ILLINOIS POLLUTION CONTROL BOARD
September 5, 2002

GERE PROPERTIES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 02-201
	)	(Third-Party Pollution Control Facility
JACKSON COUNTY BOARD and	)	Siting Appeal)
SOUTHERN ILLINOIS REGIONAL	)	
LANDFILL, INC.,	)	
	)	
Respondent.	)	

STEPHEN F. HEDINGER, OF HEDINGER LAW OFFICE, APPEARED ON BEHALF OF THE PETITIONER; and

JOHN J. MCCARTHY, SPECIAL ASSISTANT STATE'S ATTORNEY FOR JACKSON COUNTY, APPEARED ON BEHALF OF THE RESPONDENT JACKSON COUNTY BOARD; AND CHARLES F. HELSTEN, OF HINSHAW & CULBERTSON, APPEARED ON BEHALF OF SOUTHERN ILLINOIS REGIONAL LANDFILL, INC.

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

On May 15, 2002, Gere Properties, Inc. (Gere) filed a petition asking the Board to review an April 10, 2002 decision of the Jackson County Board (Jackson County) that granted Southern Illinois Regional Landfill, Inc.'s (SIRL's) application to site a pollution control facility in Jackson County. Gere appeals on the grounds that the Jackson County decision that the proposed facility is necessary to accommodate the waste needs of its intended service area is against the manifest weight of the evidence.

Gere filed this appeal pursuant to Section 40.1(b) of the Environmental Protection Act (Act) (415 ILCS 5/40.1(b) (2000)) *amended by* P.A. 92-0574, eff. June 26, 2002, that allows certain third parties to appeal a local government decision granting approval to site a pollution control facility. Third parties who participated in the local government's public hearing and who are so located as to be affected by the proposed facility, may appeal the siting decision to the Board. 415 ILCS 5/40.1(b) (2000); *amended by* P.A. 92-0574, eff. June 26, 2002, 35 Ill. Adm. Code 107.200(b). The Board found that Gere's petition met the necessary requirements and accepted this matter for hearing on June 6, 2002.

A hearing was held in this before Board Hearing Officer Steven Langhoff at the Jackson County Health Department, BACS Building, Murphysboro, on July 17, 2002. No members of the public attended the hearing. Gere filed its post-hearing brief on July 26, 2002.

Jackson County filed its post-hearing brief on August 6, 2002. SIRL filed its post-hearing brief on August 7, 2002. On August 16, 2002, Gere filed a motion for leave to file a reply brief, along with a reply brief. One public comment was filed before the Board. The comment was made by Gary Pearson, the General Manger for the SIRL landfill and was favorable toward SIRL. Tr. at 7.

For the reasons set forth below, the Board affirms Jackson County's decision to grant siting approval.

BACKGROUND

Gere is the owner of the Perry Ridge Landfill (Perry Ridge), in Perry County. C03536. A developmental permit was issued by the Agency to Perry Ridge, but the landfill has not been issued an operating permit. C00039. SIRL is the owner and operator of the Southern Illinois Regional Landfill, the facility at issue. SIRL's landfill was originally permitted in 1971. C00035.

On November 5, 2001, SIRL filed an application for site location approval of the South Unit Expansion of the Southern Illinois Regional Landfill in Jackson County. C0001-C01627.[1] The Pollution Control Facility Committee (Committee) of Jackson County held public hearings on February 4, 2002, February 5, 2002, February 14, 2002, February 15, 2002 and February 26, 2002. The Committee issued a unanimous recommendation finding that the application met the criteria set forth in Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2000)) *amended by* P.A. 92-0574, eff. June 26, 2002, on April 10, 2002. C03745-C03750. Jackson County unanimously adopted a resolution on April 10, 2002 granting local siting approval of the South Unit Expansion. C03776-C03782.

REVIEW OF LOCAL SITING DECISIONS

Under Illinois law, local units of government act as siting authorities that are required to approve or disapprove requests for siting of new pollution control facilities**,** including new landfills. The process is governed by Section 39.2 of the Act. 415 ILCS 5/39.2 (2000) *amended by* P.A. 92-0574, eff. June 26, 2002,. In addition, Illinois law provides that siting decisions made by the local siting authorities are appealable to this Board. The appeal process is governed by Section 40.1 of the Act. 415 ILCS 5/40.1 (2000) *amended by* P.A. 92-0574, eff. June 26, 2002,.

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[1] The record form the proceeding before Jackson County will be cited as "C__"; the petition for review will be cited as "Pet. at __"; Gere's brief will be cited as "Gere at __"; Jackson County's Brief will be cited as "Jackson County at __"; SIRL's brief will be cited as "SIRL at __"; Gere's reply brief will be cited as "Gere reply at __"; and the transcript from the hearing before the Board will be cited as "Tr. at __."

Section 39.2(a) provides that the local siting authority, in this case the Jackson County Board, is to consider as many as nine criteria when reviewing an application for siting approval. 415 ILCS 5/39.2(a) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002. Section 39.2(g) of the Act provides that the siting approval procedures, criteria, and appeal procedures provided for in Section 39.2 are the exclusive siting procedures for new pollution control facilities. However, the local siting authority may develop its own siting procedures, if those procedures are consistent with the Act and supplement, rather than supplant, those requirements. *See* Waste Management of Illinois v. PCB, 175 Ill. App. 3d 1023, 1036, 530 N.E.2d 682, 692-93 (2d Dist. 1988). Only if the local body finds that the applicant has proven by a preponderance of the evidence that all applicable criteria have been met can siting approval be granted. Hediger v. D & L Landfill, Inc., (Dec. 20, 1990), PCB 90-163, slip op. at 5.

