ILLINOIS POLLUTION CONTROL BOARD February 15, 1996

CONCERNED CITIZENS OF WILLIAMSON	I)
COUNTY AND REV. PAUL CRAIN AND)
ROSE ROWELL, as members of the)
Concerned Citizens of Williamson County,)
Petitioners,)
v.) PCB 96-60) (Third Party)
BILL KIBLER DEVELOPMENT CORP.,) (Landfill Siting Review)
a/k/a KIBLER DEVELOPMENT CORP.,)
AND THE WILLIAMSON COUNTY)
BOARD OF COMMISSIONERS,)
)
Respondents.)

KENNETH A. BLEYER, ESQ., APPEARED ON BEHALF OF THE PETITIONERS;

THOMAS J. IMMEL, ESQ., APPEARED ON BEHALF OF KIBLER DEVELOPMENT CORPORATION.

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

This matter is before the Board on a September 14, 1995, petition for review, filed by Concerned Citizens of Williamson County, Paul Crain and Rose Rowell (collectively CCWC). The Board notes that only respondent Bill Kibler Development Corporation (KDC) filed an appearance in this proceeding. Hearing on this matter was held before Chief Board Hearing Officer Michael Wallace on December 13, 1995, in Marion, Williamson County, Illinois. Several members of the public were present and made statements on the record in this proceeding.

CCWC's petition was filed pursuant to Section 40.1 of the Illinois Environmental Protection Act (Act). (415 ILCS 5/1 et seq. (1994).) For the reasons enunciated below, the Board finds that the proceedings before the Williamson County Board of Commissioners (Williamson County Board) were fundamentally fair. The Board also finds that the decision of the Williamson County Board with respect to the landfill siting criteria at Section 39.2 of the Act (415 ILCS 5/39.2) was not against the manifest weight of the evidence. The Board affirms the Williamson County Board landfill siting decision.

LEGAL FRAMEWORK

Pursuant to Section 39(c) and 39.2(a) of the Act, an applicant for a new pollution control facility is required to request and receive siting approval from the local government before a development or construction permit is issued by the Illinois Environmental Protection Agency ("Agency"). (415 ILCS 5/39(c) and 5/39.2(a).) Section 39.2(a) provides that local authorities are to consider nine criteria when reviewing an application for landfill siting approval. Only if the local body finds that all applicable criteria have been met by the applicant can landfill siting be granted.

Section 40.1 of the Act (415 ILCS 5/40.1) authorizes appeal to the Board of a local government decision to grant landfill siting approval. Section 40.1 of the Act also requires the Board to review the proceedings before the local siting authority to assure fundamental fairness. In E & E Hauling, Inc. v. IPCB (2d Dist. 1983), 116 Ill. App. 3d 586, 594, 451 N.E. 2d 555, 564, aff'd in part (1985), 107 Ill.2d 33, 481 N.E.2d 664, the appellate court found that although citizens before a local decision-maker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. (See also Industrial Fuels, 227 Ill. App. 3d 533, 592 N.E. 2d 148; Tate, 188 Ill. App. 3d 994, 544 N.E.2d 1176.) Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. (Waste Management of Illinois Inc. v. IPCB (2d Dist. 1989), 175 Ill.App.3d 1023, 530 N.E.2d 682.) The manner in which the hearing is conducted, the opportunity to be heard, the existence of ex parte contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. (Hedinger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163, 117 PCB 117.)

Board review of a local government decision approving landfill siting must apply the "manifest weight of the evidence" standard of review (Waste Management of Illinois, Inc. v. IPCB (1987), 160 Ill.App.3d 434, 112 Ill.Dec. 178, 513 N.E.2d 592; see also City of Rockford v. IPCB (1984), 125 Ill.App.3d 384, 80 Ill.Dec. 650, 465 N.E.2d 996). 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.) The province of the hearing body is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses. Merely because we could reach a different conclusion, is not sufficient to warrant reversal. (City of Rockford v. IPCB and Frink's Industrial Waste, (2d Dist. 1984) 125 Ill.App.3d 384, 465 N.E.2d 996; Waste Management of Illinois, Inc. v. IPCB, (3d Dist. 1984) 22 Ill.App.3d 639, 461 N.E.2d 542; Steinberg v. Petta, (1st Dist. 1985) 139 Ill.App.3d 503, 487 N.E.2d 1064; Willowbrook Motel v. IPCB, (1st Dist. 1985) 135 Ill.App.3d 343, 481 N.E.2d 1032.)

