ILLINOIS POLLUTION CONTROL BOARD
July 1, 1993

MATERIAL RECOVERY CORPORATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 93-11
	)	(Landfill Siting Review)
VILLAGE OF LAKE IN THE HILLS,	)	
	)	
Respondent.	)	

JAMES L. WRIGHT, OF MILITELLO, ZANCK & COEN, P.C., APPEARED ON BEHALF OF THE PETITIONER;

KATHY P. FOX AND JAMES R. MORRIN, OF WILDMAN, HARROLD, ALLEN & DIXON, APPEARED ON BEHALF OF THE RESPONDENT.

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

This matter is before the Board on an appeal by Material Recovery Corporation (MRC) of the December 15, 1992, denial by the Village of Lake in the Hills (Village) of an application for site location suitability for a new regional pollution control facility. The petition was filed by MRC, the applicant for siting approval, on January 15, 1993. Hearings were held on May 4 and 5, 1993. Several members of the public appeared and offered statements on the record.

The Board's responsibility in this matter arises from Section 40.1 of the Environmental Protection Act (Act). (415 ILCS 5/40.1 (1992).) The Board is charged, by the Act, with a broad range of adjudicatory duties. Among these is adjudication of contested decisions made pursuant to the local siting approval provision for new regional pollution control facilities, set forth in Section 39.2 of the Act. More generally, the Board's functions are based on the series of checks and balances integral to Illinois' environmental system: the Board has responsibility for rulemaking and principal adjudicatory functions, while the Board's sister agency, the Illinois Environmental Protection Agency (Agency) is responsible for carrying out the principal administrative duties, inspections, and permitting. The Agency does not have a statutorily-prescribed role in the local siting approval process under Sections 39.2 and 40.1, but would make decisions on permit applications submitted if local siting approval is granted and upheld.

Briefs were filed by MRC on May 21, 1993, and June 11, 1993. The Village filed its brief on June 4, 1993. An amicus curiae brief was filed on behalf of the Village of Lakewood and Landfill Emergency Action Committee II on June 4, 1993.

Also on June 4, 1993, the Village filed two motions, one a motion to dismiss and one a motion to supplement the record. On June 11, 1993, the Board received MRC's response to the motions. Also on June 11, 1993, MRC filed a motion to strike the amicus curiae brief.

PRELIMINARY ISSUES

Before proceeding to the merits of the case, the Board will address the outstanding motions. In the motion to dismiss, the Village argues that MRC has "failed to reimburse the Village for actual costs incurred by the Village". (Mot. at 1.) The Village asserts that such failure is in violation of the annexation agreement with the Village and therefore MRC has "waved its right to proceed with this appeal". (Mot. at 1.) The Village also argues that the appeal should be dismissed because MRC has not complied with Section 39.2(n) of the Act in that MRC has not paid the costs for preparation of the record on appeal. MRC responds to the Village by offering a copy of a letter which included payment for preparation of the record on appeal. The letter is dated June 7, 1993, and was sent to the Village. Further, MRC asserts that the annexation agreement provided for reimbursement only if siting approval was granted.

The Board finds that the costs for preparation of the record have been paid. Therefore, the Board denies the motion to dismiss as moot.

The Board also denies the motion to supplement the record. The Village seeks to include correspondence between MRC's attorney and the Village's attorney: one letter dated December 18, 1992, and one dated January 14, 1992. Neither letter is an appropriate inclusion in the Village record as both were sent after the decision of the Village had been made and after the decision deadline had passed. Thus, the Village had made its decision and these letters were not a part of the record considered by the Village in making the decision. (Section 40.1 of the Act.)

Further, the Board denies the motion to strike the amicus curiae brief. The motion to strike submits that the amicus brief is single-spaced and 33 pages long. The motion argues that this is contrary to the Board's procedural rules. (See 35 Ill. Adm. Code 101.103(d).) The Board agrees that the amicus brief does not conform with the Board's regulations. However, the Board determines that the filing of a single spaced brief, in this proceeding, will not prejudice the parties.

BACKGROUND

On June 5, 1992, MRC filed with the Village an Application for Regional Pollution Control Facility Siting Approval (Application). (C. 31-520.)[1] The petitioner tendered a filing fee of $150,000.00 with its Application pursuant to the Village's siting ordinance. (C. 19-30.)

The proposed site consists of 113 acres located on the east side of Illinois Route 47 in the Village of Lake in the Hills, in McHenry County, Illinois. (See Supplement No. 9 to Application, C. 393-459.) The proposed facility consists of a material recovery facility and a "residual solid waste balefill". (See Supplement No. 5 to Application, p. 30; C. 33.)

A public hearing on the Application commenced on September 14, 1992, and adjourned on October 26, 1992. The Villages of Lakewood and Huntley and a citizens group objected to the proposed facility and participated in the local hearing.

On December 15, 1992[2], the Village Siting Committee made a recommendation to the Village Board, entitled "Decision and Recommendation". (C. 3463-3468.) In this document, the Siting Committee stated that the petitioner had satisfied all of the statutory criteria of Section 39.2(a) of the Act, except criterion no. 2. On the same date, the Village Board adopted the "Decision and Recommendation" of the Committee (C. 3469-3470), thereby denying the petitioner's siting request.

