ILLINOIS POLLUTION CONTROL BOARD
December 6, 1989

METROPOLITAN WASTE SYSTEMS, INC., SPICER, INC., and SPICER PROPERTIES, INC., Petitioners,	)	
v.	)	PCB 89-121 (Landfill Siting Review)
CITY OF MARSEILLES, Respondent.	)	

PAUL E. ROOT (GOMIEN, ROOT and RIGAZIO) and RUSSELL J. HOOVER (JENNER and BLOCK) APPEARED ON BEHALF OF APPLICANTS;

MICHAEL F. KUKLA (COWLIN, UNGVARSKY, KUKLA and CURRAN) APPEARED ON BEHALF OF AREA RESIDENTS FOR ENVIRONMENTAL SAFETY;

S. MICHAEL MASON APPEARED ON BEHALF OF THE VILLAGE OF SENECA;

GEORGE MUELLER (HOFFMAN, MUELLER, CREEDON and TWOHEY) APPEARED ON BEHALF OF SENECA COMMUNITY CONSOLIDATED GRADE SCHOOL DISTRICT NO. 170;

GERARD E. DEMPSEY (KLEIN, THORPE, JENKINS LTD.) APPEARED ON BEHALF OF SENECA COMMUNITY HIGH SCHOOL DISTRICT NO. 160;

MATTHEW J. DUNN, ASST. ATTORNEY GENERAL, APPEARED ON BEHALF OF THE PEOPLE OF THE STATE OF ILLINOIS;

ROBERT M. ESCHBACH, ASST. STATES ATTORNEY FOR LASALLE COUNTY, APPEARED ON BEHALF OF THE PROPLE OF THE STATE OF ILLINOIS.

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

This matter comes before the Board upon an appeal filed by Metropolitan Waste Systems, Inc., Spicer, Inc. and Spicer Properties, Inc. ("Applicants") on July 27, 1989 pursuant to Section 41.1(b) of the Illinois Environmental Protection Act ("Act"). (Ill. Rev. Stat. 1987, ch. 111½, par. 1041.1(b).) Applicants appeal the July 26, 1989 decision of the City Council of the City of Marseilles ("City") denying siting location suitability approval for a new regional pollution control facility.

On appeal, Applicants assert that the Hearing Officer erred in denying their "Request to Admit" and that the City's decision

that Applicants did not meet their burden of proof on criteria 1 and 2 of Section 39.2 of the Act is against the manifest weight of the evidence.

BACKGROUND

In January 1988, Applicants filed a request with the City for site location approval for a new regional pollution control facility. Following a lengthy evidentiary hearing but prior to the City reaching a final decision, Applicants withdrew their request.

On January 17, 1989, Applicants filed a new request for site approval at the same location as the 1988 request.[1] 14 days of hearings resulted in 3,075 pages of transcripts and numerous exhibits. The Hearing Officer tendered a 123-page document setting forth his findings of fact and recommendation that Applicants had met their burden of proof on each of the six criteria as required by Section 39.2 of the Act.

On July 26, 1989, the City reached its final decision. The City adopted the Hearing Officer's findings and recommendations regarding criteria 3 through 9. However, the City found that Applicant failed to meet its burden of proof regarding criteria 1 and 2. Therefore, site approval was denied.

SCOPE OF REVIEW

Requirements for the siting of a new regional pollution control facility are set forth in Section 39.2 of the Act. (Ill. Rev. Stat. 1987, ch. 111½, par. 1039.2.) Section 39.2 of the Act sets forth nine criteria which must be satisfied in order to obtain site approval. Upon review, the Board must review each of the challenged criteria. (Waste Management v. PCB, 175, Ill. App., 3d 1023, 530 N.E.2d 682, 691-92 (2nd Dist. 1988).) In the instant cause only two criteria are challenged. Therefore, this Board must determine whether the City's decisions concerning criteria 1 and 2 are against the manifest weight of the evidence. (Waste Management of Illinois, Inc. v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d 542 (3d Dist. 1984).) The standard of manifest weight of the evidence has been explained in the following manner:

> A verdict is ... against the manifest weight of the evidence where it is palpably erroneous, wholly unwarranted, clearly the result of passion or prejudice, or appears to

[1]The record of the 1988 proceeding consisting of 4,670 pages of transcripts and 200 exhibits has been incorporated into the instant record. (A.D. #8 at 2.) Citations to the record of the 1988 will be denoted as R-1. Citations to the 1989 record will be denoted as R-2.