BACKGROUND

This petition for review arose from a previous case before the Board in which the Board remanded the proceeding to Williamson County. (Concerned Citizens of Williamson County et al. v. Bill Kibler Development and Williamson County Board of Commissioners et al. PCB 94-262 (hereinafter PCB 94-262).) In PCB 94-262, the Board found in an opinion and order dated January 19, 1995, that the ex parte comments by Mr. Bill Kibler concerning technical aspects of the application at a meeting of the Williamson County Board on June 17, 1994 had led to a fundamentally unfair proceeding. (PCB 94-262 1/19/95 at 8.) In addition to allowing Mr. Kibler to address the technical merits of the application at that June 17, 1994, meeting, the Williamson County Board had established that public comments would not be allowed at the meeting and audience members would be excluded if the audience attempted to participate in the discussion. (Id.) The Board stated:

Clearly, the June 17 meeting was an ex parte discussion albeit one that is summarized in the public record. (C0936.) The existence of ex parte contacts is an element in assessing fundamental fairness. (Hedinger v. D & L Landfill, Inc., (December 20, 1990), PCB 90-163, 117 PCB 117.) The Board does not take issue with the County Board's intended purpose at the special meeting of June 17, 1994: a publicly viewed discussion with the County Board's experts on the technical aspects of the application. However, the participation of only one party (Bill Kibler, owner of Kibler Development), in the discussion, does not comport with the adjudicatory standard, including the exclusion of ex parte contacts.

(PCB 94-262 1/19/95 at 9.)

In PCB 94-262, the Board did not reach the review of the nine criteria found at Section 39.2 of the Act, because of the finding of fundamental unfairness. CCWC's petition (PCB 94-262 Am. Pet. at 1-7) had challenged the Williamson County Board's siting approval decision in relation to several of the siting criteria at Section 39.2 of the Act.

The Board determined that remand was the proper course of action for this proceeding and remanded the case to the Williamson County Board. (PCB 94-262 1/19/95 at 14.) On March 16, 1995, in response to a motion to clarify the Board stated in its order:

The orders from PCB 94-262 will be cited by date and page number; the petitioner's brief in PCB 94-262 will be cited as "PCB 94-262 Pet. Br. at ___"; the respondent's brief in PCB 94-262 will be cited as "PCB 94-262 Res. Br. at ___"; the first amended petition in PCB 94-262 will be cited as "PCB 94-262 Am. Pet. at ___"; the Board hearing transcript in PCB 94-262 will be cited as "PCB 94-262 Tr. at ___"; the petitioners' brief in the instant case will be cited as "Pet. Br. at ___"; the respondent's brief in the instant case will be cited as "Res. Br. at ___"; the record before the Williamson County Board will be cited as "C_____"; and the transcript from the Board's December 13, 1995, hearing will be cited as "Tr. at __".

The August 23, 1994, decision of the Williamson County Board of Commissioners granting siting approval to Kibler Development Corporation, is hereby reversed and remanded as a result of a fundamentally unfair proceeding. Upon remand of this proceeding:

- 1. Williamson County shall provide notice of public hearing, and hold it in accordance with the provisions of Section 39.2 of the Act, including a presentation, as nearly as practicable, of the statements made by Mr. Bill Kibler at the June 17, 1994, special meeting, as well as opportunity for questions concerning or rebuttal to, Mr. Kibler's statement. Mr. Bill Kibler shall attend the public meeting and be available to address potential questions concerning his statements of June 17, 1994.
- 2. Williamson County shall provide for a post-hearing comment period as provided in Section 39.2 of the Act.
- 3. Williamson County's siting decision must be based on the entire record before it including the public hearing held pursuant to this order, in accordance with Section 39.2 of the Act.
- 4. Williamson County's siting decision shall be consistent with this order and the Board's January 19, 1995, opinion in this proceeding.
- 5. The 120 day statutory decision time begins 35 days after the date of this order. This docket is closed.

(PCB 94-262 3/16/95 at 2.)

On May 31, 1995, the Fifth District Appellate Court dismissed an appeal by both CCWC and KDC of the Board's January 19, 1995, opinion and order. (Concerned Citizens of Williamson County, et al. and Kibler Development Corporation v. Illinois Pollution Control Board and Williamson County Board of Commissioners, No. 5-95-0250, Ill. App. 5th District, May 31, 1995.) The appeal was dismissed for lack of jurisdiction on the Board's motion because the orders in question were not final.

On remand, the Williamson County Board of Commissioners noticed a public hearing in the Southern Illinoisan on June 2, 1995. (C01208-C01211, C01242.) The notice indicated, in part, that the public hearing had been ordered by the Board to "present, as nearly as practicable, the statements of Mr. Bill Kibler at the June 17, 1994" special meeting of the Williamson County Board. (Id.) On June 22, 1995, the Williamson County hearing was held and statements were taken from Mr. Bill Kibler and others. On August 17, 1995, the Williamson County Board of Commissioners met to discuss the landfill siting and did not vote on the application. (C01418-C01419.) The County's Record from PCB 94-262 was incorporated into the County's Record in the instant case by Williamson County Hearing Officer McMeen. (C01282.) The Board at this

time incorporates the transcript, briefs and opinions and orders from PCB 94-262 into this docket by reference.

