

ILLINOIS POLLUTION CONTROL BOARD
September 19, 1996

CITIZENS UNITED FOR A RESPONSIBLE) ENVIRONMENT,)) Petitioner,)) v.)) BROWNING-FERRIS INDUSTRIES OF) ILLINOIS, INC. and VILLAGE BOARD OF) THE VILLAGE OF DAVIS JUNCTION,) ILLINOIS,)) Respondent.)	PCB 96-238 (Pollution Control Facility Siting Appeal)
--	---

KIM KRAHENBUHL OF WILLIAMS & MCCARTHY APPEARED ON BEHALF OF PETITIONERS;

GERALD CALLAGHAN AND ANN ZWICK OF FREEBORN & PETERS APPEARED ON BEHALF OF BROWNING-FERRIS INDUSTRIES, INC.;

DENNIS SCHUMACHER AND BRIAN BUZARD APPEARED ON BEHALF OF THE VILLAGE OF DAVIS JUNCTION.

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

On May 21, 1996, Citizens United for a Responsible Environment (C.U.R.E.) filed a petition (Pet.) for review of a decision by the Village of Davis Junction, Illinois (Village) granting siting approval for a pollution control facility to Browning-Ferris Industries, Inc. (BFI). On July 23, 1996, hearing (Tr.) was held before the Board's Chief Hearing Officer, Michael Wallace. The parties chose not to present testimony or evidence at that hearing wishing to rely on the record and arguments in the briefs. (Tr. at 4-5.) Members of the public were present but also chose not to make a statement at the hearing. (Tr. at 4.) C.U.R.E. filed its brief on July 29, 1996 (Pet.Br.) and its reply on August 19, 1996 (Pet. Rep.). BFI filed its brief on August 12, 1996 (BFI Br.). The Village filed a brief on August 16, 1996, which joined the facts and arguments presented by BFI.

Based on the record and arguments before the Board and for the reasons enunciated below, the Board affirms the Village's decision granting siting approval to BFI for a pollution control facility.

BACKGROUND

On November 22, 1995, BFI filed a request for siting approval for the Orchard Hills Landfill (OHL) with the Village. (C00001-C05279; BFI Br. at 2.) The Orchard Hills landfill will be located on approximately 175 acres of an approximate 289.26 acre parcel owned by BFI. (C00008; BFI Br. at 2.) The parcel is located at the northwest corner of Highway 251 and Scott Road in Davis Junction, Scott Township, Ogle County, Illinois. (*Id.*) BFI previously operated Davis Landfill, which is now closed, on an adjacent parcel for about 19 years. (C00008, C06923; BFI Br. at 2.)

The location of the proposed facility is approximately 2.3 miles south of the nearest runway at the Greater Rockford Airport (GRA) and is adjacent to the existing Davis landfill (also discussed as the "Ogle County landfill") (C05036.) The Orchard Hills landfill will be approximately one mile southwest of the Winnebago Reclamation Services Landfill (hereinafter Pagel Pit Landfill). (C05037) The Pagel Pit landfill is the closest landfill to the proposed site. (C05042-43; BFI Br. at 2.) The Davis landfill and the Orchard Hills site are located 37 miles from Lake Geneva, Wisconsin, which is a night roost for gulls in the area. (C05037.)

On April 18, 1996, the Village approved the request by BFI for siting of the Orchard Hills Landfill. (C06862.) The Village determined that BFI had met its burden of proof on all nine statutory criteria. (C06865.) This appeal followed.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 (415 ILCS 5/39.2 (1992)) of the Illinois Environmental Protection Act (Act). Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval for a pollution control facility. 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 BFI had met its burden on all nine criteria. (C06865.)

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 (Fairview); 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 (File).)

Additionally, the Board must review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act (415 ILCS 5/40.1 (1992)) 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).)

