ILLINOIS POLLUTION CONTROL BOARD
January 21, 1993

C.O.A.L. (CITIZENS OPPOSED TO ADDITIONAL LANDFILLS),	)	
Petitioner,	)	
v.	)	PCB 92-131
	)	(Landfill Siting Review)
LAIDLAW WASTE SYSTEMS, INC., and THE PERRY COUNTY BOARD OF COMMISSIONERS,	)	
Respondents.	)	

MARK MACLIN AND AARON ATKINS APPEARED ON BEHALF OF C.O.A.L.

BRIAN E. KONZEN APPEARED ON BEHALF OF LAIDLAW WASTE SYSTEMS, INC.

OPINION AND ORDER OF THE BOARD (by J. C. Marlin):

This matter is before the Board on the September 11, 1992 petition for review filed by C.O.A.L. pursuant to section 40.1(b) of the Environmental Protection Act (Act). (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1040.1(b).) C.O.A.L. seeks review of the Perry County Board of Commissioners' (County) August 21, 1992 decision granting Laidlaw Waste Systems, Inc. (Laidlaw) siting approval for a regional pollution control facility. A hearing before the Board was held October 27, 1992 in DuQuoin, Illinois, which was attended by members of the public.

BACKGROUND

On March 17, 1992, Laidlaw filed an application for siting approval for a 257-acre regional pollution control facility (RPCF) to be located in Perry County. (C. 690, 697.) The RPCF is a part of the Greater Egypt Regional Environmental Complex (GEREC), which is proposed as an "integrated, organized, and programmed complex consisting of a number of commercial, industrial, and solid waste control facilities and environmental programs, sited, designed, and operated so as to blend with the natural ecosystem and provide maximum positive benefits to the community and region." (C. 690.) The proposed RPCF would consist of a material processing facility, a composting facility, and a sanitary landfill. (C. 690-91.) "The site is generally described as a reclaimed coal strip mine(s) situated in an agricultural setting." (C. 697.)

Hearings were held before the County on June 22, 1992, June 23, 1992, and July 6, 1992. On August 21, 1992, the County entered its written decision granting approval, finding that it had

jurisdiction over the application, that it had not yet adopted a solid waste management plan, and that Laidlaw established compliance with the applicable criteria. (C. 1657-62.)

On appeal before the Board, C.O.A.L. alleges that the County did not have jurisdiction to proceed on Laidlaw's application, that the proceedings before the County were fundamentally unfair, and that the County's findings that Laidlaw met the "flood plain criteria" (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1039.2(a)(4)) and the "design criteria" (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1039.2(a)(2)) are against the manifest weight of the evidence.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. 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 County found that Laidlaw met its burden on all the criteria. C.O.A.L. challenges the County's findings on criteria #2 and #4.

When reviewing a local decision on the criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, Inc. v. County of McLean (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; 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., PCB 90-94 (August 30, 1990), aff'd File v. D & L Landfill, Inc. (5th Dist. 1991), 219 Ill.App.3d 897, 579 N.E.2d 1228.)

Additionally, the Board must review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. (E & E Hauling, 451 N.E.2d at 562.) C.O.A.L. raises both jurisdictional and fundamental fairness issues.

Jurisdiction

C.O.A.L. contends that the County lacked jurisdiction to consider Laidlaw's application because Laidlaw failed to give notice of its request for siting approval to all owners of property within 250 feet of the lot line of the subject property as required by section 39.2(b) of the Act. In particular, C.O.A.L. contends that Matilda Poiter, who owns the mineral rights to the oil and gas located in a parcel of property located within 250 feet of the site, did not receive proper notice. Laidlaw contends that it was not required to give notice to Poiter because she was not listed on the "authentic tax record" used by Laidlaw for its notice list and, alternatively, Poiter is not an "owner" of property within the meaning of the Act.

Section 39.2(b) provides, in relevant part, as follows:

> No later than 14 days prior to a request for location approval the applicant shall cause written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which the facility is to be located.

At the County hearing, Laidlaw introduced an affidavit attesting to the fact that notice was given by registered mail to owners of all property within 400 feet of the site as they appear on the authentic tax records of Perry County and copies of the registered mailing list. (C. 1410-1448.) Laidlaw stated at hearing that while it was only required to give notice to those owners within 250 feet, it "went above and beyond the 250 feet in some cases by as much as a mile." (C. 11.) In its written decision, the County made a specific finding that it had jurisdiction and that Laidlaw served all notices as required by law. (C. 1658.)

At the Board's October hearing, Matilda Poiter testified that she owned the mineral rights to property located within 250 feet of the site, that she pays taxes on that property, and that she did not receive notice of Laidlaw's application. (Tr. 10/27/92 at 12-19.) C.O.A.L. also introduced two real estate tax bills received by Poiter. (Tr. 10/27/92 at 17; Pet. Exh. 1, 2.)