> be arbitrary, unreasonable, and not based upon the evidence. A verdict cannot be set aside merely because the jury [the City] could have drawn different inferences and conclusions from conflicting testimony or because a reviewing court [IPCB] would have reached a different conclusion ... when considering whether a verdict was contrary to the manifest weight of the evidence, a reviewing court [IPCB] must view the evidence in the light most favorable to the appellee.
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> Steinberg v. Petra, 139 Ill. App. 3d 503, 508 (1986).

Consequently, if after reviewing the record, this Board finds that the City could have reasonably reached its conclusion, the decision must be affirmed. That a different conclusion might also be reasonable is insufficient; the opposite conclusion must be evident. (Willowbrook Motel v. IPCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (Dist. 1985).) Additionally, this Board must evaluate whether the procedures used by the City in reaching its final decision were fundamentally fair. (Ill. Rev. Stat. 1987, ch. 111½, par. 1040.2; E & E Hauling v. PCB, 116 Ill. app. 3d 586, 451 N.E.2d 555, 527 (2d Dist. 1983).)

FUNDAMENTAL FAIRNESS

In reviewing the City's decision, the Board is required to take into consideration the "fundamental fairness of the procedures used by the *** governing body of the municipality in reaching its decision". (Ill. Rev. Stat. 1987, ch. 111½, par. 1040.1(a).) The Appellate Court of Illinois has defined the parameters for fundamental fairness considerations of a local government in ruling on a regional pollution control facility application as follows:

> Administrative proceedings are governed by the fundamental principles and requirements of due process of law. [Citation.] Due process is a flexible concept and requires such procedural protections as the particular situation demands. [Citation.] In an administrative hearing, due process is satisfied by procedures that are suitable for the nature of the determination to be made and that conform to the fundamental principles of justice. [Citations.] Furthermore, not all accepted requirements of due process in the trial of a case are necessary at an administrative hearing. [Citation.] *** 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. PCB, 175 Ill. App. 3d 1023, 1036-37, 530 N.E.2d 682 (2d Dist. 1988).)

While Applicants do not directly challenge the fundamental fairness of the procedures used by the City, they assert that their "Request to Admit" was improperly denied by the Board's Hearing Officer and that the information sought by Applicants in the request is necessary to this Board's determination of fundamental fairness. On September 13, 1989, Applicants filed a "Request to Admit" setting forth 21 statements of fact. Statements 1 through 5 relate to Commissioner Mitchell's "straw vote" and final vote on criteria 1 and 2. Statements 6-21 pertain to the burden of proof applied by the City in reaching its decision to deny site approval. On September 27, 1989, the City filed a "Motion to Strike the Request to Admit." The Hearing Officer treated the City's motion to strike as an objection. (R-2 at 16-17.) The Hearing Officer denied the "Request to Admit" on the basis that Applicants' were not entitled to probe the individual council member's state of mind. (Id.)

Applicants assert that the information sought to be attained through statements 6-21 of its "Request to Admit" is essential to the Board's consideration of fundamental fairness. According to the Applicants, "[i]t would seem that there could be nothing more essential to 'fundamental fairness' than that the City apply the correct standard of proof in reaching its decision." (Pet. Brief at 47.) Applicants support their allegation that the City applied an incorrect standard of proof by stating that, "[g]iven the overwhelming weight of the evidence favoring the Applicants on criterion 2, there is ample reason to suggest that the City may have held them to a stricter standard of proof than the law requires." (Id.)