PRELIMINARY MATTERS

Waiver of arguments

CCWC stated in its final brief that CCWC waives any argument on certain issues. (Pet. Br. at 15-16.) CCWC waived argument regarding Mr. Bill Kibler's credibility (Pet. Br. at 14-15) as well as argument on the timeliness of the inaction by the Williamson County Board. (Pet. Br. at 16.) Therefore, the Board will not further discuss those issues in this opinion.

Hearing Notice for June 22, 1995 hearing

CCWC argues that the Board's orders in PCB 94-262 were not complied with in that the public notice of the public hearing held pursuant to those orders did not "advise the public of the purpose of the meeting on 22 June 1995". (Pet. Br. at 3.) CCWC points out that the notice of hearing indicated that the purpose for the hearing scheduled June 22, 1995, was to take "testimony from Bill Kibler". (Pet. Br. at 13.) CCWC argues that this "is not what the purpose of the public hearing was according to the orders of the Board". (Id.) CCWC maintains that the purpose of the hearing on remand was "that a 'new' 39.2 public hearing be held which, in part, was to include a recreation, as nearly as practicable, of the statements made by Bill Kibler on 17 June 1994". (Pet Br. at 13-14.)

After careful review of the notice (C01208-C01211) and the arguments, the Board finds that the notice of the June 22, 1995, hearing was sufficient. (See *infra* p.7.)

Hearing Notice for Board's December 13, 1995 hearing

CCWC asserts that improper notice was given for the Board's hearing because the published notice appeared in the *Marion Daily Republican*. (Pet. Br. at 21-22.) CCWC argues that although the *Marion Daily Republican* is published in Williamson County it is not generally circulated in the county and thus notice of the Board's hearing was invalid. (Pet. Br. at 22.)

Section 40.1 of the Act states: "The Board shall publish 21 day notice of the hearing on the appeal in a newspaper of general circulation published in that county". (415 ILCS 5/40.1(a).) CCWC concedes that the *Marion Daily Republican* is published in Williamson County. The *Marion Daily Republican* is circulated within Williamson County; therefore, the jurisdictional requirements have been met. (Village of LaGrange et al. v. McCook Cogeneration Station et al., PCB 96-41 (December 7, 1995).)

Board Hearing Officer rulings

CCWC seeks review of rulings by the Board's hearing officer in three areas. First, CCWC asserts that the hearing officer erred in denying petitioner's emergency motion to reconvene the

discovery deposition of Bill Kibler. (Pet. Br. at 4.) Second, CCWC argues that the hearing officer erred in quashing the subpoena of Mike Post. (Id.) Third, CCWC maintains that the hearing officer erred in "refusing to allow petitioners the opportunity to elicit testimony from Bill Kibler and other witnesses during the petition for review hearing". (Id.)

With reference to the first two alleged errors the Board affirms the hearing officer's rulings. A careful review of the arguments as well as the transcripts from the Board's hearing and the deposition, indicates the rulings made by the hearing officer were correct based on rules of evidence and the Board's own procedural rules. With reference to the third alleged error, the Board finds that the hearing officer did err in sustaining objections to the testimony of Max Stucker and Lucinda Morgan. The testimony of these witnesses dealt with the issue of fundamental fairness and was therefore admissible. Therefore, the offers of proof will be accepted as testimony from Max Stucker and Lucinda Morgan and considered in rendering the Board's decision in this case.

ARGUMENTS

CCWC argues that the Board's orders were not complied within six areas. Those six areas are:

- 1. The Williamson County Board failed to conduct a "new hearing" on June 22, 1995. (Pet. Br. at 3.)
- 2. KDC failed to make a case for its application for siting approval at the June 22, 1995, hearing. (*Id.*)
- 3. The Williamson County Board hearing officer improperly took "administrative notice" of the record, allowed reference to it by KDC and advised the Williamson County Board to entertain the same in its deliberations without proper foundation or justification. (*Id.*)
- Petitioners were denied an opportunity to question Bill Kibler on June 22, 1995, as to all matters germane to the comments he had made on June 17, 1994. (*Id.*)
- 5. There was a "wholly inadequate effort made to include on the record the statements of Mr. Kibler, as nearly as practicable, at the 22 June 1995, public hearing". (*Id.*)
- 6. The Williamson County Board never took a vote on the application. (Pet. Br. at 3-4.)

In addition, a seventh issue was raised when CCWC argued that the June 22, 1995, public hearing identified changes that have occurred such to "challenge the accuracy of the proof on the record in relation to the nine criteria of Section 39.2 of the Act, so that Kibler could not have made its case". (Pet. Br. at 3.) Each of the seven issues in this appeal will be discussed below.