When reviewing a local decision on the nine statutory criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. McLean County Disposal, Inc. v. County of McLean, 207 Ill. App. 3d 352, 566 N.E.2d 26 (4th Dist. 1991); Waste Management of Illinois, Inc. v. PCB, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2d Dist. 1987); E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2d Dist. 1983), aff'd in part 107 Ill.2d 33, 481 N.E.2d 664 (1985). 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. CDT Landfill Corporation v. City of Joliet, (Mar 5, 1998), PCB 98-60, slip op. at 4, *citing* Harris v. Day, 115 Ill. App. 3d 762, 451 N.E.2d 262, 265 (4th Dist. 1983).

This Board, on review, may not re-weigh the evidence on the nine criteria. 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. PCB, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3d Dist. 1990); Tate v. PCB, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989); Waste Management of Illinois, Inc. v. PCB, 187 Ill. App. 3d 79, 82, 543 N.E.2d 505, 507 (2d Dist. 1989). 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. (Aug. 30, 1990), PCB 90-94, *aff'd*, 219 Ill. App. 3d 897, 579 N.E.2d 1228 (5th Dist. 1991).

In addition to reviewing the local authority's decision on the nine criteria, the Board is required under Section 40.1 of the Act to determine whether the local proceeding was fundamentally fair. In E & E Hauling, Inc. v. PCB, 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. E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d at 596, 451 N.E.2d at 564; *see also* Industrial Fuels & Resources v. PCB, 227 Ill. App. 3d 533, 592 N.E.2d 148 (4th Dist. 1992); Tate v. PCB, 188 Ill. App. 3d at 1019, 544 N.E.2d at 1193. 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 v. PCB, 175 Ill. App. 3d 1023, 1037, 530 N.E.2d 682, 693 (2d Dist. 1988). 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. (Dec. 20, 1990), PCB 90-163, slip op. at 5.

ISSUES

The petition for review raised one issue for the Board's consideration: whether the Jackson County decision that SIRL met the need criterion. *See* Section 39.2(a)(i) (415 ILCS 5/39.2(a)(i) (2000)) *amended by* P.A. 92-0574, eff. June 26, 2002 – that the proposed facility is necessary to accommodate the waste needs of its intended service area - is against the manifest weight of the evidence. Pet. at 2. However, in its brief, Gere, for the first time,asks the Board to rule that SIRL's siting application is against the manifest weight of the evidence with respect to both criterion (i), (the need criterion), and criterion (viii). Gere at 14. Criterion (viii) requires the proposal to be consistent with the county's solid waste management plan. *See* 415 ILCS 5/39.2(a)(viii) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002.

PRELIMINARY MATTERS

A number of preliminary matters have arisen. The Board will address each of these in turn.

Gere's Motion to File a Reply Brief

On August 16, 2002, Gere filed a motion for leave to file a reply brief, along with a reply brief. To date, no response to the motion has been received.

In its motion, Gere requests leave to file a reply to respondents' briefs in order to prevent material prejudice to Gere. Mot. at 1. Gere asserts that the response briefs were replete with mischaracterizations of the record and misrepresentations of arguments, and that without leave to file a reply, the Board may be misled and thus Gere would be materially prejudiced. Mot. at 1-2.

In addition, Gere asserts that it requires leave to identify and rebut a number of new and irrelevant arguments made by SIRL in its brief. Mot. at 2. Further, Gere asserts that SIRL presented numerous statements as though they are part of the record, when many are no more than unsupported assertions or suppositions. *Id*.

Finally, Gere notes that SIRL included the motion to strike in its brief. Mot. at 2. Gere argues that, despite SIRL's sharp practice of waiting until the last minute to file its motion, Gere is including in its reply a response to the motion to strike, and that in the absence of the allowance to file the reply, Gere would be materially prejudiced through inability to file a response to SIRL's late motion. *Id*.

The Board grants Gere's motion to file a reply, and accepts Gere's reply brief.

Gere's Motion to Supplement the Record

In its reply brief, Gere asserts that upon reviewing the record in preparation of the reply, it became aware that two pages of its exhibit 12 were omitted from the record. Gere states that the first sheet of the only admitted page clearly reveals that it is the first of a three-page document. Reply at 21. Gere requests that the Board allow the entire exhibit to be filed as a supplement to the record.

The Board grants Gere's motion to supplement the record, and accepts the three pages of attached exhibit B as Gere exhibit 12.

Attempted Challenge to Criterion (viii)

Motion to Strike

In its brief, SIRL moves to strike that portion of Gere's request for relief requesting the Board to rule with respect to Criterion (viii). SIRL at 27-28. SIRL asserts that Gere designated only one issue to be heard on appeal in its petition, and that prior to the filing of its brief did not in any way challenge Jackson County's decision as to other criterion. SIRL at 27. SIRL continues that Gere did not request that it be allowed to challenge other criterion before the close of the hearing, but only presents the matter in the very last portion of the very last sentence of its closing brief. *Id*.