Based upon Poiter's testimony and the two exhibits, C.O.A.L. asserts that the County lacked jurisdiction because Laidlaw failed to comply with the notice provisions of section 39.2(b).

Section 39.2(b) requires that applicants for siting approval use the "authentic tax records" to determine the owners to whom notice must be sent. (Bishop v. PCB (5th Dist. 1992), 601 N.e.2d 310.) In Bishop, the appellate court addressed the issue of what are "authentic tax records". (Id. at 311-15.) The applicants argued that the "authentic tax records" were those maintained by the county treasurer and the citizens group opposed to siting argued that the "authentic tax records" were those maintained by the county clerk. (Id. at 311.) The record contained testimony establishing that the offices of the county clerk, assessor, and treasurer all play a role in the collection and record-keeping function of the taxing process. (Id. at 315.) Consequently, the court distinguished Bishop from a Board case (DiMaggio v. Solid Waste Agency of Northern Cook County) where the county clerk testified that the county clerk's office maintained the "authentic tax records." (Id. at 315.) In construing section 39.2(b), the court noted that section 39.2(b) does not define owners as those persons appearing from the county clerk's records or as those available from the most up-to-date record. (Id. at 315) "Generally, as long as notice is in compliance with the statute and places those potentially interested persons on inquiry, it is sufficient to confer jurisdiction...." (Id. at 315.) Therefore, the court held that the authentic tax records in Bishop included the records maintained by the treasurer's office. (Id. at 315.)

Here, Laidlaw states in its brief that it "served notice on all owners appearing in the authentic tax records of the Perry County Supervisor of Assessments." (Brief at 5.) However, in its reply brief, C.O.A.L. contends that "the information regarding Mrs. Poiter and her co-owner's ownership of the mineral rights could have been ascertained from the Supervisor of Assessments of Perry County, as her office has a property index card on the property, as evidenced by the attached copies of the property index cards, copies of which are submitted herewith, and are marked "Exhibit D" and made a part hereof." (Reply Brief at 3.) Also attached to C.O.A.L.'s reply brief is "Exhibit A", a certified copy of a warranty deed conveying the mineral rights to certain property to Matilda Poiter, and Poiter's sisters and brother, "Exhibit B" is Poiter's affidavit attesting to the fact that Poiter has paid taxes on the property for approximately 19 years, and "Exhibit C" is the affidavit of Frank Mangin, County treasurer of Perry County, stating that Poiter has paid taxes on the property in excess of six years.

Initially, the Board must address Laidlaw's December 10, 1992 motion to strike the "exhibits" attached to C.O.A.L.'s reply brief. Laidlaw contends that these documents should be stricken because they were not introduced at the Board's hearing and are, therefore,

outside the record on review. Additionally, Laidlaw asserts that fundamental fairness requires that a party be afforded the opportunity to confront, rebut, and cross-examine evidence and that consideration of these documents would violate these rights. C.O.A.L.'s response, filed December 18, 1992, contends that it may raise a jurisdictional issue at any time and relies on Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc. (2d Dist. 1986), 144, Ill. App. 3d 334, 494 N.E.2d 180 in support of its position that it may also introduce evidence on a jurisdictional challenge at any point in the proceedings.

In Concerned Boone Citizens (CBC), CBC filed a motion to dismiss in the appellate court alleging that the court lacked jurisdiction because M.I.G. failed to give notice of its application in accordance with Section 39.2(b) of the Act. Attached to its motion was a certificate of publication showing that notice was given 13 days prior to filing as opposed to the requisite 14 days. (Id. at 182.) CBC did not raise the jurisdictional issue below and the certificate was not part of the record on appeal. (Id.) The court recognized that a jurisdictional issue may be raised at any time and that the court may allow facts affecting its jurisdiction, which are not of record, to be proven by extrinsic evidence. (Id.)

The Board finds the instant case distinguishable from Concerned Boone Citizens. Here, C.O.A.L. raised the jurisdictional issue at the Board's October 27, 1992 hearing and presented evidence in support of its position that the County lacked jurisdiction. As noted above, Poiter testified concerning her property and payment of taxes. C.O.A.L. introduced tax bills in support of this testimony. This is not a situation where, for the first time at the briefing stage before the Board, C.O.A.L. has discovered and presented a jurisdictional challenge. Unlike Concerned Boone Citizens, C.O.A.L. had ample opportunity to present evidence in support of its jurisdictional challenge and in fact presented such evidence. C.O.A.L. does not contend that the "exhibits" attached to its brief are newly discovered evidence. C.O.A.L. should not be allowed at this late stage to supplement the record with documents relating to an issue where it was afforded the opportunity to fully address the matter at hearing and to present evidence in support of its jurisdictional challenge. Therefore, the Board grants Laidlaw's motion to strike the "exhibits" attached to C.O.A.L.'s reply brief. Pursuant to 35 Ill. Adm. Code 101.241, the Board denies Laidlaw's December 23, 1992 motion to file a reply to C.O.A.L.'s response.