1. Williamson County failed to conduct a "new hearing" on June 22, 1995.

CCWC argues that the Williamson County Board failed to hold a "new public hearing" contrary to the Board's orders of January 19, 1995, and March 16, 1995. CCWC maintains that the orders of the Board direct that a new public hearing be held pursuant to Section 39.2 of the Act; but do not establish "any limitations on the application of Section 39.2" of the Act. (Pet. Br. at 5.) CCWC asserts that a "cursory reading of the transcript" from June 22, 1995, public hearing establishes that Section 39.2 of the Act was not followed. (Id.)

KDC maintains that the Board's March 16, 1995, order "required" the Williamson County Board to consider "everything that occurred regarding the pending KDC application <u>prior</u> to the remand as well as the June 22nd public hearing itself". (Res. Br. at 6.) Thus, KDC appears to be arguing that this is not a new proceeding but a continuation of the prior proceeding.

The Board agrees that this is a continuation of the prior proceeding. The Board's orders of January 19, 1995, and March 16, 1995, remanded this proceeding to cure an error which had led to a fundamentally unfair proceeding. Although the Board's order closed the previous docket, the Board did not require that the applicant provide notice of a new petition or a new petition be filed. Further, the Board did not simply reverse the Williamson County Board but, instead, the Board reversed and remanded this matter. Clearly, the Board did not intend that the application process must begin anew. The Board's order of March 16, 1995, clearly required that a hearing would be held and at that hearing Mr. Kibler would testify as to his statements of June 17, 1994. The Board's orders directed that a "new" hearing be held because the previous public hearing had been held and the record closed.

The record indicates that the Williamson County Board's hearing officer (Patricia McMeen) had a clear understanding of the Board's orders on this issue. Hearing Officer McMeen stated:

It is my understanding of the PCB's orders that the fundamental fairness issue was based upon the meeting of June 17, 1994. That is why the decision was reversed and the matter was remanded, that issue alone, and the basis is the meeting that was held; therefore, I view this as a supplemental proceeding to correct that lack of fundamental fairness. (C01259-C01260.)

Thus, the Board finds that Williamson County properly opened a new hearing, but also included the record from the prior proceeding.

2. KDC failed to make a case for its application for siting approval at the June 22, 1995, hearing.

3. The Williamson County Board hearing officer improperly took "administrative notice" of the record, allowed reference to it by KDC and advised the Williamson County Board to entertain the same in its deliberations without proper foundation or justification.

CCWC maintains that no record for the siting application was made because "absent KDC's request for administrative notice of the record of the prior proceeding nothing was done

to make a case for siting". (Pet. Br. at 6.) CCWC then argues that it was error for the Williamson County hearing officer to take administrative notice of the "prior record" as no foundation was laid. CCWC states that "time has elapsed since the making of that record" and "circumstances have changed". (Pet. Br. at 14.)

KDC argues that this is a continuation of the previous proceeding. (Res. Br. at 6.) In any event, KDC asserts that it incorporated the entire record into its presentation of June 22, 1995, and "handed the entirety over" to the Williamson County Board for decision. (*Id.*)

The Board finds that County Hearing Officer McMeen appropriately incorporated the County Record from PCB 94-262 into this proceeding. As discussed above, the remand to the Williamson County Board was in order to cure deficiencies in the record from *ex parte* comments, not to begin the application process anew. Therefore, the Board finds that the record is sufficient to support the landfill siting decision of the Williamson County Board.

4. Petitioners were denied an opportunity to question Bill Kibler on June 22, 1995, as to all matters germane to the comments he had made on June 17, 1994.

CCWC states:

With this petition for review the petitioner would show that had they been allowed to ask legitimate questions within the scope of what the Board authorized upon remand enlightening and provocative information would have surfaced which the County should have known in making its determination on whether or not to site. It was barring of the questions which made the proceedings fundamentally unfair. (Pet. Br. at 7.)

KDC maintains that County Hearing Officer McMeen was correct in precluding the cross-examination of Mr. Bill Kibler "for four different reasons". (Res. Br. at 7.) KDC first argues that certain of the questions posed by CCWC related to issues which were "not even mentioned" on June 17, 1994. (Id.) Second, KDC asserts that with regard to those same issues, Mr. Kibler did not discuss those issues in direct testimony. (Id.) Third, KDC argues that the applicable statutory criteria do not include the financial state of the applicant among them. (Id.) And finally, KDC asserts that based on Southwest Energy Corp. v. PCB (4th Dist. Sept. 7, 1995) No. 4-94-0759, petitioners do not have the right to cross-examine witnesses at siting hearings. (Id.)