SIRL asserts that neither the county board nor SIRL was aware of Gere's intention to challenge criterion (viii) until receipt and review of the closing brief on or about July 24, 2002, and that both Jackson County and SIRL would be substantially prejudiced by Gere being allowed to raise any argument as to this criterion after the hearing in the matter has been closed. SIRL at 27.

Finally, SIRL argues that the Board would establish an unwise precedent by allowing Gere to argue issues in its closing brief that were not previously raised, and that Gere's attempt to sneak issues literally in the back door of this case should be denied. SIRL at 27.

Response to Motion to Strike

Gere asserts that SIRL has not explained in any specific or general way how it is prejudiced by Gere's raising of criterion (viii). Reply at 18-19. Gere argues that the case cited by SIRL (A.R.F. Landfill, 174 Ill. App. 3d 82) was decided with respect to an issue of prejudice concerning fundamental fairness, and not with respect to one of the substantive criteria. Reply at 19.

Gere contends, nonetheless, that it clearly informed both SIRL and Jackson County on the very first night of the proceedings before Jackson County that it would challenge the siting application on the basis of both criterion (i) (need) and criterion (viii) (consistency with the solid waste management plan). Reply at 19, citing C02069-C02072.

Gere argues that SIRL cites no authority to support the "novel position" that it was obligated to have specified the criterion (viii) issue in earlier pleadings with the Board or to have appeared at the Board's hearing to state its intention to challenge this criterion. Reply at 19. Gere asserts that nothing in the Act nor the Board's regulations provide any such requirement.

Finally, Gere argues that because the criteria in Section 39.2(a) are to be decided on the record produced before Jackson County, virtually no purpose would have been served by raising the issue at hearing, since no additional evidence could have been introduced on the point. Reply at 19.

Discussion

Section 107.208 of the Board's procedural rules provides the petition content requirements for a petition to review a pollution control facility siting decision. See 35 Ill. Adm. Code 107.208. Such a petition must include, *inter alia*, a specification of the grounds for the appeal, including any manner in which the decision as to particular criteria is against the manifest weight of the evidence. 35 Ill. Adm. Code 107.208(c).

In its petition, Gere alleged only that the Jackson County decision as to criterion (i) was against the manifest weight of the evidence. Gere never attempted to amend its petition, and did not request the Board to review criterion (viii) until the filing of its post-hearing brief. No attempt to challenge criterion (viii) is contained in any hearing officer order in this matter.

The Board grants SIRL's motion to strike. Gere did not meet the requirements of Section 107.208(c) that clearly provide that the petition must specify any manner in which the decision as to particular criteria is against the manifest weight of the evidence. Gere had the opportunity to amend the petition at any point before the hearing, and even during the hearing itself, but never attempted to do so. Gere did not raise the challenge to criterion (viii) until July 26, 2002, when it filed its post-hearing brief. Gere's late attempt to challenge criterion (viii) before the Board resulted in prejudice to the respondents, who were not able to address this issue through the pendency of the case. At a minimum, the respondents were prejudiced by having to spend unanticipated time and effort responding to a new issue not presented until only two weeks remained before their briefs were due.

Accordingly, the motion to strike is granted, and that portion of Gere's brief that requests the Board rule that Jackson County's decision approving the siting application is against the manifest weight of the evidence with respect to criterion (viii) is stricken.

CHALLENGE TO SITING CRITERION (i)

Having determined that Gere may not, at this point, challenge criterion 8, the Board now turns to a discussion of the remaining challenged criterion. As noted above, the Board cannot reweigh the evidence. The Board may only reverse the Jackson County decision on the criteria if the decision was against the manifest weight of the evidence. Waste Management of Illinois, Inc. v. IPCB (1987), 160 Ill. App. 3d 434, 513 N.E.2d 592. 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, 115 Ill. App. 3d 762, 451 N.E.2d 262. Merely because the Board could reach a different conclusion, is not sufficient to warrant reversal. City of Rockford v. PCB and Frank's Industrial Waste, (2nd Dist. 1984) 125 Ill. App. 3d 384, 465 N.E.2d 996.

The sole criterion at issue provides:

The facility is necessary to accommodate the waste needs of the area it is intended to serve. 415 ILCS 5/39.2(2)(i) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002,.

Gere's Argument

Gere argues that the uncontroverted evidence reveals that at the earliest, SIRL's expanded facility will not be necessary for eleven or more years. Gere at 6. Gere contends that no dispute exists with respect to the threshold issue of how long it will be before the service area exhibits a shortfall in disposal capacity. Gere at 3. Gere claims that SIRL's witness at the underlying hearing Timothy Boos, acknowledged that, without the sought expansion, the earliest at which the service area would run out of capacity is the year 2013. Gere at 3. Further, Gere contends that Mr. Boos' testimony relates to a worst-case scenario that would likely not occur and that the earliest date of shortfall should be after 2013 and, perhaps, not until 2030. *Id*.

Gere cites to an Illinois Appellate Court case holding that while a proposed landfill need not be shown to absolutely necessary, it still must be shown to be "expedient, indicating some urgency or reasonably convenient. In other words, the applicant must show his landfill is reasonably required by the waste needs of the area taking into consideration its waste production and disposal capabilities." Gere at 4 citing Wabash and Lawrence Counties Taxpayers and Water Drinkers Assoc. v. PCB, 198 Ill. App. 3d 388, 391, 555 N.E.2d 1081, 1084 (5th Dist. 1990). Gere contends that 'reasonably convenient' also requires a level of urgency and requires a petitioner to show more than convenience. *Id*.

