

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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| AMERICAN BOTTOM CONSERVANCY, |) | |
| and SIERRA CLUB, |) | |
| |) | |
| Co-Petitioners, |) | |
| |) | |
| v. |) | PCB 07-84 |
| |) | (Pollution Control Facility |
| CITY OF MADISON, and WASTE |) | Siting Appeal) |
| MANAGEMENT OF ILLINOIS, INC., |) | |
| |) | |
| Respondents. |) | |

NOTICE OF FILING

See attached Service List.

PLEASE TAKE NOTICE that on February 1, 2008, the undersigned electronically filed with the Clerk of the Illinois Pollution Control Board **WASTE MANAGEMENT OF ILLINOIS, INC.'S RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION**, in the above entitled matter, a copy of which is attached hereto.

WASTE MANAGEMENT OF ILLINOIS, INC.

By: /s/ Lauren Blair
One of Its Attorneys

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| AMERICAN BOTTOM CONSERVANCY, and |) | |
| SIERRA CLUB, |) | |
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| Petitioners, |) | PCB 07-84 |
| |) | |
| v. |) | (Third-Party Pollution Control |
| |) | Facility Siting Appeal) |
| CITY OF MADISON, ILLINOIS, and WASTE |) | |
| MANAGEMENT OF ILLINOIS, INC., |) | |
| |) | |
| Respondents. |) | |

**WASTE MANAGEMENT OF ILLINOIS, INC.'S RESPONSE TO
PETITIONERS' MOTION FOR RECONSIDERATION**

Respondent, Waste Management of Illinois, Inc. ("WMII"), submits this response to the Motion to Reconsider Order of December 6, 2007 ("Motion to Reconsider") filed by Petitioners, American Bottom Conservancy and Sierra Club ("Petitioners").

INTRODUCTION

Petitioners have requested that the Illinois Pollution Control Board ("Board") reconsider its December 6, 2007 Order affirming the City of Madison's ("City") decision granting site location approval for the expansion of the existing Milam Recycling and Disposal Facility ("North Milam" or "Facility"). The basis for the Motion to Reconsider is the allegation that "new facts" exist concerning the speculation that by May 2009¹, the area where North Milam is located will be determined to be within a 100-year floodplain and that the Facility is, therefore, not "flood-proofed."

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The May 2009 date referenced in the Motion to Reconsider is entirely speculative. It was taken from a draft report, entitled "Southwestern Illinois Flood Prevention Initiative" that was prepared by the East-West Gateway Council of Governments (attached to Petitioners' Motion to Reconsider as Exhibit 4), and is simply the date by which the final flood insurance maps are "predicted" to be finalized by the Federal Emergency Management Agency ("FEMA"). (See Pet. Ex. 4, pp. 3, 36.)

Petitioners argue that, based on this information, criteria (ii) and (iv) of Section 39.2(a) of the Illinois Environmental Protection Act ("Act") were not met. (*See* Motion to Reconsider, pp. 2-3, ¶¶ 7-10.)

The Motion to Reconsider should be denied for the following reasons. On appeal, Petitioners argued that the City's decision was against the manifest weight of the evidence only with respect to criteria (i) and (iii), not criteria (ii) and (iv), and therefore, any argument concerning criteria (ii) and (iv) has been waived. Furthermore, information about the potential future de-accreditation of levees is not newly discovered information because it was available at the time of the hearing (in fact, Petitioners submitted similar information as public comment). Even assuming Petitioners' argument was not waived and the information was newly discovered, the submitted information is not probative: it is mere speculation about the possibility for future de-accreditation of certain levees located in Madison, St. Clair and Monroe Counties, and it does not establish, even if de-accreditation should occur, that the Facility lies within the 100-year floodplain or has not been flood-proofed. Hence, the Motion to Reconsider is baseless, and should be denied.

ARGUMENT

A motion to reconsider is proper only if it seeks to bring to the court's attention newly discovered evidence that was not available at the time of the hearing, changes in the law, or clear errors in the court's previous application of existing law. *See Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992). Petitioners here do not argue a change in the law or an erroneous application of existing law. Rather, Petitioners improperly attempt to raise for consideration by the Board two entirely new arguments based upon speculative information that was available at the time of the hearing. The Motion to Reconsider should be

denied because Petitioners have failed to meet the legal standard for reconsideration.

I. PETITIONERS CANNOT SEEK A REVIEW OF CRITERION (ii) AND CRITERION (iv) IN A MOTION TO RECONSIDER BECAUSE THOSE CRITERIA WERE NOT CHALLENGED ON APPEAL

A party cannot raise new arguments in a motion to reconsider that could have been raised before the decision in the case, but were not. *North River Insurance Co. v. Grinnell Mutual Reinsurance Co.*, 369 Ill. App. 3d 563, 572-73, 860 N.E.2d 460, 468-69 (1st Dist. 2006); *McLean County Disposal Co., Inc. v. County of McLean*, PCB 89-108, slip op. at 6 (January 11, 1990). The only criteria that Petitioners formally and fully presented to the Board for review were criteria (i) and (iii).