County Hearing Officer McMeen sustained objections by KDC's attorney at C01297, C01309 and C01311 of the County Record. The first objection was that the question posed had been asked and answered. The second objection sustained was to the question "What are the assets of the corporation?". (C01306-C01307.) The last objection sustained was to the question "How is your corporation affiliated with Fred Barbara (ph)?" (C01310.) Hearing Officer McMeen made her rulings on the record after hearing arguments by CCWC's attorney, KDC's attorney and the county's attorney. The Board can find no argument on the record or in the briefs which convinces the Board that County Hearing Officer McMeen ruled incorrectly. County Hearing Officer McMeen sustained objections to questions which were outside the scope of the

testimony given by Mr. Kibler on June 22, 1995, and outside the scope of statements made on June 17, 1994. In fact, the record demonstrates that County Hearing Officer McMeen allowed a great deal of latitude to CCWC's attorney in his cross-examination. The Board finds that the actions of the Williamson County's Hearing Officer did not lead to a fundamentally unfair proceeding.

5. There was a "wholly inadequate effort made to include on the record the statements of Mr. Kibler, as nearly as practicable, at the 22 June 1995, public hearing".

CCWC argues that "much could have been presented" at the June 22, 1995, hearing to establish what transpired at the June 17, 1994, County Board meeting. (Pet. Br. at 11.) CCWC maintains that numerous witnesses could have been called to testify as to the statements made by Mr. Kibler at the June 17, 1994, County Board meeting. (Id.) CCWC further maintains that as a result "relevant information as to what Bill Kibler stated to the County" on June 17, 1994, has never been made a part of the record. (Pet. Br. at 12.)

Mr. Bill Kibler testified as to what his statements were at the June 17, 1994, hearing. He testified that he recalled answering questions from Williamson County Board Commissioners on June 17, 1994, regarding: KDC operation of the landfill; the number of employees at the proposed landfill; the slow process of development of a landfill; the building of an access road for the proposed site; visibility of the landfill from a nearby mall; and the ultimate use of the landfill property after acceptance of waste concluded. (C01286-C01290.) Mr. Kibler stated that his responses to questions were based on the application and information from the technical experts who developed the application. (Id.) Mr. Kibler further indicated that he did not recall any additional issues that he addressed to the Williamson County Board. (Id.)

The testimony of Max Stucker (Tr. at 56-69) recalls that Mr. Kibler:

...talked about a lot of things. He talked about the road closures, road construction, traffic, the amount of tonnage that would be coming into the landfill. And I believe he -- yes he did. At that time that he would be the developer and operator of the landfill. * * * He talked about hours of operation. That would be from - - there was some discussion on that at one proposal, 7 to 3 and another proposal 7 to 4 hours minus an hour, hour and a half one way or the other for covering up purposes. (Tr. at 67.)

Lucinda Morgan testified that (Tr. at 85-93.) it is her recall that "other things" were discussed at the June 17, 1994, meeting. (Tr. at 89.)²

The Board finds that the testimony of Mr. Kibler of June 22, 1995, was sufficient to establish the statements made by Mr. Kibler on June 17, 1994. The testimony provided by CCWC at the Board's hearing demonstrates that although Mr. Kibler may not have complete

² The testimony of Margaret Degan from the Board's hearing in PCB 94-262 was discussed in this hearing and Board Hearing Officer Wallace took administrative notice of that testimony. (Tr. at 78.)

recall of his statements, the substance of information he provided on June 17, 1994, was provided on June 22, 1995. Therefore, the Board finds that the hearing of June 22, 1995, sufficiently cured the deficiencies caused by Mr. Kibler's *ex parte* comments of June 17, 1994.

6. The Williamson County Board never took a vote on the application.

CCWC argues that pursuant to the Board's January 19, 1995, and March 16, 1995, orders the Williamson County Board "was directed to make a decision". (Pet. Br. at 15.) CCWC asserts that the matter was before the Williamson County Board "not pursuant to statute but instead pursuant to Board orders". (Id.) CCWC states: "The orders called for a decision to be made and there was no provision for default approval in the absence of a decision, such as is the case with the statute." (Id.)

While the Board's order reversed and remanded this matter to the Williamson County Board, it was for the specific purpose of curing the fundamental unfairness of Mr. Kibler's ex parte comments on June 17, 1994. Our decision did not specifically direct that a second vote be taken by the Williamson County Board. In fact, the Board's orders anticipated that a decision might not be made and imposed a decision deadline of 120 days. We believe that the Williamson County Board's action of holding a hearing for the limited purpose of curing our fundamental fairness concerns effectively complied with the Board's remand orders. Therefore, because the Williamson County Board has taken no action to change its original siting approval decision based on the additional information, we construe their action as an affirmation of the original decision that siting should be granted. As the Williamson County Board has cured our fundamental fairness concerns, we may now address the four siting criteria which were challenged by the petitioners and briefed fully by all of the parties in the original docket (PCB 94-262).

7. Changes in relation to the nine criteria of Section 39.2 of the Act.

CCWC also argued that the June 22, 1995, public hearing identified changes that have occurred such to "challenge the accuracy of the proof on the record in relation to the nine criteria of Section 39.2 of the Act, so that Kibler could not have made its case". (Pet. Br. at 3.)