The Board now addresses the issue of whether Laidlaw's reliance on the supervisor of assessments' records as the "authentic tax records" is consistent with the Act. In the instant case, unlike Bishop and DiMaggio, the record contains no testimony from any county employees as to which records are the "authentic tax records." However, the record does contain the County's

written finding that jurisdiction exists and that Laidlaw served notice as required by the law. Such a finding necessarily includes a finding that Laidlaw served notice on owners as they appear on the "authentic tax records." The Bishop holding that records maintained by any one of the three county offices may constitute the "authentic tax records coupled with the County's finding of jurisdiction leads the Board to conclude that the supervisor of assessments' records constitute the "authentic tax records" in the instant case.

The Board must now determine whether Laidlaw properly served notice on the persons appearing on the supervisor of assessments' records. The record does not contain the supervisor of assessments' records which form the basis of Laidlaw's notice. However, the Act does not require that an applicant submit such information. Here, Laidlaw introduced an affidavit and registered mailing list to establish notice was given in accordance with section 39.2(b). The County found that Laidlaw's notice satisfied the requirements of the Act. Consequently, on appeal before the Board, C.O.A.L. has the burden of establishing that the County's finding that notice was proper is erroneous.

The only evidence properly introduced into the record by C.O.A.L. are the real estate tax bills received by Poiter. (Pet. Exh. 1, 2.) However, C.O.A.L. does not contend, nor does the record indicate, that these bills are contained in the supervisor of assessments' records. Because C.O.A.L. fails to establish a connection between Poiter's tax bills and the supervisor of assessments' records, which are the authentic tax records in this case, the Board finds that these bills do not establish that Laidlaw was required to serve Poiter with notice in order to comply with section 39.2(b). Moreover, although C.O.A.L. contends in its reply brief that Poiter's name appeared on the supervisor of assessments' records, there is no evidence in the record to support this bare assertion. As noted above, the Board cannot rely upon documents attached to C.O.A.L.'s reply brief, which were never introduced at hearing, to determine whether Poiter's name appeared on the supervisor of assessments' records. Moreover, the Board finds that even if the "exhibits" attached to C.O.A.L.'s reply brief were properly before the Board, these documents do not establish that Poiter's name appeared on the supervisor of assessments records. "Exhibit A" is simply a copy of the warranty deed, "Exhibit B" simply reiterates Poiter's own testimony that she has paid taxes on the property, "Exhibit C" indicates that Poiter's name appeared on the records kept by the County treasurer and "Exhibit D" is a property record but there is no indication from which county office the records were obtained. Hence, a consideration of these documents leads the Board to again conclude that C.O.A.L. has failed to establish that Poiter was entitled to notice.

Therefore, while the Board agrees with C.O.A.L.'s contention

that the notice requirements of section 39.2(b) are jurisdictional prerequisites to siting approval (Wabash & Lawrence County Taxpayers v. PCB (5th Dist. 1990), 198 Ill. App. 3d 388, 555 N.E.2d 1081, 1084; Kane County Defenders, Inc. v. PCB (2d Dist. 1985), 139 Ill. App. 3d 588, 487 N.E.2d 743)), C.O.A.L.'s allegation of improper notice is not supported by the record. Having concluded that C.O.A.L. fails to establish the necessity of serving Poiter with notice, the Board need not address the issue of whether Poiter, as the owner of mineral rights, is an "owner" of property under section 39.2(b).

C.O.A.L.'s second jurisdictional challenge is based upon an alleged failure to serve William Walker with notice within the 14-day time period set forth in section 39.2(b). Walker testified at the Board hearing that he is a resident of DuQuoin and that he owns property near the site. (Tr. 10/27/92 at 20.) He further testified that he received notice 13 days before the filing of the request for site approval. (Id.) While Walker testified that he had records from the post office to support his testimony (Tr. 10/27/92 at 21), no such evidence was introduced into the record. Additionally, C.O.A.L.'s assertion that a certified mail receipt which is part of the permanent record shows that Walker did not receive notice until 13 days prior to filing of Laidlaw's application is not supported by any citation to the record. The Board's review of the record failed to reveal such evidence. The Board also notes that Walker participated extensively at the County hearings. (C. 480.)

Laidlaw contends that C.O.A.L. has failed to establish that Walker was entitled to notice because C.O.A.L. has presented no evidence indicating that Walker's name appeared on the supervisor of assessments' records or that Walker owns property within 250 feet of the site. The record does include an affidavit attesting that Laidlaw served Walker with notice by delivering the mailing on March 3, 1992 to the Granite City Post Office. (C. 1410, 1439.) Laidlaw states that it mailed notices to persons beyond the 250 feet boundary required by section 39.2(b). Laidlaw also contends that, assuming Walker is entitled to notice, section 39.2(b) does not require that the owner receive notice no later than 14 days prior to filing, but only that the applicant cause service no later than 14 days prior to filing an application.