As stated by the Board in its December 6, 2007 Order:

Petitioners appeal on the grounds that the City conducted the siting proceeding in a manner that was fundamentally unfair, and that the City's determination was contrary to the manifest weight of the evidence with respect to **two** siting criteria in Section 39.2(a) of the [Act].

See American Bottom Conservancy v. City of Madison, slip op. at 1, PCB 07-84 (December 6, 2007).

(Emphasis added.) Those two criteria appealed were criterion (i) concerning the need for the facility, and criterion (iii) concerning the compatibility of North Milam with the character of the surrounding area. *Id.*, slip op. at 3, 31-63. After thoroughly considering the arguments raised by the parties herein and the evidence relating to those arguments, the Board concluded:

[P]etitioners have failed to prove that the City's siting procedures were fundamentally unfair, or that the City's determinations on siting criteria (i) and (iii) of Section 39.2(a) of the Act were contrary to the manifest weight of the evidence. Therefore, the Board affirms the City's decision granting siting approval to Waste Management for North Milam.

Id., slip op. at 63.

In the Motion to Reconsider, Petitioners now argue, for the first time, that the City's findings that criteria (ii) and (iv) were satisfied are against the manifest weight of the evidence. Because criteria (ii) and (iv) were not raised on appeal, however, any arguments with regard to those criteria have been waived and cannot be the subject for reconsideration. *See North River Insurance Co.*, at 572-73, 860 N.E.2d at 468-69. In *North River Insurance Co.*, the defendant's insured, a general contractor, contracted with plaintiff's insured, a subcontractor, to perform work on a construction project. An individual was injured during the project and sued. The general contractor tendered its defense to the subcontractor's primary insurer and a settlement was entered. The defendant was ordered by the trial court to reimburse the primary insurer. On a motion to reconsider, the defendant contended that the trial court erred by making a *de facto* finding of fact with regard to its allocation of fault by requiring it to reimburse the full amount without first conducting a hearing on its proportionate liability. The appellate court held that the defendant had waived any such argument since it did not raise the issue of liability apportionment until its motion to reconsider. *Id.*

Similarly, here, Petitioners did not raise any attack on the City's findings with respect to criteria (ii) and (iv) until the instant Motion to Reconsider. It is axiomatic that Petitioners cannot ask the Board to "reconsider" an issue that was never raised with the Board on appeal, and thus never considered in the first instance. Because Petitioners did not argue criteria (ii) and (iv) until the instant motion to reconsider, they have waived the issue and the Motion to Reconsider could, and should, be denied on this basis alone.

II. PETITIONERS' SUBMISSION IS NOT NEWLY DISCOVERED EVIDENCE

Petitioners incorrectly assert that the information concerning the possible future de-accreditation of certain levees in the Madison, St. Clair and Monroe counties is newly discovered evidence. Newly discovered evidence, however, is evidence that was not available prior to the hearing. *North River Insurance Co.*, 369 Ill. App. 3d at 572-73, 860 N.E.2d at 468-69. The information submitted in support of Petitioners' Motion to Reconsider was available prior to the hearing date, and in fact, very similar information was presented by Petitioners as public comment.

The hearing date in this matter was August 23, 2007. Petitioners' own public comment materials show that information about possible de-accreditation was available as early as April 15, 2007. (See Public Comment #19, #29.) In a public comment submitted on September 19, 2007, by Kathy Andria, President of American Bottom Conservancy, she states that:

On August 15, 2007, the U.S. Army Corps of Engineers (USACE) and the Federal Emergency Management Agency (FEMA) held a Levee Summit at Alton to report the important findings with regard to Metro East Corps levees in place to protect the floodplain from the Mississippi River. ...

At the August 15 meeting, FEMA indicated that residents and businesses located in the floodplain would be required to obtain flood insurance.

This is the same floodplain where Waste management proposes to construct yet another new landfill.

(See Public Comment #29, p. 1.) (Emphasis added.) Similarly, in a public comment submitted on September 17, 2007, by Jack Norman, Sierra Club Member, he attached a three-page memo on "Levee and Flood Control Issues in Illinois" and stated that "[t]his memo further illuminates the subjects considered at the **August 15** Illinois Levee Summit." (See Public Comment #19, p. 1.)