CCWC argues:

Time has elapsed since the making of the previous record, circumstances have changed. This fact was made clear when petitioner called David Fitzpatrick as a witness. Mr. Fitzpatrick testified that since the close of the prior record changes had occurred which affected the accuracy of the needs assessment report tendered by Kibler, particularly dealing with the Herrin transfer station and the life of it, all of which the filed report totally discounted as irrelevant.

(Pet. Br. at 15.)

The Board's review of the nine criteria of Section 39.2 of the Act is based on whether or not the decision of the local siting authority is against the manifest weight of the evidence contained in the County Record. The Board will restrict its review to the evidence already in the County Record

on the nine criteria of Section 39.2(a). The Board cannot look to information that was not a part of the County Record in the Board's review of the nine criteria found at Section 39.2(a) of the Act.

Summary of Fundamental Fairness Issues

In conclusion, the Board finds that the Williamson County Board has cured the fundamental unfairness created by Mr. Kibler's comments at the June 17, 1994, Williamson County Board meeting. The Board also finds that the Williamson County Board complied with the Board's orders of January 19, 1995, and March 15, 1995, by holding the June 22, 1995, hearing. We will now review the siting criteria challenged in PCB 94-262 to determine whether or not Williamson County Board's landfill siting decision was against the manifest weight of the evidence.

CHALLENGED SITING CRITERIA FROM SECTION 39.2 OF THE ACT

Now that the Board has found that the Williamson County Board decision to grant landfill siting approval was fundamentally fair, we will review the siting criteria challenged in PCB 94-262. In PCB 94-262, CCWC challenged the landfill siting approval in relation to Criteria #1, 2, 3 and 6 found at Section 39.2(a) of the Act (415 ILCS 5/39.2(a)(1), (2), (3), and (6)). We will review each of the challenged criteria below, by applying a manifest weight of the evidence standard.

Criterion 1: The facility is necessary to accommodate the waste needs of the area it is intended to serve. (415 ILCS 5/39.2(a)(1).)

CCWC challenges Criterion 1 (PCB 94-262 Am. Pet. at 5-6) on the basis that KDC failed to qualify its expert, Michael Rapps, prior to testimony regarding need for a regional landfill. Petitioners also allege that such testimony was given without Mr. Rapps gathering information crucial to forming an opinion on need. The petitioners state that Mr. Rapps did not know of Herrin Landfill plans and did not consider Saline County landfill nor the Southern Illinois Regional Landfill. (PCB 94-262 Am. Pet. at 5-6.)

In response, KDC argued that Mr. Rapps indicated that the need for the landfill was manifest and supported by the published reports of the Agency concerning remaining landfill capacity in southern Illinois. (PCB 94-262 Res. Br. at 12; C0023-C0029, C0577-C0583.) Further, applicant contends that Mr. Rapps' testimony, subject to cross-examination, was not contradicted by other evidence. (PCB 94-262 Res. Br. at 12.)

After reviewing the record, the Board finds the decision by the Williamson County Board was not against the manifest weight of the evidence in relation to Criterion 1. The record before the Williamson County Board included a report prepared by Rapps Engineering and Applied Science entitled, "Needs Assessment" dated December 1991 and an "Update to the December, 1991 Needs Assessment, dated January 5, 1994". (C0023-C0029.) The engineering firm concluded in this "Needs Assessment" that the entire region has only a few years of landfill

capacity remaining. (C0026, C0027.) The Rapps report did consider the Herrin Landfill and other area landfills. (C0024). Mr. Rapps testified before the Williamson County Board hearing on June 2 and 3, 1994 (C0573-C0576) concerning his qualifications and expertise. Mr. Rapps further testified about reports generated by his engineering firm on the need for an additional landfill as proposed in the application. (C0577-C0579.) Mr. Rapps was not offered as an expert witness, but to explain the needs assessment report that he prepared for KDC. (C0580.) Mr. Rapps was subject to cross-examination by the petitioners and the petitioners did not present any evidence on the issue of need in the County Record.

Criterion 2: The facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected. (415 ILCS 5/39.2(a)(2).)

CCWC challenges Criterion 2 (PCB 94-262 Am. Pet. at 6) on the basis that the Williamson County Board was not given enough information on the issue of protecting the public health, safety, and welfare. Petitioners allege that the issues of subsidence fault dangers were explained inadequately and that possible questions about site stability require independent geological studies. (PCB 94-262 Pet. Br. at 27-28.) Petitioners also allege that the proximity of the mall, a planned retirement community, and the Big Muddy Cemetery, were not addressed. (PCB 94-262 Pet. Br. at 28.) Further, petitioners allege that a neighboring ammunitions ground was not checked for groundwater quality, that closure use and day to day management practices were not addressed, and that Mr. Rapps could not testify to the identity of the landfill's operator. (PCB 94-262 Pet. Br. at 28.)