C.O.A.L. fails to establish that Walker is the owner of property located within 250 feet of the site. Walker only testified that he owned property "near" the site. Laidlaw's affidavit attesting to service, dated March 4, 1992, and statements made at the County hearing, establish that Laidlaw served notice upon persons beyond the 250 feet boundary. C.O.A.L. fails to establish that Walker was an owner within 250 feet rather than a person served with notice beyond the 250 feet boundary. Additionally, C.O.A.L. has not presented any evidence establishing that Walker appears on the "authentic tax records" relied upon by

Laidlaw in serving notice. Therefore, while the Board agrees that the 14-day notice requirement of section 39.2(b) is a jurisdictional requirement (Wabash & Lawrence County Taxpayers v. PCB (5th Dist. 1990), 198 Ill. App. 3d 388, 555 N.E.2d 1081, 1084; Browning-Ferris v. PCB (5th Dist. 1987), 162 Ill. App. 3d 801, 516 N.E.2d 804; Kane County Defenders, Inc. v. PCB (2d Dist. 1985), 139 Ill. App. 3d 588, 487 N.E.2d 743), the Board finds that C.O.A.L.'s assertion that Walker was entitled to notice is not supported by the record.

Having concluded that C.O.A.L. fails to establish that Walker was entitled to notice, the Board need not address Laidlaw's contention that it complied with the 14 day requirement by placing notice in the mail within this time period.

Fundamental Fairness

As noted above, section 40.1 of the Act requires that the Board review the procedures used at the local level to determine whether those procedures were fundamentally fair. C.O.A.L. contends that the County proceedings violated fundamental fairness because: (1) several members of the public were denied access to the hearing when the County voted on the application; (2) members of the public had no opportunity to review the contract between the County and Laidlaw providing for compensation to the County after Laidlaw received its operating permit; and (3) there were ex parte contacts between Laidlaw and the County with respect to the contract.

At the Board's October hearing, Ruth MacMurray and Marie Robler testified in an offer of proof that they were denied access to the meeting on August 21, 1992 when the County voted on, and subsequently approved, siting. (Tr. 10/27/92 at 27-33.) According to the witnesses, the meeting room was full and they stood in the hall with many other persons outside the room, but could not hear what occurred. (Id.) C.O.A.L. made an offer of proof that T.A. Atkins and Charles Janesio would have offered the same testimony. (Id. at 34.)

C.O.A.L. contends that the fact that many members of the public were denied access to the August 21, 1992 meeting violates both fundamental fairness and the Illinois Open Meetings Act. (Ill. Rev. Stat. 1991, ch. 102, par. 41 et seq.) Initially, the Board notes that it does not have the statutory authority to enforce the Illinois Open Meetings Act and, therefore, any such alleged violation does not in and of itself establish a violation of fundamental fairness. Hence, the relevant inquiry is whether

the local procedures were fundamentally unfair as alleged by C.O.A.L.[1]

While the record establishes that many members of the public were denied access to the meeting where the County voted on Laidlaw's application, it is clear that this occurred simply because the room could not accommodate all those in attendance. The record also establishes that members of the public were afforded ample opportunity to participate in the actual hearings which formed the record before the County. (C. 642-69.) After the close of the hearings, the public was afforded 30 days in which to submit comments. (C. 676.) At the August 21, 1992 meeting when the County voted on the application, no evidence was submitted because the record was closed. The record establishes that members of the public were not deprived of the opportunity to make their positions known; rather, some members were merely denied the opportunity to hear the County vote on the application. Because the local procedures did not frustrate public participation in the actual hearings which form the basis of the County's decision, the Board finds that the denial of access to some members to the August meeting does not render the proceedings fundamentally unfair.

C.O.A.L.'s remaining two contentions relate to a contract entered into between the County and Laidlaw on August 21, 1992 which provides compensation to Perry County from Laidlaw. (PCB Pet. Exh. 3.) First, C.O.A.L. alleges that the version of the contract filed with the application differs from that entered into by the County and Laidlaw on August 21, 1992 and that the failure to allow the public the opportunity to review or comment on this contract was fundamentally unfair. Secondly, C.O.A.L. contends that there were ex parte contacts between Laidlaw and the County regarding the terms of the contract.

Gene Gross, Perry County State's Attorney, testified at the Board hearing as to the events surrounding the contract. (Tr. 10/27/92 at 34.) Gross stated that, on August 21, 1992, the County voted on all the applicable criteria. (Id.) A request was made that the application be approved, at which time the chairman produced the revised version of the contract. (Id.) The revised contract is similar to the original filed with the application except that it narrowed the radius in which material could be brought to the facility and increased the fees. (Id. at 37.) The chairman indicated that he wanted Laidlaw to review the revisions

[1] Although the hearing officer sustained Laidlaw's objection to MacMurrary and Robler's testimony because allegations of open meetings violations are irrelevant, C.O.A.L. presented the testimony in an offer of proof. (Tr. 10/27/92 at 23-25.) The Board will consider the testimony only insofar as it is relevant to the issue of fundamental fairness.

before the Board acted on the application, at which point a recess was taken. (Id.) While Laidlaw reviewed the contract, Gross advised the County that they should proceed with the vote and that it was inappropriate to consider the contract as part of the siting process. (Id.) The County approved siting and subsequently Laidlaw agreed to the revisions and the contract was signed. (Id.)