Gere asserts that Illinois courts have universally rejected needs analyses that propose landfills in service areas that will not run out of airspace, absent the siting proposals, for 10 years or more. Gere at 4. Gere points to another appellate court case allowing the siting body to consider evidence of a proposed new facility as well as the existence of nearby facilities

outside of the county to decide that there is no need within the meaning of criterion (i). Gere at 5-6, citing 175 Ill. App. 3d 1023, 520 N.E.2d 682 (2nd Dist. 1988).

Gere contends that the record reveals, and SIRL admits, current adequate capacity. Gere at 7. Gere asserts that the existing SIRL site will not run out of airspace for four or five years, and that SIRL admits that Perry Ridge, with its 20 years' capacity, will be open in 2002 or 2003, and that the Cottonwood Hills facility near Marissa is already open with a capacity of nearly 46 million cubic yards. Gere at 7. Gere further states that the Marion Ridge Landfill located in adjacent Williamson County with its capacity of 37 million cubic yards is in the process of seeking a developmental permit. *Id*. Gere contends that if the Marion Ridge airspace is added to SIRL's existing airspace, that there will indeed be a tremendous glut of available airspace. *Id.*

Gere asserts that the planning entities responsible for production of the Greater Egypt Region Municipal Waste Management Plan recommended against the expansion of SIRL or any other facility until after all active proposals were concluded. Gere at 8. Gere contends that the planners said that if the Perry County and Williamson County landfills received siting approvals, there would be no need or justification for SIRL's additional landfill initiative. Gere at 9.

Gere further asserts that SIRL and Jackson County have adopted a "convenience" interpretation of the need criterion, but that this interpretation has been specifically rejected by every court that has considered. Gere at 9, citing 123 Ill. App. 3d 1075, 1084, 463 N.E.2d 969, 976 (2nd Dist. 1984). Gere claims that Jackson County's approval of SIRL's proposal could have grave environmental consequences for the entire planning region by causing a capacity surplus. Gere at 9-10. Gere contends that the heart of the need criterion is the regional nature of solid waste management, and that both Perry County and Saline County addressed this issue to the Jackson County Board, but were ignored. Gere at 10. Gere asserts that both Perry and Saline County recently granted siting approval for new landfills within their borders on reliance upon the then-current needs of service areas that include and overlap with the service area described by SIRL. Gere at 10.

Gere asserts that one major reason Perry Ridge was sited by Perry County was because of the expected closure date of SIRL and that SIRL's proposed expansion will interfere with the reasonable and legitimate expectations of Perry County Gere at 11. Gere notes that the Saline County Board's Landfill Committee Chairman, Jim Grimes, expressed similar concerns when noting that now, as opposed to their 1997 proceeding, there is no urgency at all. Gere at 11. Gere contends that Mr. Grimes also referenced potential environmental hazards as a result of too much available disposable capacity. Gere at 12, citing C03208. Gere claims that Mr. Grimes urged Jackson County to reject SIRL's proposal because the additional airspace is simply not necessary and will interfere with the attempts of Saline County to provide a healthy environment to its citizens. Gere at 12, citing C03210.

Gere contends that the Marion Ridge proposed landfill is proceeding and if it receives approval, the result will be a substantial capacity surplus in the region and one of the area's landfills likely will not make it. Gere at 13. Because, concludes Gere, there is no current urgency, there was no justification for Jackson County to have approved SIRL's proposal and thereby to have subjected the surrounding counties to the dangers of too much landfill capacity. *Id.*

Gere highlights the testimony of its witness Don Sheffer that throughout the proposed area SIRL contends it will serve numerous expansion proposals exist in Missouri and Kentucky as well as throughout Southern Illinois. Gere at 14. Based on this, Gere contends, Mr. Sheffer was able to conclude that no immediate crisis situation exists so that something needs to be done right now. *Id.*

Finally, Gere requests that the Board rule that the Jackson County decision approving the siting application of SIRL is against the manifest weight of the evidence with respect to criterion one and that it should be reversed and SIRL's application denied. Gere at 14.

Jackson County's Arguments

Jackson County first notes that Gere bears the burden of showing the Board that the siting decision was against the manifest weight of the evidence, and that the evidence clearly demonstrates that Gere has failed to carry its burden of proof because the record amply supports Jackson County's decision in this case. Jackson County at 3.

Jackson County asserts that if after reviewing the record in this case, the Board finds that Jackson County could have reasonably reached its conclusion, the decision must be affirmed. Jackson County at 5. Further, Jackson County contends that the fact that a different conclusion might also be reasonable is insufficient, but that rather the opposite conclusion must be clearly evident, plain or indisputable. *Id.*

Jackson County asserts that necessary does not meant that landfills must be shown to be absolutely necessary, only that they must be shown to be reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capabilities, along with any other relevant factors. Jackson County at 6, *citing* Waste Management of Illinois, Inc. v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d 542 (3rd Dist 1984).