ISSUES

In this proceeding, the petitioner challenged the fundamental fairness of the proceeding before the Village on two grounds. (Pet. at 4.) First, C.U.R.E. asserted that private meetings held between individual members of the Village Board and "their Attorney" were fundamentally unfair. Second, C.U.R.E. maintained that failing to vote on each of the nine criteria was fundamentally unfair. (*Id.*) C.U.R.E. restated these two assertions in the brief; however, C.U.R.E. failed to present any argument or facts on those issues. Therefore, the Board finds that C.U.R.E. waived its argument on the issue of fundamental fairness and we will not address these issues further. (see D & B Refuse Service v. IEPA, PCB 89-106 __ PCB __ (October 24, 1991); and Staunton Landfill, Inc. v. IEPA, PCB 91-95 __ PCB __ (March 26, 1992) both *citing* In re Application of Anderson, 516 N.E.2d 860 (2d /Dist. 1987).)

C.U.R.E. has challenged the decision of the Village on two of the nine criteria. (Pet. at 2-3.) Specifically, C.U.R.E. maintains that the Village's decision that the facility is designed, located and proposed to be operated so that the public health, safety and welfare will be protected (Section 39.2(a)(2)) is against the manifest weight of the evidence. (Pet. at 2.) C.U.R.E. also maintains that the Village's decision that the facility is consistent with the Ogle County solid waste plan (Section 39.2(a)(8)) is against the manifest weight of the evidence. (Pet. at 3.)

ARGUMENTS

Section 39.2(a)(2): The facility has been designed, located and proposed to be operated to protect the public health, safety and welfare

C.U.R.E. maintains that the facility has not been designed, located and proposed to be operated so that the public health, safety and welfare will be protected because of the proximity of the proposed landfill to the Greater Rockford Airport. C.U.R.E. argues that the evidence presented at the public hearing establishes that the proximity of the facility to the

airport of the facility will cause a “bird strike hazard” for aircraft using the airport. (Pet. Br. at 3.) C.U.R.E. points out that BFI’s own study indicated that over 180 gulls visited the former Davis Landfill, which is adjacent to the location for this facility, on one day in November of 1992. (Pet. Br. at 4.) C.U.R.E. bolsters its argument by presenting both federal and state regulations in support of its argument. (*Id.*) The Federal Aviation Authority (FAA) considers any landfill within a five mile radius of an airport to be incompatible with the airport if the landfill attracts or sustains hazardous bird movement from feeding, water or roosting areas into or across the runways or approach and departure patterns of aircraft. (Pet. Br. at 3, *citing* FAA Guideline Order 5200.5A.) In addition the Board’s own regulations require consent from the FAA before a landfill may be located within 10,000 feet of a runway used by turbojet aircraft and 5,000 feet of a runway used by piston-engine aircraft. (Pet. Br. at 3-4, *citing* 35 Ill. Adm. Code 811.302(e).) Thus, C.U.R.E. argues the location and plan of operation of the proposed landfill will create a bird hazard for aircraft arriving and departing the airport. (Pet. Br. at 4.)

C.U.R.E. also maintains that the increased volume of waste to be accepted by the proposed facility will create a more substantial hazard around the landfill. LGL Limited (LGL) conducted two investigations of the landfill site on behalf of BFI. (Pet Br at 4; C05035-C05086.) C.U.R.E. maintains that the study indicates that possible doubling of waste at the landfill “could affect the potential for bird hazard”. (Pet. Br. at 4.) C.U.R.E. also points to the testimony by Mr. Ron Merritt, former Chief of the Bird Aircraft Hazard Team for the U. S. Airforce and now with Geomarine. (C07248.) Mr. Merritt testified on behalf of C.U.R.E.. (Pet. Br. at 5.) Mr. Merritt testified that “if you increase the food source the opportunity for birds to increase is there.” (C07263.)