Don Hirsch, County Clerk, testified that he did not know who drafted the revised contract and that, to his knowledge, the terms of the revised contract were not specifically discussed at any county board meeting. (Id. at 40, 42.)

In alleging ex parte contacts, C.O.A.L. relies on the existence of a revised contract, presented at the August 21, 1992 meeting, which provides Perry County with, inter alia, royalties for waste landfilled at the facility . (Pet. Exh. 3 at 76.) However, the testimony of Gross and Hirsch do not indicate that any discussion occurred at the meeting between Laidlaw and the County regarding the contract and its relation to siting. Gross' testimony merely states that a revised contract was produced at the meeting by the chairman and that Laidlaw was allowed to review the contract. Hirsch's testimony establishes only that he did not know who drafted the contract and that he did not know of any county board meetings regarding the contract. C.O.A.L. fails to establish that any ex parte communication occurred.

Moreover, even if an ex parte communication occurred, C.O.A.L. fails to establish that it was prejudiced by this contact. A court will not reverse an agency's decision because of ex parte contacts with members of that agency absent a showing of prejudice. (Fairview Area Citizens Taskforce v. IPCB (3d Dist. 1990), 198 Ill. App. 3d 541, 555 N.E.2d 1178, 1183, citing, Waste Management of Illinois v. PCB (1988), 175 Ill. App. 3d 1023, 530 N.E.2d 682, 697-80.) The record establishes that a similar version of the contract was filed with Laidlaw's application (Tr. 10/27/92 at 36-38.) such that it could be reviewed and commented on at the local proceedings by members of the public. However, a review of the hearings below establishes that no members of the public commented on the original contract. C.O.A.L. fails to allege how its participation would have differed had it been aware of the changes in the revised version of the contract prior to the close of hearings.

Finally, the record establishes that the County was instructed to not consider the contract in voting on the application and that it was not until siting approval was granted that the County entered into the contract. Public officials are presumed to act without bias and should not be disqualified as a decision-maker simply because revenues are to be received by the County. (E & E Hauling, Inc. v. PCB (1985), 107 Ill.2d 33, 481 N.E.2d 664, 668.) There is nothing in the record to indicate that the County's decision was based on anything other than the statutory criteria.

The Board's review of the record leads it to conclude that the procedures followed by the County were fundamentally fair.

Criterion # 4

Section 39.2(a)(4) of the Act requires that the applicant establish that the proposed facility is located outside the boundary of the 100-year flood plain or that the site is flood-proofed. The Board must determine whether the County's finding that Laidlaw met this criterion is against the manifest weight of the evidence.

Laidlaw's application states that the drainage features and flood zone data depicted on available maps appear to represent conditions characteristic of pre-mine activities or at least prereclamation activities. (C. 789-90.) The record also indicates that Laidlaw attempted to obtain more updated information regarding the flood plain from the Illinois Department of Transportation, but was informed that it could provide no better information regarding flood zone areas. (C. 790.) Laidlaw states that "it is not anticipated that development of the ... RPCF will restrict the flow of a 100-year flood, result in the washout of solid waste from the 100-year flood, or reduce the temporary water storage capacity of the 100-year flood plain. Additional verification studies may be conducted during the permitting phase of this project (if needed). Should subsequent development of this area occur, stringent design criteria and flood-proofing in full compliance with all applicable regulations will be implemented." (C. 790.)

Hydrogeologist Rodney Bloese of Foth and VanDyke testified on behalf of Laidlaw. Bloese testified that in attempting to discern whether the facility would be located outside the 100-year flood plain, the information available was "pre-mining". (C. 120.) This information indicated that "on the northwestern portion of the 600 plus acres there was an area that was in the flood plain area." (C. 120.) However, this area is where Laidlaw intends to locate an industrial park. (C. 120.) Bloese testified that the proposed RPCF facility itself is not located in the pre-mine flood area. (C. 120.) Bloese further testified that "[o]ne of the things we are going to have to do as part of this is to determine, based on the information right now it indicates there is no indication that it is within a hundred year flood plain. However, along the southern portion of this site, Williams Creek, we are going to have to perform additional investigations to ascertain is it indeed within a hundred year flood plain." (C. 120.) On recross-examination, Bloese testified that while Laidlaw had not excluded the possibility of the site being within a 100-year flood plain, it had also found no evidence that the site is within a hundred year flood plain. (C. 182.) Because of the absence of post-mining information, Bloese testified that Laidlaw intended to perform additional studies to determine if any portion of the site is within a 100-year flood plain. (C. 182-84.)

