

ILLINOIS POLLUTION CONTROL BOARD
January 11, 1990

McLEAN COUNTY DISPOSAL)	
COMPANY, INC.)	
)	
Petitioner,)	
)	
v.)	PCB 89-108
)	(Landfill Siting
THE COUNTY OF McLEAN,)	Review)
)	
Respondent.)	

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on McLean County Disposal Company's (MCD) motion for rehearing or reconsideration, filed on December 13, 1989. Respondent the County of McLean filed its response in opposition to MCD's motion on December 26, 1989.

On November 15, 1989, this Board affirmed the McLean County Board's June 20, 1989 denial of MCD's application for siting approval of MCD's proposed regional pollution control facility. The County Board had held that MCD did not satisfy three of the statutory criteria of Section 39.2(a) of the Environmental Protection Act. Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1039.2(a). Upon review of that decision, this Board upheld the County Board's decisions on criteria 2 and 6, but reversed the decision on criteria 3. The Board also rejected MCD's challenges regarding the Board's decision deadline. MCD now seeks rehearing or reconsideration of the Board's November 15 decision.

MCD first argues that the Board brushed aside the "enormous weight" of technical evidence in support of MCD's application and held that the County Board's decision was not against the manifest weight of the evidence because the County Board heard one witness who disagreed, and might have chosen to believe that witness. MCD asserts that this decision "effectively relegates the manifest weight of the evidence rule to the ashcan because it utterly bypasses the inquiry into whether the County could have 'reasonably' arrived at the conclusion it did." MCD contends that the implication of the Board's ruling is that if the evidence is uncontroverted, the advancing party prevails. MCD then maintains that it presented an array of impressive witnesses on the issue of public health, safety, and welfare (criterion 2), and that it was not reasonable for the County Board to accept the testimony of objectors' sole witness over that of MCD's witnesses. MCD also argues that "the role of the Illinois State Geological Survey [ISGS] in this matter ...has astonishingly been relegated to a role of almost no importance by this Board in its decision of November 15." MCD contends that the County Board was not reasonable in rejecting the advice of Beverly Herzog (the ISGS employee who

advised the County Board on criterion 2) as well as the testimony of all of MCD's witnesses. MCD then argues the County Board's decision that MCD's plan failed to minimize the impact on existing traffic flows (criterion 6) was contrary to the manifest weight of the evidence, and that the Board should reconsider its decision upholding the County Board.

In response, the County disagrees with MCD's claim that the County Board could not have reasonably arrived at its conclusions because the weight of MCD's testimony is "heavier" than the testimony presented by the objectors. The County maintains that it is clear that this Board, on administrative review, cannot reweigh the evidence or determine the credibility of the witnesses. The County contends that if the evidence at the local level presents conflicting testimony and issues of the credibility of witnesses, the County Board decision should be sustained. The County also argues that MCD has attempted to persuade this Board to reconsider its decision by rehashing the testimony and putting itself (MCD) in the shoes and minds of the decisionmakers to rule on the evidence. The County maintains that MCD's arguments ignore "the wealth of evidence presented by its [MCD's] own witnesses that raised doubt in the minds of the triers of fact with respect to whether or not [c]riteria [sic] 2 was met." As to criterion 6, the County contends that MCD simply did not present sufficient evidence to meet its burden of proof. Thus, the County states that the Board correctly reviewed the County Board's decisions on criteria 2 and 6, and asks the Board to deny MCD's motion to rehear or reconsider its conclusions.

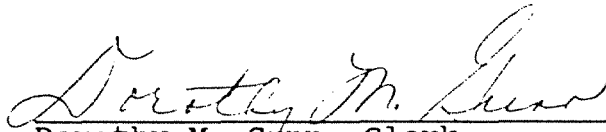
The Board is not persuaded by MCD's assertions. Contrary to MCD's claims, this Board did not "brush aside" the technical testimony presented by MCD's witnesses, but instead reviewed that testimony under the manifest weight of the evidence standard. As the Board noted in its November 15 decision, if this Board finds that the County Board could have reasonably reached its conclusion, that conclusion must be affirmed. McLean County Disposal Company, Inc. v. County of McLean, PCB 89-108, November 15, 1989, at p. 5. The Board's review did not "bypass the inquiry into whether the County could have 'reasonably' arrived at the conclusion it did." As the County points out, it is not this Board's function to determine credibility of witnesses or resolve conflicts in the testimony. The statutory scheme for landfill siting in Illinois gives that authority to the local decisionmaker. MCD is also mistaken in its contention that the Board's ruling implies that if the evidence is uncontroverted, the advancing party prevails. The Board specifically addressed this issue in Waste Management of Illinois, Inc. v. Village of Bensenville, PCB 89-28, August 10, 1989, at pp. 8-9. The Board stated that the lack of evidence in opposition to an application is not, in and of itself, grounds for reversal of a local decision. The Board continues to believe that it properly applied the manifest weight of the evidence standard when reviewing the County Board's decision on criteria 2 and 6, and will not reverse those decisions.

Finally, "to avoid any possible suggestion of 'waiver'", MCD "reasserts" its objections to the manner in which this Board docketed and figured the decision deadline in this case. The Board must point out that one of the arguments which MCD "reasserts" was never raised for the Board's original consideration of this case. On page 9 of MCD's motion, it contends that if this case is regarded as a new case separate from the previous Board docket, the case must be deemed to have been filed on July 7, 1989, and not on July 20, 1989. Contrary to the implication, MCD never argued that this case was filed on July 7, but instead argued that it was properly filed on July 17. See Transcript of the August 28, 1989 Board hearing, at pp. 4-9. A petitioner may not raise for the first time any issue on reconsideration which could have been raised before the decision on the case. Therefore, the Board finds that MCD has waived the specific claim that this case was filed on July 7 for purposes of figuring the 120-day decision deadline. As to the other procedural issues reasserted by MCD, the Board finds that it properly disposed of those claims on November 15 (see pp. 2-3), and will not reiterate that discussion here.

MCD's motion for rehearing or reconsideration is denied on its merits.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 11th day of January, 1990, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board