Jackson County maintains that over the last few years, speculative landfill developments have been proposed in Williamson, Saline, Perry and Randolph Counties, but that the status of these developments is uncertain. Jackson County at 7. Jackson County asserts that the ability of these proposed landfills to provide for the citizens of Southern Illinois is also uncertain since none of these developers presently operate any waste disposal or collection services in the region. *Id.*

Jackson County contends that SIRL is so vital to the region's needs that the Greater Egypt Region Municipal Waste Management Plan states that if the owners of SIRL do not want to expand the landfill, that further expansion could be initiated by the County, and that the County should support further development and expansion of SIRL to serve its long-term needs. Jackson County at 7, citing C00035. Jackson County further maintains that SIRL is expected to reach capacity in less than five years, and that the proposed expansion will guarantee the future disposal needs of Jackson County and surrounding Illinois counties for approximately 20 years. *Id.*

Jackson County asserts that although Perry Ridge is not yet receiving waste, the permitted capacity was assumed as available capacity in the service area and accounted for in the application, and that the additional capacity provides only about 30 percent of the service area need during the study period. Jackson County at 9.

Further, Jackson County discusses the testimony of Mr. Boos who testified that the SIRL expansion is necessary to accommodate the waste needs of the area it is intended to serve. Jackson County at 10. Jackson County states that Mr. Boos testified that the basis for his opinion, that the expansion is necessary to accommodate the waste needs of the service area, is as follows: that the service area is currently a net exporter of waste; that SIRL is the only operating facility in the service area; that it has been a long standing provider for the area; that they will be out of space in a few years; and that without expansion, the service area will consume its permitted operating capacity by 2006. Jackson County at 10. Jackson County asserts that Mr. Boos testified that even if Perry Ridge is included, the service area would consume its capacity by 2013, and that if both SIRL and Perry Ridge were both assumed to be operating facilities, that the needs of the service area would still not be satisfied. *Id.*

According to Jackson County, Gere's witness, Don Sheffer, testified that if SIRL runs out of capacity in 2006 and Perry Ridge doesn't open by that time, there would be no available disposal capacity facilities within the service area. Jackson County at 11, citing C03173. Jackson County asserts that the Greater Egypt Region Municipal Waste Management Plan offers recommendations for Jackson County landfill disposal that state the county should "support further development and expansion of the Southern Illinois Regional Landfill to serve its long-term needs." Jackson County at 15, citing C00341.

Finally, Jackson County identifies testimony from Mr. Boos stating that "it couldn't be any clearer in the solid waste management plan from 1996, and the 2001 update clearly identified that the future needs for the county and the surrounding area will be – is expected to be provided by SIRL. It's pretty clear that the plan identified SIRL as the long term solution for its waste needs." Jackson County at 16, citing C02954, C02957.

SIRL's Arguments

SIRL asserts that when reviewing the Jackson County decision granting site approval, the Board is limited to a determination of whether the decision on the criteria is contrary to the

manifest weight of the evidence. A point, states SIRL, that Gere conveniently fails to identify and apparently does not believe deserves consideration. SIRL at 2. SIRL contends that a decision is contrary to the manifest weight of the evidence only if the opposite result is clearly evident, plain or indisputable from a review of the evidence. SIRL at 3. SIRL asserts that considerable deference must be given to the local unit of government, and that the decision shall only be overturned under the most extraordinary of circumstances. SIRL at 4.

SIRL contends that under any standard of review, the record as developed in this matter contains more than sufficient detail upon which Jackson County could have based its decision that every criterion in 39.2(a) (including criterion 1) was met. SIRL at 4. The application itself, asserts SIRL, contains sufficient detail upon which Jackson County could have properly determined that criterion 1 had been satisfied. *Id.*

SIRL argues that the application sets forth clearly that the existing capacity of SIRL will be filled on or around 2006, despite Gere's assertions to the contrary. SIRL at 4. Expansion of the landfill is so vital to the area's waste needs, contends SIRL, that the Greater Egypt Regional Municipal Waste Management Plan states that further expansion of the landfill could be initiated by the county. SIRL at 5.

SIRL notes that the application highlights that the SIRL facility is the only operating facility within the service area, and that if the facility is not expanded; the existing facility is expected to reach capacity in less than five years. SIRL at 5, citing C00035, C00039. SIRL contends that it has never, nor have any of its testifying witnesses or representatives, indicated that the expected capacity of the facility will extend past five years. SIRL at 5. SIRL maintains that only four additional existing sanitary landfill are currently operating within 25 miles outside of the service area, and that one of them (Saline County Landfill) is scheduled to close in the near future. SIRL at 5.

SIRL contends that of the three proposed facilities within 25 miles outside the service area, Grand Prairie in Randolph County has already been denied siting approval, and only Perry Ridge in Perry County has even been granted a development permit. SIRL at 6. SIRL notes that none of the three proposed facilities have existing hauling or waste management operations. SIRL at 6, citing C00041.

SIRL asserts that not one regional planning commission or authority located within the service area designated by SIRL in the application, appeared and formally objected to the application; but that, at most, Saline and Perry County filed public comments that expansion should not be allowed as the siting may prejudice the potential financial interest of the counties that have landfill projects pending. SIRL at 2.