C.U.R.E. argues that the larger active face of the proposed landfill and the use of alternative daily cover will also increase the likelihood of bird strikes. (Pet. Br. at 5.) Mr. Merritt testified that the larger the active face of a landfill the greater the opportunity to feed without being disturbed by compacting equipment. (C07263.) Mr. Merritt also testified that the best cover to reduce bird attraction is six inches of soil and alternative daily covers do not work as well. (C07256.) Mr. Merritt cited to a study by Cornell University looking at various types of daily cover as support for his statements. (*Id.*)

In addition to Mr. Merritt’s testimony C.U.R.E. also relies on the testimony of Mr. James Loomis, the executive director of the Greater Rockford Airport to support C.U.R.E.’s argument. Mr. Loomis testified that: “I’m opposed to any use of land in close proximity to the Greater Rockford Airport that could cause a bird strike hazard to airplanes landing and taking off from the airport.” (C07356.) Mr. Loomis indicated that the FAA had indicated that he “should come make an appearance and testify, if I could.” (C07359.)

BFI argues that C.U.R.E.’s arguments are not supported by the record and are based almost entirely on the testimony of Ronald Merritt who the Village found not to be credible. (BFI Br. at 4.) The Village stated in its findings of fact: “The Village Board finds that the OHL will not create hazardous bird movements that threaten aircraft safety at the Greater Rockford Airport, and that the OHL is not incompatible according to the FAA’s Guideline

Order 5200.5A and that Ronald Merritt, who testified on behalf of the objectors C.U.R.E., was not a credible witness.” (C06868.) BFI maintains that the Village’s finding that the landfill is compatible is consistent with the evidence presented by BFI to the Village which included a site-specific study of the area’s bird activity (BFI Br. at 4; C05029-C05086.) Dr. Rolph Davis, who authored the study also testified before the Village discussing the study and answering questions. (C07211-C07237.)

Dr. Davis conducted the site-specific study at BFI’s request to determine whether the proposed facility would conform with FAA Guideline 5200.5A. (BFI Br. at 5, *citing* C07214.) Dr. Davis’s field study began in February 1992 and continued until January 1993, during a one year period when the Davis Landfill was fully operational. (BFI Br. at 6; C05037.) The number and behaviors of birds were determined on 39 different days during that period and background information in the surrounding countryside was gathered in a 49 mile road survey. (C05037.) Dr. Davis determined that the primary birds of concern were gulls. (BFI Br. at 6; C07216.)

Dr. Davis also reviewed bird strike data for the GRA and found that there were only nine reported bird strikes from 1990 to 1995, two which occurred after closure of Davis Junction Landfill. (C07220-C07221.) Dr. Davis testified:

of the nine strikes six of them occurred at night and were not concerned with gulls at landfills at night because landfills close and gulls go back to their night roost, so basically we only have three daytime strikes that have occurred during that period we’re interested in and two of those birds that were struck were identified, one in one case was swallows and in another case it was ducks and in the third case it’s listed as unknown.

Id.

Based on his study Dr. Davis concluded that “the expansion of the Ogle County Landfill will not create a hazardous gull movements that threaten aircraft safety at the Greater Rockford Airport.” (C05039.)

BFI argues that Illinois courts have consistently held that a determination of whether the provisions of Section 39.2(a)(2) have been met is “purely a matter of assessing the credibility of the expert witnesses.” (BFI Br. at 4, *citing* File and Fairview.) BFI further argues that the Board cannot reverse a local citing decision simply because the local decisionmakers could have drawn a different conclusion from conflicting testimony. (BFI Br. at 4.) BFI maintains that in this case, C.U.R.E. is asking the Board to believe C.U.R.E.’s witness instead of BFI’s and the Board cannot reweigh the testimony. (BFI Br. at 5.)