The record contains ample evidence that the City was properly instructed as to the burden of proof to apply in determining whether Applicants satisfied each of the six statutory criteria for site approval. In his recommendation of July 7, 1989[2] (A.D. #8 at 2-5), the Hearing Officer stated that the burden of proof to be applied is the "preponderance of the evidence" standard. (Id.) The Hearing Officer explained that this standard meant that the applicant must establish that a fact or proposition is more probably true than not. (Id.) The applicability of this burden of proof was reiterated at the City Council meeting prior to the City

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[2]This recommendation was non-substantively corrected on July 13, 1989.

rendering its final decision on the application for site approval. (R-2 at 3097.)

Applicants' argument that the disapproval of their application in and of itself indicates that the City applied an erroneous burden of proof is unpersuasive. Simply because the City reached a decision unfavorable to Applicants does not mean that the City applied the wrong burden of proof. Such an assertion could be made by any party against whom an adverse decision has been rendered. If, as applicants suggest, the overwhelming weight of the evidence favors the Applicants on criterion 2, this matter will be dealt with in the Board's analysis of whether the City's decision on criterion 2 is against the manifest weight of the evidence.

There is nothing in the record indicating that the City misunderstood that the burden of proof to be applied to Applicants' request for site approval is the "preponderance of the evidence" standard. The information regarding the burden of proof which Applicants seek to attain through their "Request to Admit" is not necessary to the Board's inquiry into fundamental fairness. There being no other challenge to the fairness of the procedures followed by the City, the Board finds that the procedures utilized by the City satisfy the requirements of fundamental fairness.

Regarding their "Request to Admit," Applicants also argue that the Hearing Officer erred in denying the request to admit facts pertaining to Commissioner Mitchell's votes on criterion 1. By their "Request to Admit," Applicants seek to inquire into whether Commissioner Mitchell misunderstood the vote on criterion 1.

The record establishes that, prior to reaching a final vote on each criterion, a "straw vote" was taken to determine if a majority vote existed either in favor of approving or disapproving the application. (R-2 at 3095-96.) The Hearing Officer specifically stated that the "straw vote" was not binding and that an "aye" vote meant approval and a "nay" vote meant disapproval of the application. (Id. at 3096-97.) Commissioner Mitchell voted "aye." (Id. at 3098.) The Hearing Officer then posed a "straw vote" as to criterion 1 stating that an "aye" vote meant that the Criterion was not satisfied. (Id. at 3103, 3104.) Commissioner Mitchell voted "aye." (Id. at 3104.) When the final vote was taken (id. at 3146), Commissioner Mitchell voted "aye," thereby voting to approve the document stating that Criterion 1 had not been satisfied and that the facility is not necessary to accommodate the needs of the intended area of service.

Admittedly, the record reveals an inconsistency between Commissioner Mitchell's "straw vote" and final vote. Furthermore, his final vote appears to be inconsistent with his statement that he felt the recommendation of the Hearing Officer should be followed. (Id. at 1040-41.) However, it is also clear that the "straw vote" was not binding and that at many points during both

the "straw vote" and the final vote the Hearing Officer explained the effect of an "aye" or "nay" vote. Moreover, Commissioner Mitchell was free to change his vote until the final vote was taken. It is well established that one cannot invade the mind of the decision-maker. (Ash v. Iroquois County Board, PCB 87-29 at 12 (July 16, 1987).) Just as a judge cannot be subjected to such scrutiny, so the integrity of the administrative process is equally respected. (Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); United States v. Morgan, 313 U.S. 409 (1941).) The Board finds that the Hearing Officer correctly denied Applicants' "Request to Admit."

CRITERION NO. 1

Section 39.2(a)(1) of the Act requires the City to review Applicants' request for site approval to ensure that the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve. (Ill. Rev. Stat. 1987, ch. 111½, par. 1039.2(a)(1).) As earlier mentioned, the City found that the applicant had failed to satisfy the criterion.