In the application, SIRL sets forth a disposal capacity analysis that asserts that even assuming Perry Ridge is one day granted an operating permit, that the additional capacity so afforded would provide only about 30% of the future long-term service area disposal capacity needs during the period in question. SIRL at 6, citing C00049. Further, argues SIRL, Gere's

own expert on the issue of need, Mr. Donald Sheffer, conceded that Perry Ridge may never become operational, but even if it does, the projected capacity of Perry Ridge (14 million in-place cubic yards) plus the SIRL proposed expansion capacity (21.1 million in-place cubic yards) would address only 75% of the long-term service area needs, thus resulting in a long-term disposal capacity shortfall within the service area for the planning period in question. SIRL at 6, citing C00049.

SIRL contends that the application included a detailed sensitivity analysis to verify the accuracy of the date use, and that the data and information obtained, evaluated analyzed and reported in the application demonstrated a clear and convincing need for additional long-term disposal capacity in the service area. SIRL at 7. SIRL further argues that the application established that the proposed SIRL expansion was necessary to help relieve the projected capacity shortfall for the planning period in question. *Id.*

SIRL next addresses the testimony of its witness, Mr. Boos, on criterion 1. Mr. Boos' testimony, asserts SIRL, evidences the fact that he has considerable expertise and experience in the area of needs assessments, and is well qualified to testify on the issue of need within a designated service area. SIRL at 8. SIRL contrasts this with Gere's expert Mr. Sheffer who, prior to this matter, had never before even testified on the issue of need and has much less needs experience. *Id.* Given this significant disparity in experience, contends SIRL, Jackson County was well within its rights to give more weight to the testimony of Mr. Boos. SIRL at 9.

SIRL argues that Gere has misstated Mr. Boos' testimony on when the service area would run out of capacity, and that Mr. Boos testified that even assuming that Perry Ridge becomes operational, and even that its service area is identical to the SIRL service area, that the service area designated by SIRL would still run out of capacity in 2013. SIRL at 9. However, asserts SIRL, Perry Ridge does not have the same identical service area as SIRL and that fact was significant to Mr. Boos in arriving at his conclusions. *Id.* SIRL also argues that the distinct possibility exists that some, if not a significant portion, of Perry Ridge's capacity (if ever actually developed and in operation) would be devoted to waste outside the service area designated by SIRL. *Id.*

SIRL argues that Mr. Boos concluded that anywhere from 40 – 50% of the waste presently being generated within the service area was being exported, and that this fact in and of itself demonstrates an immediate need for additional service capacity. SIRL at 10. SIRL contends the Mr. Boos testified that even with the additional capacity SIRL was requesting in this expansion, a need still exists for the development of additional capacity within the service area, that it is well documented that the existing facility would run out of air space within a few years, and that without the SIRL expansion the service area will exhaust its current permitted operating disposal capacity by the year 2006. SIRL at 10.

SIRL argues that Gere grossly misrepresented SIRL's testimony when it stated "SIRL admitted that Perry Ridge will be open at 2002 or 2003 at the latest." SIRL at 11. SIRL

claims the testimony of Mr. Boos was only a conservative assumption, not a statement that Perry Ridge would be open by 2002 or 2003. *Id*. SIRL asserts even Gere's own needs' expert Mr. Sheffer acknowledged that it is uncertain when, if ever, Perry Ridge will receive its operating permit and become operational. SIRL at 12. Further, SIRL asserts that Gere's needs expert also acknowledged that he did not know when, if ever, the Marion Ridge facility would be operational. *Id*.

SIRL asserts that there is a good, if not compelling, reason to believe these two facilities may not be operational for another ten years. SIRL argues that, in any event, the law does not require the county to accept as true the unsubstantiated opinions about speculative landfill projects, when they may never come to fruition. SIRL at 12.

SIRL asserts that the facts elicited from Gere's own witness undeniably establish that the need for more capacity within the SIRL service area exists in the foreseeable future. SIRL at 13. Gere's witness Mr. Sheffer conceded that Perry Ridge had only recently received its development permit, had not even applied for an operating permit, and that he did not know when, if ever, Perry Ridge would become operational. *Id*. SIRL contends that Mr. Sheffer also readily conceded that he did not know what volume of waste that Perry Ridge will receive from portions of its service area common to that of SIRL. SIRL at 14.

SIRL stresses that Gere's entire argument on the issue of needs is solely premised on a very tenuous house of cards, namely that the proposed Perry Ridge facility (if it ever becomes operational) will only accept waste from the SIRL service area. SIRL at 15. Most importantly, argues SIRL, Mr. Sheffer admits that if SIRL runs out of capacity by 2006 and Perry Ridge is not online by then, the designated service area will have no available disposal capacity in 2006. *Id*. SIRL concludes that requesting an expansion in 2002 to accommodate a need that may very well arise as early as 2006 is totally reasonable. *Id*.

Next, SIRL asserts that the record shows that Perry Ridge is burdened with significant legal impediments to its ultimate operability that do not show any sign of resolution in the near future. SIRL at 15. Specifically, the public comment of William Poiter reveals that he and his family hold the mineral estates under the Perry Ridge site and intend to take all legal action necessary to defend those rights. SIRL at 16. Further, SIRL contends that it is evident from the record that the Perry Ridge facility initially commenced its quest for siting and permit approval in 1992, and that they did not even receive a developmental permit until nearly a decade later. *Id*. SIRL maintains that Mr. Poiter's comment reveals he does not intend to sell his rights to the estate, and intends to take legal action in the future to enforce and preserve their rights. In addition, asserts SIRL, Gere's witness conceded that the proposed Perry Ridge facility had not even applied for an operating permit. SIRL at 18. For these reason, asserts SIRL, it is no wonder that Jackson County chose to substantially dismiss the viability of the Perry Ride site in making its determination. SIRL at 17.