Section 39.2(a)(8): The facility is consistent with the Ogle County solid waste management plan

C.U.R.E. maintains that the Village decision that the facility is consistent with the Ogle County solid waste management plan is against the manifest weight of the evidence. (Pet. Br. at 8.) C.U.R.E. argues that the plain language of the plan requires that any applicant requesting siting approval for a new landfill or landfill expansion in Ogle County guaranty to the county twenty years of capacity from November 17, 1992. (Pet. Br. at 8-9.) C.U.R.E. provides several citations to provisions in the plan which indicate that the 20 years of capacity is “beginning” on the date the proposal was adopted, November 17, 1992. (Pet. Exh. A at 1-2.) Therefore, according to C.U.R.E., BFI has not established that it can guaranty twenty years of capacity beginning November 17, 1992 for the proposed facility. C.U.R.E. maintains that absent a November 17, 1992 “beginning” date, the facility is inconsistent with the solid waste management plan adopted by Ogle County and the Village’s decision should be vacated. (Pet. Br. at 11.)

BFI argues that the evidence supports the Village’s finding that the facility is consistent with the Ogle County solid waste management plan. BFI points to the testimony of Mr. Steve Rypkema, Solid Waste Coordinator for the Ogle County Health Department, who participated in development of the solid waste management plan and is responsible for implementing the plan. (C07122, C07124-C07125.) Mr. Rypkema testified that BFI has provided the Ogle County with the 20-year capacity guaranty recommended in the plan. (*Id.*) In addition, BFI presented Ms. Sheryl Smith who also testified that BFI had provided the 20-year guaranty to Ogle County and that in her opinion the facility is consistent with the Ogle County plan. (C07181.)

Further, Mr. Rypkema testified that the date of November 17, 1992 referenced in the Plan is merely the starting date for negotiations between Ogle County and the existing disposal facilities in the county. Mr. Rypkema testified that Ogle County does not require that the 20-year capacity guaranty begin on November 17, 1992. (C07127-C07128.)

DISCUSSION

The Board’s authority when reviewing a local decision regarding the siting of a pollution control facility is well established in the Act and case law. When examining local decisions 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. The Board, on review, is not to reweigh the evidence and where, as here, 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.) On both issues raised by C.U.R.E. the record clearly establishes that there was evidence to support the findings by the Village.

C.U.R.E. presented testimony from an expert regarding bird strikes and bird traffic. BFI also presented an expert on bird strikes and bird traffic. BFI also provided a detailed site-specific study on bird traffic in the area which included a review of reported bird strikes at the GRA. The Board finds this situation to be governed by the decision in Fairview. Therefore, the Board finds that the decision of the Village regarding Section 39.2(a)(2) was not against the manifest weight of the evidence.

C.U.R.E. argues that the plain language of the Ogle County solid waste management plan is inconsistent with the siting of this facility. However, the Board has previously held that the solid waste management plan need not be "followed to the letter" as long as the approval is not inapposite of the plan. (City of Geneva v. Waste Management of Illinois, Inc., PCB 94-58, (July 21, 1994).) The evidence before the Village included testimony by the Ogle County Solid Waste Coordinator who indicated that the facility was consistent. Further, the same testimony indicates that the "plain language" relied upon by C.U.R.E. does not require capacity beginning on November 17, 1992. Therefore, the Board finds that the decision of the Village regarding Section 39.2(a)(8) is not against the manifest weight of the evidence.

CONCLUSION

C.U.R.E. challenged the Village's decision that the facility was designed to protect the public health, safety and welfare and also the Village's finding that the facility was consistent with the Ogle County solid waste management plan. The basis for these challenges was that the evidence did not support the Village's findings. However, the record clearly indicates that there is testimony and evidence which supports the Village's finding. Therefore the Board finds that the Village's decision was not against the manifest weight of the evidence and the Village's decision is affirmed.

C.U.R.E. also set forth two challenges regarding the fundamental fairness of the proceedings. However, C.U.R.E. did not present arguments or evidence on the issue of fundamental fairness and the Board finds that the arguments are waived.

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

ORDER

The decision of the Village of Davis Junction granting local siting approval for a pollution control facility to Browning-Ferris Industries of Illinois is affirmed.

IT IS SO ORDERED.

Board Member J.Theodore Meyer concurs.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill.Adm.Code 101.246 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board