National Company v. The Fulton County Board, (June 15, 1992) PCB 91-256, 134 PCB 273.) In another case, the appellate court affirmed a Board finding that the operational plan criterion was satisfied, despite CBE's challenge due to lack of details in the application. (Fairview Area Citizens Taskforce v. IPCB (3d Dist. 1990), 198 Ill.App.3d N.E.2d 1178, cert. denied, 133 Ill.2d (1990)). RRRC also argues that the sample operational plan submitted into the record (C000333-000363) is for an actual waste-to-energy facility, which has been implemented by the same operator, Foster-Wheeler, which will operate the planned Robbins facility. RRRC contends that the level of detail in the draft plan is "more than sufficient

evidence for the Village Board to find that RRRC satisfied criterion five". (RRRC Br. at 27.)

After reviewing the record and pertinent precedents, the Board finds that the Village's finding that: "The plan of operations for the Facility is designed to minimize the danger to the surrounding area from fire, spills, or operational accidents" (C005366) is not against the manifest weight of the evidence. The Board is satisfied that RRRC submitted sufficient details in the application for the Village Board to appropriately make its finding. (Industrial Fuels, 227 Ill.App.3d 533, 592 N.E.2d 148.) For example, the Board notes that the sample plan of operations (C000333-000363) is for an actual operating facility which is run by the same operator that will manage the Robbins facility.

CONCLUSION

Daly et al. challenged the local siting decision of the Village asserting that the proceedings were fundamentally unfair. CBE challenged the decision of the Village alleging that the decision was against the manifest weight of the evidence in relation to criteria #1, #4, and #5. After extensively reviewing the evidence in the case, the Board finds that the Village's proceedings were fundamentally fair, and its decision on the criteria was not against the manifest weight of the evidence. Therefore, the Board affirms the siting approval for a regional pollution control facility by the Village of Robbins.

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

ORDER

The Board affirms the February 9, 1993, decision of the Village of Robbins granting site location suitablility approval for a new regional pollution control facility to be located in Robbins, Cook County, Illinois.

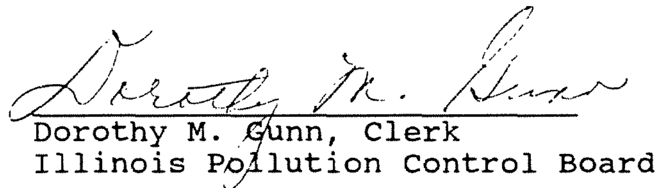
IT IS SO ORDERED.

Chairman Claire A. Manning concurs.

Board Member Bill Forcade dissents.

Section 41 of the Environmental Protection Act (415 ILCS 5/40.1) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But 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 ____1st____ day of ____July____, 1993, by a vote of ____6-1____.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board