Ron Meister, an engineer from Foth and VanDyke, testified that he took the lead in designing the proposed facility. (C. 190-91.) Meister also testified that, based on the FEMA flood control maps and the information from IDOT, the available information does not indicate a 100-year flood plain problem at the site. (C. 215.)

William Walker, a retired Caterpillar worker and part-time farmer, testified that he lived three-eights of a mile northeast of the site. (C. 481.) Walker testified that the area frequently floods and that the Township Road 196 which Walker uses to access his property becomes covered with water. (C. 481-84; C.O.A.L. Exh.1.) On cross-examination, Walker testified that there is a culvert under the road and that Williams Creek flows under the road. (C. 485.) Walker testified that it was possible that there was blockage in the creek when the road flooded. (C. 489.)

Michael McCarrin, a geologist-hydrogeologist employed by Foth and VanDyke, also testified on behalf of Laidlaw. (C. 492.) McCarrin testified that the United States Geological Survey (USGS) map was "old flood plain data" and that the FEMA/HUD map was "generated subsequent to the strip mining as we were aware of it." (C. 500-01.) McCarrin testified that in looking at these two maps, Laidlaw noticed that the flood plain delineations between the two agencies changed and the "actual flood plain from the more recent studies dropped south of our site and appears to be fairly removed from our site. I guess it was our basic belief that the flood plain is not an issue from the standpoint of it actually existing near our RPCF, and in any case we have the ability and we have so set out the plan to develop the site now to flood proof the site if there is a problem." (C. 501.) McCarrin further testified that "[a]s an extra back-up precaution we have also proposed to do another flood plain type study to collect additional data during the permit." (C. 501.)

On cross-examination, McCarrin agreed that surface mining operations in strip mining coal could change the 100-year flood plain. (C. 505.) However, McCarrin testified that he believed that the site "currently is not in a 100-year flood plain." (C. 504.) This opinion was based on a comparison of the USGS "pre-mining" map and the FEMA/HUD "post-mining" map. (C. 505, 506.) McCarrin testified that he believed the FEMA/HUD map is a "post-mining" map because it is dated 1980 and McCarrin understood that mining at the site was completed in 1978 such that the map would have been prepared after the mining ceased. (C. 510.) Additionally, McCarrin testified that the FEMA/HUD map is a "post-mining" map because in comparing the maps, there is a sufficient surface change which led McCarrin to believe that much of the area had already been strip mined in the FEMA/HUD map versus the USGS map. (C. 509-10.) However, he agreed that the FEMA/HUD map did not show the location of some strip mine pits or lakes which existed at the time of the hearing. (C. 516-17.) McCarrin admitted that it was possible that the FEMA/HUD map was prepared prior to the completion

of all mining at the site. (C. 517.) McCarrin maintained, however, that he believed that the more strip mining that was done on the site pushed the 100-year flood plain further south of the site. (C. 518-19.) McCarrin testified that "strip mining ... has a tendency to show more storage on the site and less connection to the basin." (C. 519.) According to McCarrin, aerial photographs of the site show "a lot more strip mining" at the site, but also show "a lot more storage water." (C. 519.) McCarrin testified that the ponds on the site "appear to be isolated basins with no direct connection to the Williams Creek basin." (C. 519.) McCarrin also testified that computer programs could have been run to establish the location of the 100-year flood plain and that the report he prepared recommends that such additional studies may need to be performed. (C. 520-21.) When questioned about the connection between the flooding of Williams Creek and the location of the 100-year flood plain, McCarrin testified that the flood plain was not the cause of the flooding and that he believed the flooding was caused by debris blocking the channel and the culvert which goes under the road being too small. (C. 537-38.) He stated that removing debris would be part of the flood protection methods implemented by Laidlaw. (C. 536.) Again, McCarrin testified that the studies and data collected indicate that the site is not within the 100-year flood plain. (C. 538.)

C.O.A.L. introduced the testimony of Paul Oldaker, a hydrogeologist and hydrologist from Colorado. (C. 428.) Oldaker testified that he is familiar with the most commonly used models in the field of both surface water and groundwater. (C. 430.) Oldaker defined a 100-year flood plain as "the flood and the area that it would extend over that would occur from a flood with a statistical probability of occurring once every 100 years." (C. 430.) Oldaker reviewed the data regarding the location of the 100-year flood plain and opined that the data was "pre-mining" data, that the current site has been altered by mining, and that there was "no data presented with the application to make a determination whether a 100-year flood currently is happening" would cover the site. (C. 431.) Oldaker testified that, in most cases, mining activities would affect the location of the 100-year flood plain to some degree. (C. 431-32.) Oldaker testified that the location of a 100-year flood plain can be "calculated from design storm runoffs what the drainage areas are [sic], how much will run off certain areas, et cetera, using generally computer models since there is quite a bit of calculation. The HEC 1 model is used for that." (C. 432.) An HEC 1 model "is the model used by the Corps of Engineers to calculate 100-year flood plains. The HEC 2 model then calculates water surface profiles over a certain area." (C. 433.) Oldaker testified that the data submitted by Laidlaw is deficient because it does not include current topography or flow data calculations. (C. 433.) Oldaker testified that the location of a 100-year flood plain cannot be accurately determined without current topography. (C. 449.)