Six members of the Board were present at the December 6, 1989 meeting at which decision in this matter was statutorily required to be made. Section 5 of the Act provides that "4 votes shall be required for any final determination by the Board." The draft Opinion discussed at the meeting failed to pass, the Board being "deadlocked" at a 3-3 vote. As a statutory majority of 4 votes could not be mustered for any written Opinion, there is no Opinion of the Board as to the criterion 1 issue in this case.

CRITERION NO. 2

The second criterion of Section 39.2 of the Act is whether the proposed facility is so designed, located and proposed to be operated so that the public health, safety and welfare will be protected. The City determined that Applicants failed to meet their burden of proof on this criterion. Applicants assert that the City's decision is against the manifest weight of the evidence. Applicants' challenge to the City's decision on criterion 2 focuses on evidence relating to the integrity of the bedrock system underlying the proposed site, the clay liner and a general attack on the reasons given by individual members of the City Council for finding that criterion 2 was not met.

The proposed site straddles U.S. Route 6 in a sparsely populated area of the City of Marseilles, Illinois, approximately two miles east of the downtown area of Marseilles and two miles west of the downtown area of the Village of Seneca. (App. Ex. 22 at 3, 5-6, 15; App. Ex. 27; R-2 731). Applicants propose that the portion of the site located to the south of Route 6 be developed with a rail terminal, a gas treatment facility, a leachate pre-treatment facility, maintenance facilities and roadways leading to

an underpass under Route 6, connecting the portion of the site south of the highway with the western portion of the landfilling operations north of the highway. (R-1 at 509, 561-62, 2167-68; App. Ex. 6 at 290-91; App. Ex. 14, Sheets 4, 16.)

The landfilling operations themselves north of Route 6 will be divided between a west site and an east site separated by the Kickapoo Creek Valley. (App. 6 at 29; App. Ex. 14 Sheet 11.) The total acreage north of Route 6 is approximately 400 acres, of which Applicants contemplate 330 acres will accept waste. (R-1 at 508; App. Ex. 6 at 20.) Fifty acres in the Kickapoo Creek Valley, as well as property along the landfill setback, will be devoted to semi-private recreational use and conservancy. (App. Ex. 6 at 20; App. Ex. 14 Sheet 6; App. Ex. 23.) A 1,000,000 square foot section on the southwest corner of the site, overlying an abandoned coal mine, has been excluded by Applicants from the waste boundaries. (App. Ex. 6 at 27; App. Ex. 14 Sheet 10.)

The design of the proposed facility consists of a 10 foot recompacted clay liner overlain with a 60-mil high density polyethylene synthetic liner, a 12-inch thick sand and gravel blanket and a leachate collection system.

The quality of the underlying bedrock was the subject of dispute at the hearings below. The site is underlain by rocks of the Cambrian, Ordovician and Pennsylvanian systems. (App. Ex. 15 at 4-7.) The St. Peter aquifer underlies the proposed facility and provides a service of drinking water to several of the surrounding communities.

Applicants presented testimony that the Pennsylvanian strata consists of shale, sandstones, limestones and other rocks with a permeability of less than 1x10-8 cm/sec. Applicants' geologists and engineers drilled additional wells into the Ordovician layer beneath the Pennsylvanian strata at six points around the perimeter of the proposed site. (App. Ex. 15, 16.) According to Applicants, the seven deep borings uniformly demonstrate that, included within the bedrock barrier protecting the St. Peter aquifer, exists between 45 to 65 feet of shales and underclay. (R-1 at 3586, 4378, 4394-96, 4612; R-2 at 2530, 2546, 2661-62.) Applicants contend that this testing demonstrates the essentially impermeable nature of the rock.

Applicants also took readings to determine groundwater elevations and flows. (App. Ex. 6, 15.) Applicants' expert testified that the difference in water elevations between the St. Peter Sandstone and the sand and gravel deposits on the site establish that there is no hydraulic connection between the two. (R-2 at 2651, 2661.) According to Applicants, this evidence demonstrates that the Pennsylvanian strata serves as an aquitard.