SIRL contends that Gere's reliance on two proposed facilities that may never become operational to meet the long term needs of the service area is misleading and misplaced. SIRL at 17.

SIRL maintains that when all relevant segments of the Jackson County Solid Waste Management Plan are read as a whole, and in the proper context, that the need for the SIRL expansion is clearly demonstrated. SIRL at 18. SIRL stated that the 1996 Regional Plan recognizes that a need for additional airspace in the Greater Egypt Region could arise as early as 2003, and that Gere disingenuously ignores those additional portion of the 1996 plan that expressly endorse the expansion of existing landfills in the area. SIRL at 19.

SIRL notes that Franklin County and Perry County planners who participated in the regional planning process specifically earmarked and designated SIRL as a facility to be used to address their county's long-term disposal needs. SIRL at 21. In fact, SIRL states, the Perry County portion of the Greater Egypt Plan specifically contemplates the expansion of the SIRL facility to address the long-term needs of both Perry County and the region. *Id*. According to SIRL, each and every county within the Greater Egypt Regional Planning area specifically anticipated and endorsed the necessary future expansion of SIRL when the plan was first approved in 1996. SIRL at 22. SIRL asserts that the Jackson County's 2001 five-year update to its solid waste management plan provides that the future expansion of the SIRL landfill should be supported to serve the county's long-term needs. SIRL at 24.

SIRLS asserts that the case law cited by Gere is irrelevant due to the overwhelming evidence that SIRL will reach capacity on or around 2006, but that even if capacity is not reached by that time, that Gere has offered no legal authority to overturn the Jackson County decision to grant siting approval. SIRL at 25. SIRL argues that Gere's proposed rule – that any landfill with greater than a ten-year capacity must fail criterion – is almost childish in its oversimplification and is not representative of the broad range of landfill life expectancies that have passed muster. SIRL at 26. SIRL argues that the cases Gere cites are based upon express finds made by the local decision maker that sufficient existing capacity was available to meet the near- and long-term needs, but that in the present case, the local decision found the opposite – that sufficient capacity was not available. *Id*.

SIRL concludes that the record developed in this siting proceeding overwhelmingly supports the determination of Jackson County that the applicant satisfied each criterion set forth in Section 39.2(a) of the Act. SIRL at 29.

Gere's Reply

In reply, Gere asserts that Mr. Boos admitted on the witness stand that the application missed many operating landfills located within 25 miles of the perimeter of SIRL's identified service area, and that SIRL's assertion that only four such facilities exist was proven untrue. Reply at 5, citing C02514. Gere highlights that Perry Ridge is located within the service area and, because it has received developmental permitting from the Agency, considered an existing

landfill as required by law. Reply at 5. Gere disputes SIRL's assertion that Perry Ridge has made 'little substantive progress' towards becoming operational in light of the fact that Perry Ridge has received a developmental permit. Reply at 6.

Gere asserts that its witness Mr. Sheffer did not state that there will be a dire need for the SIRL expansion as early as 2006. Reply at 6. Gere contends that Mr. Sheffer's testimony also considered the availability of facilities outside of the SIRL service area and that such facilities must be considered available to handle the service area's disposal capacity. Reply at 7. Gere argues that SIRL's facility could not possibly have been considered an active proposal under the terms of the Solid Waste Management Plan when it was drafted. Reply at 8.

Gere contends that the need issue is not a 'battle of experts' as argued by the respondents, but that SIRL's own evidence proves no need exists here. Reply at 9. For example, asserts Gere, SIRL's expert Mr. Boos forgot to include several landfills that were located within 25 miles of the boundary of SIRL's proposed service area even though all such facilities were required to been accounted for in the needs analysis according to Jackson County's siting ordinance. Reply at 10. Gere argues that the facts presented to Jackson County reveal that there is still in excess of a minimum of 11 years of lead-time before there is even the possibility of a disposal capacity shortfall, and a need for the proposed expansion does not exist. *Id*.

Gere asserts that the respondents ignored the impact that landfills located within 25 miles of SIRL's service area will have upon the necessity of the proposed expansion. Reply at 11. Gere questions why the Cottonwood Hills Landfill and the West End facility would not be available to absorb much, if not all of the waste, even if Perry Ridge's capacity is not available. *Id*. Gere asserts that even if Perry Ridge is not open by the time SIRL closes, landfill capacity in surrounding areas is more than sufficient to assure the waste needs of the service area will be met for literally decades to come. Reply at 12.

Gere maintains that the earliest date of capacity deficiency in the service area is 2013, and although some speculation exists in the record that, if certain things such as Perry Ridge not continuing with the operating permit process don't happen tragedies could result, there were no facts or competent evidence submitted to support that speculation. Reply at 12. Gere contends that Mr. Boo's testified that it is a reasonable assumption that Perry Ridge would take the waste produced in SIRL's service area if SIRL's expansion was not granted. Reply at 13, citing C02493. Gere contends that since the service area already imports up to half of its generated waste, there is not reason why those facilities could handle SIRL's additional capacity. *Id*.