C.O.A.L. contends that Laidlaw failed to establish with sufficient certainty that the facility is not located within the boundary of the 100-year flood plain or that the site is flood-proofed. Laidlaw contends that the County's finding that Laidlaw met the "flood plain criterion" is not against the manifest weight of the evidence.

In Tate v. IPCB (4th Dist. 1989), 188 Ill.App. 3d 994, 544 N.E.2d 1176, petitioners challenged the Board's decision upholding the Macon County Board's granting of site approval in part because the applicant failed to establish the exact location of the 100-year flood plain. Tate is analogous to the instant case in that in both the record contained testimony of flooding in the area (Id. at 1187), testimony that the facility itself would not be located in the flood plain (Id. at 1189), and the recognition that a new study was needed to determine the exact location of the flood plain (Id. at 1181, 1188). The appellate court affirmed the Board even though the applicant did not identify the exact location of the 100-year flood plain. (Id. at 1195.) Therefore, the Board finds that simply because the record contains some uncertainty as to the exact location of the flood plain and indicates that additional studies may need to be performed does not in and of itself lead to the conclusion that the County's finding that Laidlaw met this criterion is against the manifest weight of the evidence.

The Board finds that the County had sufficient evidence before it to find that the RPCF will not be located within the boundary of the 100-year flood plain. Several witnesses testified on behalf of Laidlaw that the available data indicates the RPCF will be located outside the flood plain. A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or undisputable from the record. (File v. D & L Landfill (5th Dist. 1991), 219 Ill. App. 3d 897, 579 N.E.2d 1228, 1232.) In reviewing the record, the Board cannot find that the conclusion that Laidlaw failed to establish that the RPCF is within the flood plain is "clearly evident, plain, or undisputable." Moreover, the record also contains sufficient evidence for the County to find that, should additional studies be necessary and such studies reveal that the RPCF is within the flood plain, the site will be flood-proofed. Therefore, the Board concludes that the County's finding that Laidlaw met criterion #4 is not against the manifest weight of the evidence.

Criterion # 2

C.O.A.L. also contends that the County's finding that Laidlaw established that the "facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected" is against the manifest weight of the evidence. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1039.2(a)(2).) C.O.A.L.'s primary assertion is that the facility is not located so as to protect the public health, safety, and welfare. Laidlaw contends

that the County's finding is supported by the record and is not against the manifest weight of the evidence.

Rodney Bloese, senior project hydrologist for Foth and VanDyke, testified that the facility is located so as to protect the health safety, and welfare. (C. 142-43.) Bloese testified that his investigation included reviewing public information regarding the foundation of the site, the prior strip mine activity, ground water (C. 118-22), and seismic impacts (C. 122-25). (C. 114-43; Laidlaw Exh. 22, 23, 31.)

John Devon, vice-president and general manger of Marston and Marston, an consulting firm which provides mining engineering, geological engineering, and geological services, was retained by the County to evaluate the safety of the site. (C. 357, 424.) Devon testified that he has worked on coal mining projects and has a Bachelors Degree in geology. (C. 358.) Devon testified that he reviewed Laidlaw's application and that, in his opinion, the "safety of the landfill has not been demonstrated." (C. 364, 617-19.) Devon explained that the question in his view was whether the landfill could be constructed at the proposed location safely and that he did not know the answer to this question. (C. 364.) According to Devon, the proposed site is unique with potential unknown risks and the application fails to address those risks. (C. 364-65.) In particular, Devon questioned whether the "foundation conditions" were adequate. (C. 365, 412, 423.) Devon testified that "the answer may be that it is not a safe location [a]nd the answer may be that it is a safe location. The risks have not been analyzed." (C. 366.) Devon testified that assuming the facility is "properly engineered and designed" he still had concerns about the foundation. (C. 369.) Devon also speculated that the mining activity at the site may have weakened the foundation. (C. 370-85.) In addressing the liner, Devon questioned the suitability of the clays at the site noting that a "brief visit" to the site indicated the presence of rocks and stones, but also noted that these materials could be removed. (C. 367, 385, 387-87.) Devon further testified that the risk of seismic activity had not been adequately addressed. (C. 385.) In conclusion, Devon testified that "to buy into this thing is a blind marriage. So my opinion is that the foundation is not an engineered structure, it is unpredictable. If I had to make a decision on whether this landfill could be constructed in the best interests of public safety and health, I would say I don't know if it can or not. I couldn't approve it. I couldn't warrant it. I couldn't guarantee it. Neither am I saying, to finish, that it won't work, it will never work. Neither am I saying that the Laidlaw people or their engineers can't determine what those risks are and answer the questions. But at this point there is not enough information." (C. 386, 389; C. 624.)