(Emphasis added.)²

Thus, while Petitioners claim that this information is "new," it was clearly available as of August 15, 2007, eight days prior to the hearing, but simply was not presented by Petitioners at that time. The purpose of a motion for reconsideration is not to add evidence that could have been produced earlier. *North River Insurance Co.*, 369 Ill. App. 3d at 572-73, 860 N.E.2d at 468-69. As articulated by the appellate court in *North River Insurance Co.*, "[t]rial courts should not allow litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling." *Id.*

The Board, too, has held that it will not act lightly and reopen a proceeding to consider matter submitted after the close of record, even to the extent that it purports to present new information, absent a compelling reason as to why such information could not have been presented before the close of the record. *See In the Matter of: Proposed Site-Specific Rule Change for the City of East Moline's Public Water Supply Treatment Plant Discharge*, R87-35, slip op at 4, (May 10, 1990). The record here has been closed. The Board made its decision affirming site location approval based on the record. Petitioners have not articulated any reason for their failure to present the information as to potential de-accreditation before now. The Motion to Reconsider should be denied because the supporting information is not new and no compelling reason was given for the delay in presenting it for consideration.

²

The draft report entitled "Southwestern Illinois Flood Prevention Initiative," prepared by the East-West Gateway Council of Governments also indicates that this information was available as early as August 15, 2007, when Congressman Jerry Costello convened an Illinois Levee Summit onboard the U.S. Army Corps of Engineers Motor Vessel Mississippi for the purpose of providing an overview of the levee systems in the St. Louis region and describing levee deficiencies and flood risks for five levee systems in the Illinois area of the region. (*See* Pet. Ex. 4, p. 1.)

III. THE POSSIBILITY OF FUTURE DE-ACCREDITATION OF CERTAIN LEVEES IS SPECULATION, AND NOT PROBATIVE

In addition, the Motion to Reconsider should be denied because it is based exclusively on speculation and is probative of nothing. The entire basis for Petitioners' new argument that criteria (ii) and (iv) were not met is the possibility of future de-accreditation of certain levees in the Madison, St. Clair and Monroe counties that is predicted to occur in May 2009. In support of this argument, Petitioners rely on a draft report entitled "Southwestern Illinois Flood Prevention Initiative," prepared by the East-West Gateway Council of Governments, that discusses the possible de-accreditation of levees in the Madison, St. Clair and Monroe counties over a year from now. The report itself demonstrates the highly speculative nature of the potential for any future de-accreditation.

The report does not state that de-accreditation of all levees will definitely occur in May 2009, but only discusses that de-accreditation **could** occur and that it is currently predicted to occur in May 2009. There is no certainty that this event will happen at all. In fact, the report itself calls for a plan to prevent the de-accreditation of levees in the Madison, St. Clair and Monroe counties. Specifically, the report recommends that an application should be made to FEMA by January 30, 2008, for "Restoration Zone" or "AR Zone" status. (*See* Pet. Ex. 4, p. iv.) The report explains that:

The AR Zone status is a transitional designation that recognizes that the area has been adequately protected from flooding in the past and is now in a transitional process to restore protection. The AR Zone designation confirms there is a plan to restore the levees and also provides significant relief in the insurance rates and requirements for new development. Further, it will signal that there is a plan in place that will fully restore adequate flood protection within ten years.

(*See* Pet. Ex. 4, p. 35.)

The report also discusses the development of a ten-year plan to restore the flood protection

system in the area, the retention of expert assistance to advise on legal, financial and engineering design and construction issues, and the securing of funding. (*See* Pet. Ex. 4, pp. 36-37.) In short, the report recognizes that the area at issue has been adequately protected from flooding, and sets forth a detailed plan to restore the levees to provide better protection. Thus, the report that Petitioners rely on actually underscores the speculative nature of de-accreditation of the levees.

Beyond the speculative information provided, Petitioners have not put forth any reliable evidence that the levees in the Madison, St. Clair and Monroe counties will, in fact, be de-accredited. The mere possibility of a future event is insufficient to support a motion for reconsideration. *See North River Insurance Co.*, 369 Ill. App. 3d at 573, 860 N.E.2d at 469 (motion to reconsider liability apportionment was properly denied where it was based on the defendant's speculation that another party could have been found mostly or entirely at fault in the underlying lawsuit). Even if they were de-accredited, that event does not establish that the Facility would fall within the 100-year flood plain, or that the Facility would not be flood-proofed. Thus, the Motion to Reconsider should be denied on this basis as well.

CONCLUSION

For the reasons set forth above, Petitioners' Motion to Reconsider lacks any merit and should be denied.

WHEREFORE, Respondent, WASTE MANAGEMENT OF ILLINOIS, INC., respectfully requests that the Board DENY Petitioners' Motion to Reconsider Order of December 6, 2007, and grant such other relief that it deems fair and appropriate.

Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

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CERTIFICATE OF SERVICE

I, Lauren Blair, an attorney, on oath state that I caused a copy of the foregoing **WASTE MANAGEMENT OF ILLINOIS, INC.'S RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION** to be served on the following parties:

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via electronic delivery and by depositing same in the U.S. mail with proper postage paid at 161 N. Clark St., Chicago, Illinois 60601, on or before 5:00 p.m. on this 1st day of February, 2008 to the addresses indicated above.

/s/ Lauren Blair
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