Gere next contends that the respondents addressed the need issue as one concerning the interests of Jackson County in obtaining cheap disposal capacity for its own residents, and other benefits that would follow from being a host community, and that these are convenience positions that do not meet the appropriate standard. Reply at 14.

Gere argues that the public comment of Mr. Poiter has no bearing on the Perry Ridge facility because the materials provided by Poiter pertain to a different landfill and fail to support any basis for concluding that Perry Ridge might be subject to the same issues. Reply at 15. Further, Gere argues that the public comment does not raise any issues pertaining to whether the mineral estate's owners would have any right to shut down the landfill proposal as it was being constructed or prior to its opening for business. *Id*. Gere continues that the respondents' contention that the Perry Ridge Landfill was discredited on the basis of a bald assertion of a non-lawyer that he will stop the opening of that landfill "barely even rises to the level of silly." Reply at 16.

Finally, Gere contends that the admission that 40-50% of the waste in the service area does not demonstrate an immediate need for additional service capacity, but rather demonstrates that only 50-60% need be dealt with by SIRL, Perry Ridge Landfill or any other alternate. Reply 16-17.

Discussion

The application submitted by SIRL defines the primary service area as including Jackson County and the following additional counties of southern Illinois: Alexander, Franklin, Hardin, Johnson, Jefferson, Massac, Perry, Pope, Pulaski, Randolph, Union, Williamson and Washington. C00039. Also included are the Missouri counties of Cape Girardeau, Perry, Scott, St. Francois, St. Genevieve and the Kentucky counties of Ballard and McCracken. *Id*. All of these 21 counties have previously utilized SIRL for their waste disposal needs. The Board has previously held that the applicant defines its own service area. CDT Landfill, PCB 96-60 (Mar. 5, 1998).

Section 39.2(a)(i) of the Act provides that local siting approval shall only be granted if the facility is necessary to accommodate the waste needs for the area it is intended to serve. The applicant is not required to show absolute necessity in order to satisfy criterion (i). Fairview Area Citizens 198 Ill. App. 3d at 551, *citing* Tate v. PCB, 188 Ill. App. 3d 994, 544 N.E.2d 1176 (4th Dist. 1989); Clutts v. Beasley, 185 Ill. App. 3d 543, 541 N.E.2d 844 (5th Dist. 1989). The Third District Appellate Court has construed "necessary" as a degree of requirement or essentiality, and found that a landfill must be shown to be reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capability, along with any other relevant factors. Waste Management, Inc., v. PCB, 122 Ill.App.3d 639, 644; 461 N.E.2d 542 (3rd Dist. 1984).

After careful review of the record, the Board finds that there is evidence in the record to support Jackson County's decision on the need criterion, and therefore, the decision is not against the manifest weight of the evidence. SIRL's expert Mr. Boos testified that SIRL expansion is necessary to accommodate the waste needs of the service area in part because the area is currently a net exporter of waste; SIRL is the only operating facility in the service area; and that without expansion, the service area will consume its permitted operating capacity by

2006. Although Gere interprets the information used by Mr. Boos differently, Jackson County's reliance on Mr. Boos' testimony is not unreasonable, especially in light of his greater level of experience in need analysis than Gere's expert witness.

Further, although landfill developments have been proposed in the nearby counties, the status of each of these developments is uncertain, and not one of the proposed landfills has been granted an operational permit. Although a local decision-making unit may consider the availability of proposed facilities in its needs analysis (*See* Waste Mangement v. PCB, 175 Ill. App. 3d 1023, 530 N.E.2d 682 (Nov. 7, 1988), the local unit is not prohibited from considering the speculative nature of the proposed facilities, and in reaching their decision on need, may have legitimately weighed the testimony of both experts that Perry Ridge and the other proposed landfills may never become operational.

The record contains evidence suggesting potential legal impediments to the ultimate operability of Perry Ridge as the holders of the mineral estates under the proposed site have expressed an intention to fight the permitting of the landfill. The public comment asserting the rights and intention of the mineral estates holder clearly identifies Perry Ridge as the landfill where mineral estates are located, and could have been properly considered by Jackson County as part of the decision-making process. Additionally, evidence exists in the record that even if Perry Ridge does become operational, the combined projected capacities of Perry Ridge and the SIRL expansion would still result in a long-term disposal capacity shortfall for the service area.

The applicant is not required to show absolute necessity in order to satisfy criterion (i), but must show the facility is reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capability, along with any other relevant factors. The Board finds that SIRL has shown the proposed expansion to be reasonably required by the waste needs of the area intended to be served.

Accordingly, Jackson County's decision that SIRL met the need criterion is not against the manifest weight of the evidence, and is affirmed.

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

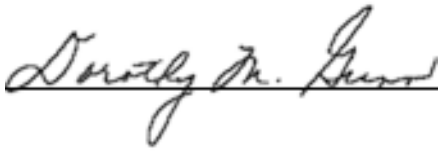
CONCLUSION

The Board finds that Jackson County's decision on criterion (i) was not against the manifest weight of the evidence. Jackson County is affirmed, and the Board upholds its decision to grant local siting to SIRL.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002; *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 5, 2002, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board