Objectors assert that there are serious problems with the water-blocking capacity of the Pennsylvanian strata. They contend that the "safety" criterion has not been met because there are fractures, fissures and joints in the subsurface bedrock which would provide an avenue for leachate migration should the liner fail. Objectors presented testimony in support of their contention that the rock is of a generally poor quality in that it is weathered and fissile. These two characteristics indicate that the rock strata is susceptible to fractures and increased permeability. (R-1 at 1318-19.) While both parties' experts agree that there is jointing in the bedrock at the site, Objectors' presented testimony that the jointing is extensive and penetrates the bedrock to the St. Peter aquifer. (R-2 at 1572, 1789.) Objectors relied upon the Rock Quality Designations (RQD) to support this assertion. RQD is an assessment of subsurface rocks with respect to fracture the purpose of which is to denote the presence of fractures, fissures and joints. (R-2 at 1708, 1710.) Objectors' expert testified that an RQD of less than 50% indicates a very poor rock quality. (R-2 at 1710.) The Applicants' boring logs reveal that 75% of all the rock cores had an RQD well below 50%. Applicants assert that the correlation between RQD and permeability is doubtful.

Objectors also presented evidence that the stream drainage pattern indicates the presence of extensive jointing in the bedrock which extends to the St. Peter aquifer. (R-2 at 1759, 1778-89, App. Ex. 44, 45.)

The second major area of dispute concerns the integrity of the clay liner proposed to be used by Applicants and whether that liner will resist water penetration. Applicants submitted the results of soil samples which were tested for grain size, hydraulic conductivity, Atterberg limits, cation exchange capacity and moisture content. (R-1 at 1162-3.) Applicants assert that the low permeability, grain size, plasticity and high cation exchange capacity of the soil will enable it to provide good attenuation as part of the clay liner. (R-1 at 1182, 1184-85; App. Ex. 7 at Appendix 6.) Applicants also propose constructing a test pad so that permeability and density testing may be performed on the soil both before and after it is incorporated into the liner system to ensure that a density of 95% standard proctor is achieved. (R-2 at 367; App. Ex. 6 at 73-74.) Applicants experts opined that both the clay liner and polyethylene synthetic liner are designed so as to protect the public health safety and welfare. (R-1 at 531-32, 1199-1200, 1227, 2206, 4408; R-2 at 164, 316-17.)

Objectors submitted testimony that although the soil on the proposed site is good liner material from a compaction-density standpoint, the soil is not sufficiently plastic to prevent flexure. (R-2 at 1724-25.) Objectors' witness, an expert in clay mineralogy soil mechanics and rock mechanics, opined that the clay would be subjected to pressure which would cause the clay to warp resulting in cracks through the entire liner. (R-2 at 1724-25,

2848, 2882.) Objectors' experts opined that the proposed facility is not designed or located so as to protect the public health, safety and welfare.

The City found that the proposed facility is not so designed, located and proposed to be operated as to protect the public health, safety and welfare. The City further stated that:

> "The credibility and substance of testimony offered by the witnesses for the various objectors outweighs the evidence and testimony offered by the Applicants, such that the facility as a whole has not been shown to meet the requisite health, safety and welfare criteria [sic]. Specifically, the council questions the integrity of the underlying rock at the site, finds that the clays and clay liner are likely inadequate for the retention of leachate and that for other specific reasons made known orally on the record by individual members of the Council, the criteria [sic] is not satisfied on this record."

Experts testified for Applicants and on behalf of the various objectors. The credibility to be accorded such testimony is a matter to be determined by the hearing tribunal, not this Board as it sits in review of the local decision making body's determination. Again, merely because there is some evidence which, if accepted, would have supported a contrary conclusion, does not mean that this Board will substitute its decision for that of the City. After a review of the record, the opposite conclusion from that reached by the City is not clearly evident. Therefore, this Board cannot say that the City's decision regarding the public health, safety and welfare criterion is against the manifest weight of the evidence.

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

ORDER

The City's decision denying Applicants' request for site location approval is hereby affirmed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985, ch. 111-½, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion and Order was adopted on the 6th day of December, 1989 by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board