On cross-examination, Devon stated that his expertise was "not in landfills." (C. 394, 403, 412.) Devon had never designed or

help construct a landfill nor had he ever inspected a facility during operations. (C. 415, 416.) Devon also testified that he did not know how many landfills in the state were located on abandoned strip mines. (C. 393-34.)

Paul Oldaker also testified that the application did not contain sufficient information to determine whether the facility is located so as to protect the health safety and welfare. (C. 438.)

C.O.A.L. presented the testimony of Walter Neal, a pit foreman for Arch Mineral Corporation. (C. 480.) Neal testified that his experience with coal mine sites led him to conclude that the location of the site did not protect the health, safety, and welfare. (C. 465-67.) On cross-examination, Neal testified that he was not familiar with the "concept of the factors of safety" with regard "to foundation stability" nor was he familiar with landfills in general. (C. 468.) Neal testified that he did not like the proposed site, but that he had no technical expertise to back up that opinion. (C. 478.)

Also testifying for C.O.A.L. was Richard Smith, an employee of Freman United Coal Company, who has worked in the coal mines where the facility is proposed to be located. (C. 625-26.) Smith questioned the adequacy of the foundation given the prior mining activity. (C. 633-34.)

Mike McCarrin also testified on behalf of Laidlaw regarding criterion #2 and stated that Laidlaw had provided sufficient information in its application to determine whether the facility was designed and located so as to protect health, safety, and welfare. (C. 502-03.) In particular, McCarrin testified that the foundation investigation contained in the application was complete and that the location of the site was adequate to protect health, safety, and welfare. (C. 523-24.) McCarrin also testified that the possibility of seismic activity was considered in designing and locating the facility. (C. 547-48.)

Dr. Nandu Paruvakat, a geotechnical engineer employed by Foth and VanDyke, testified that he designed approximately fifteen landfills in different foundation conditions, three of which were located on strip mines. (C. 552.) Paruvakat testified that he believed that the application submitted by Laidlaw contained sufficient information to show that the public health, welfare, and safety would be protected. (C. 554, 576.) According to Paruvakat, "[t]he foundation conditions in this particular case are good enough that the failure of the foundations or the slopes can be practically ruled out." (C. 554-55; C. 582.) Paruvakat explained the boring process used in evaluating the foundation. (C. 556-67; Laidlaw Exh. 31.)

C.O.A.L. contends that the County's decision that Laidlaw met criterion #2 is against the manifest weight of the evidence because

the County "ignored the findings of their own expert, Marston and Marston, with respect to the stability of the proposed site...." (Brief at 17.) C.O.A.L. contends that because Laidlaw's experts were hired by Laidlaw, Marston and Marston's testimony that the site does not meet criterion #2 is more credible than Laidlaw's witnesses testimony that the facility does meet criterion #2. C.O.A.L cites File v. D & L Landfill (5th Dist. 1991), 219 Ill. App. 3d 897, 579 N.E.2d 1228 in support of this contention. In File, the court, citing Fairview Area Citizens Taskforce v. PCB (3d Dist. 1990), 198 Ill. App. 3d 541, 555 N.E.2d 1178, 1185, recognized that where there is conflicting evidence on criterion #2, the determination is purely a matter of assessing the credibility of the witnesses. (Id. at 1236.) In Fairview, the court noted that conflicting testimony was given on criterion #2 and recognized that a determination of whether the applicant met its burden was a matter of assessing the credibility of expert witnesses. (555 N.E.2d at 1185.) The village board had decided in favor of the applicant on criterion #2 and the court held that since there was evidence to support the village's ruling, the finding of the village board on criterion #2 was not against the manifest weight of the evidence. (Id.)

File and Fairview merely establish that where there is conflicting expert testimony, the finder of fact must weigh the credibility of the witnesses. Here, in finding that Laidlaw met its burden of establishing that the facility is so located as to protect the health, safety, and welfare, the County apparently found Laidlaw's expert witnesses more credible than that of John Devon of Marston & Marston. There is ample evidence in the record to support the County's finding. Consistent with File and Fairview, the Board will not reweigh the evidence or reassess credibility. (See Fairview at 1185.) The Board concludes that the County's finding that Laidlaw met its burden of establishing that the facility is so designed, located, and proposed to be operated that the public heath, safety, and welfare will be protected is not against the manifest weight of the evidence.

In summary, the Board finds that the County had jurisdiction over Laidlaw's application for siting approval, that the proceedings below were fundamentally fair, and that the County's findings on criterion #2 and #4 are not against the manifest weight of the evidence.

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

ORDER

For the foregoing reasons, the County's decision granting Laidlaw siting approval is affirmed.

IT IS SO ORDERED.

J. Theodore Meyer abstains.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Casteneda v. Illinois Human Rights Commission (1989), 132 Ill. 2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of January, 1993 by a vote of 5-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board