In response, KDC argues that the only evidence on the design, location, and operation of the proposed landfill came from the applicant, Kibler Development Corporation. (PCB 94-262 Res. Br. at 12.) KDC noted that petitioners did not produce any contrary expert evidence. (PCB 94-262 Res. Br. at 13.) KDC asserts that the Williamson County Board had sufficient evidence to justify its final action in approving the application.

After reviewing the record, the Board finds that the Williamson County Board's decision was not against the manifest weight of the evidence. Included with the application was the "Facility Design and Operation" plan developed by Rapps Engineering and Applied Science dated January 27, 1994. (C0140) The "Facility Design and Operation" plan addresses in detail the construction and operation of the proposed landfill. At the hearing conducted by the Williamson County Board on June 2 and 3, 1994, Mr. Rapps testified concerning the facility design (C0585) and was subject to cross-examination. Mr. Rapps stated that the landfill was designed to conform to current Agency regulations and that mine subsidence was dealt with in the design. Mr. Rapps stated that the design and plan of operations for the landfill was protective of the public health and safety. (C0609). Petitioners did not present any evidence on this criteria in the County Record.

Criterion 3: The facility is so located so as to minimize the incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property. (415 ILCS 5/39.2(a)(3).)

CCWC challenges Criterion 3 (PCB 94-262 Am. Pet. at 6) by alleging that KDC failed to qualify Mr. Reeder as an expert on land value and that as an expert, he was unable to give knowledgeable testimony in that Mr. Reeder could not identify the proposed landfill site when he was given a full feature map. (PCB 94-262 Pet. Br. at 29, C0508, C0517, C0527.) Petitioners also assert that Mr. Reeder offered testimony on the highest and best use of the property which was not credible because of his conclusion that because the area was a strip mine, it was unsuitable for other uses. (PCB 94-262 Pet. Br. at 29.)

KDC argues that Mr. Reeder's report was filed with the application, including a list of his qualifications (PCB 94-262 Res. Br. at 13; C0063-C0137.) KDC also notes that Mr. Reeder's report states that the proposed landfill was located to minimize impact on the value of the surrounding property. (PCB 94-262 Res. Br. at 13; C0065.) KDC also maintains examination of the transcript from the county hearing fails to reveal that Mr. Reeder was unable to give knowledgeable testimony. (PCB 94-262 Res. Br. at 13; C0495-C0545.) Finally, KDC asserts that the Williamson County Board placed greater weight on the evidence offered by Mr. Reeder than on the counter-evidence presented by petitioners' land appraiser, Mr. Havens, who authored the "Landfill Impaction Report". (C0960-C0977.)

The Board finds that the Williamson County Board's conclusion that the proposed landfill is so located so as to minimize the incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property is supported by ample evidence in the record and was therefore, not against the manifest weight of the evidence. (See e.g., Hedinger, et al. v. D.L. Landfill, et al. (December 20,1990) 90-163.) KDC argued that Mr. Reeder's credentials were submitted as part of his appraisal report and that report was submitted with the application to show that the landfill proposal was designed to minimize the impact on the surrounding property values. (PCB 94-262 Res. Br. at 13; C0063-C0137.) A review of the transcript, demonstrates that Mr. Reeder was fully qualified to testify as to the report he created and to the land values. (C0506-C0527.) There is no credible evidence to counter the information provided by Mr. Reeder such that the Williamson County Board's decision is reversible on this criterion. The petitioners provided a "Landfill Impaction Report" 30 days following the public hearing which was prepared by an appraiser hired by petitioners (C0960-C0977); however, while the report offered opinions on geology and economics; it did not address minimization of impact to the surrounding area. It was appropriate for the Williamson County Board to give greater weight to information provided by Mr. Reeder over that provided by the petitioners' "Landfill Impaction Report". As in the case of A.R.F. Landfill, Inc. v. IPCB and Lake County, (2d Dist. 1988) 174 Ill. App. 3d 82, 528 N.E. 2d 390, the Board will not reweigh the evidence presented to the Williamson County Board in the instant case.

Criterion 6: The traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows. (415 ILCS 5/39.2(a)(6).)

CCWC challenges Criterion 6 (PCB 94-262 Am. Pet. at 6-7) on the basis that the local unit of government did not have sufficient information upon which to make an informed decision regarding impact on traffic flow. The petitioners argue that KDC's witnesses were not properly qualified as experts such that the Williamson County Board could not assess their credibility. Additionally, CCWC alleges various problems with the traffic study, including: the study was based on a "hearsay" discussion with the Illinois Department of Transportation (IDOT); the study reflected erroneous dates; the study assumes a road closure in the future, but no impact assessment was made regarding the closure; and the study failed to consider a secondary access road, the impact on Route 13, and the developing mall area. (PCB 94-262 Pet. Br. at 29-30.)

Finally, CCWC argues that the Williamson County Board had insufficient information because they had requested a current IDOT traffic study, but since it would not be available for the Williamson County Board's consideration until two weeks after the County Record was closed, the Williamson County Board therefore requested that Duane Wittenborn, a Williamson County engineer, prepare a report. (C0936.) CCWC asserts that Mr. Wittenborn testified that his report was constructed based on data and information provided by John Crawford, one of the applicant's experts. (PCB 94-262 Pet. Br. at 30; PCB 94-262 Tr. at 116.) Accordingly, CCWC argue that use of the report is in error because it is based on "ex parte" information which had not been cross-examined thereby denying CCWC the opportunity to develop the record. (PCB 94-262 Pet. Br. at 30.)

KDC asserts that petitioners are wrong to argue that the Williamson County Board had insufficient information regarding the impact of the proposed facility on traffic flow. (PCB 94-262 Res. Br. at 14.) KDC notes that Engineer John Crawford completed a traffic study which was submitted as part of the KDC application (PCB 94-262 Res. Br. at 14; C0030-C0036) and that he testified before the County Board. (C0552.) In addition, KDC maintains that the County engineer, Mr. Wittenborn, submitted a staff report which reached similar results as the Crawford study (PCB 94-262 Res. Br. at 15; C1015-C1021) and noted Mr. Wittenborn's testimony before this Board. (PCB 94-262 Tr. at 112-116.)

As part of the application, KDC has a statutory obligation to show how the proposal is designed to minimize the traffic impact of the proposed facility, but that obligation has not been construed to mean that the applicant must eliminate any additional traffic impact. (See <u>Fairview Area Citizens Taskforce v. IPCB</u>, (3d Dist. 1990) 144 Ill. Dec. 659, 555 N.E. 2d 1178, 1186.) There is sufficient information in this case to support a finding by the Williamson County Board that the traffic impact of the proposal would be minimized. In addition, there was information in the record to show that the impact on traffic flow from the proposed landfill would be minimal. John Crawford, the engineer hired on behalf of KDC, submitted information regarding the impact of the proposed traffic flow as part of the original application. The report concluded that increased traffic due to the landfill operations would have only a minimal impact. (C0031.) County engineer, Mr. Wittenborn, did a similar study reaching the same conclusion and his report is a matter of record. (C1015-C1021.) Additionally, he testified at the Pollution Control Board's

hearing on December 19, 1994 that he viewed his analysis as more conservative than Crawford's because he increased the number of assumed vehicles that would go to the new landfill (PCB 94-262 Tr. at 116), and he still concluded the impact on traffic flow would be minimal. (C1018.) That the Williamson County Board chose to credit the conclusions of its own engineer in making a decision does not render the Williamson County Board's decision against the manifest weight of the evidence. Units of local government are entitled to do so. Importantly, we will not reweigh the evidence before the Williamson County Board. The Board will not substitute its judgment in such a circumstance. (See e.g. McHenry County Landfill, Inc. v. IPCB, (2d Dist. 1987) 154 Ill.App.3d 89, 506 N.E.2d 372, 381.)

CONCLUSION

This proceeding is a result of a reversal and remand from this Board to Williamson County in PCB 94-262. The reversal and remand was necessary to cure fundamental unfairness which resulted from statements to the Williamson County Board by the applicant's representative, Mr. Bill Kibler on June 17, 1994. In response to the Board's remand order, the Williamson County Board noticed and held a hearing on June 22, 1995, to allow testimony regarding Mr. Kibler's statements of June 17, 1994. The Board finds that the Williamson County Board complied with the Board's orders of January 19, 1995, and March 15, 1995, in holding the June 22, 1995, hearing. The Board further finds that the procedures used by the Williamson County Board were fundamentally fair. Additionally, the Board finds that the Williamson County Board's decision on the four challenged criteria from Section 39.2(a) of the Act was not against the manifest weight of the evidence.

ORDER

The Board finds that the procedures before the Williamson County Board of Commissioners were fundamentally fair and in compliance with previous orders by the Illinois Pollution Control Board. Further, the decision of the Williamson County Board of Commissioners to site a landfill in Williamson County as proposed by Kibler Development Corporation is not against the manifest weight of the evidence with respect to the siting criteria in Section 39.2 of the Illinois Environmental Protection Act (415 ILCS 5/39.2). The decision by the Williamson County Board to site a landfill proposed by Kibler Development Corporation is hereby affirmed. This docket is closed.

IT IS SO ORDERED.

Board Members Emmett Dunham and Joseph Yi concur.

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 Ill	linois Pollution Cor	ntrol Board, hereby cer	rtify that the
above opinion and order was adopted on th	e <u>/5 4</u> day of _	Lebrusy	, 1996,
by a vote of $7^{-\delta}$.		1	
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	Dorothy M. Gun	n, Clerk	
	Illinois Pollution	Control Board	