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

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[1]The record from the local hearing will be cited as "C. __"; the transcript from the local hearing will be cited as "V. Tr. at __"; and exhibits from the local hearing will be cited as "App. Exh. __" or "Obj. Exh. __". The transcript of the Pollution Control Board hearing will be cited as "PCB Tr. at __"; exhibits from the Board hearing will be cited as "Pet. Exh. __" or "Res. Exh. __". The petitioner's brief will be cited as "P. Br. at __"; the reply brief will be cited as "P. Rep. at __"; the Village's brief will be cited as "V. Br. at __"; and the amicus brief will be cited as "Am. Br. at __".

[2]On November 24, 1992, MRC stipulated to a 14 day extension of the decision deadline until December 17, 1992. (C. 1577.)

can siting approval be granted. Section 39.2(a) provides in part that local siting approval shall be granted if:

* * *

2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.

* * *

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 v. County of McLean (4th Dist. 1991), 207 Ill. App. 3d 352, 566 N.E.2d 26 McLean County.) 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, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill. App. 3d 586, 451 N.E.2d 555, 562, aff'd in part (1985) 107 Ill. 2d 33, 481 N.E.2d 664.)

ISSUES

The three issues raised by the parties in this proceeding are:

I. Whether MRC has waived its right to claim that the filing of a single joint consulting report was fundamentally unfair, because petitioner had ample opportunity to raise this issue in the proceedings below.

II. Whether MRC was denied fundamental fairness in the proceeding by the Village under section 40.1(a) of the Act.

III. Whether the Village's decision denying petitioner's application on the basis of failure to meet criterion no. 2 was against the manifest weight of the evidence.

Waiver Of Right To Claim Fundamental Unfairness.

Before proceeding to the substance of this issue a brief recitation of the pertinent facts is necessary. On November 16, 1992, a report (the "Wight report") was submitted into the Village record. (C. 3105-3283.) The report indicated that it had been authored by the five consultants retained by the Village to review the application and the record in the siting proceeding. (C. 3105-3107.) The Wight report was prepared by Mr. Scott Sanderson, an employee of Mr. George Wight at Wight Consulting Engineers, and Mr. Wight, who is also the Village engineer. The report was prepared in a lengthy drafting session between Friday, November 13, 1992, and Sunday, November 15, 1993,

at Wight's office in Barrington. (P. Br. at 13.) None of the several experts retained by the Village were physically present during the drafting of the report. (PCB Tr. at 263.) Mr. James Morrin, counsel for the Village, was present during the drafting. (P. Br. at 13.)

The Village argues that MRC waived its right to claim unfairness of the proceeding. The Village relies on three arguments in support of its position. First, the Village asserts that on November 16, 1992, the day the Wight report was filed, "it was abundantly clear that individual consultant's reports were not filed; it would be inconceivable that the Wight Report, jointly authored by five consultants, could have been written without some form of written submittals by each consultant". (V. Br. at 23.)

The Village next asserts that MRC could have raised the issue in a motion to the Village to reconsider its decision. Further, the Village notes that a letter asking for reconsideration was sent on December 17, 1992, two days after the Village rendered its decision. (V. Br. at 24.) The Village states that on January 14, 1993, MRC withdrew its request for reconsideration. (V. Br. at 24.)

Lastly, the Village asserts that MRC clearly waived its right to claim unfairness arising out of misstatements in the Wight report. The Village points out that MRC filed comments on the Wight Report and did not raise the issue of misstatements at that time. (V. Br. at 26.)

MRC responds to the Village's assertion that it waived its right to allege unfairness of the proceeding by first pointing out that the Village has no authority to reconsider its decision. MRC cites to Weingart v. Department of Labor, (1988) 122 Ill.2d 1, 521 N.E.2d 913 and Reichhold Chemicals, Inc. v. PCB, (3rd Dist. 1990) 204 Ill. App.3d 674, 561 N.E.2d 1343. MRC maintains that those cases support the proposition that an administrative agency, absent specific statutory authority, may not reconsider its decision once it is announced. (P. Rep. at 15.) MRC then asserts that Section 39 of the Act does not provide a mechanism for reconsideration. (P. Rep. at 15.)

MRC maintains that the first knowledge it had of individual reports being prepared and submitted to Wight Engineers was December 17, 1992. (P. Rep. at 15-16.) This date was after the decision deadline had passed and after the Village had rendered its decision. (P. Rep. at 15-16.)

The Board notes that the Village has correctly cited the applicable law regarding waiver of an objection to unfairness in a landfill siting case. A party can, by inaction in the proceeding before the local siting board, waive its right to

raise the issue on appeal to the Board. (Fairview Area Citizens Task Force v. IPCB, (3rd Dist. 1990) 144 Ill. Dec. 659, 555 N.E.2d 1178.) The Board further notes that MRC has correctly cited the applicable law regarding motions for reconsideration or rehearing, for administrative agencies. In this case, the Board finds that MRC did not waive its right to challenge the unfairness of the proceeding below with regards to the individual reports. The Board is persuaded that the first date on which MRC had actual knowledge of individual reports was December 17, 1992. Therefore, the issue could not have been raised prior to the issuance of the decision by the Village.

The Board notes that neither the Village ordinance nor Section 39.2 of the Act contain any provisions for reconsideration by the local siting authority. (C. 1- 30.) In addition, both the ordinance and Section 39.2 set forth specific decision deadlines. Thus, the Village has no specific statutory authority allowing for reconsideration. The Board finds that the instant matter is analogous to Reichhold in that the courts have held that in landfill siting the local decision maker is acting as an adjudicatory decision maker. (E & E Hauling, Inc. v. IPCB, (2d Dist. 1983), 116 Ill. App. 3d 586, 451 N.E.2d 555, 566, aff'd in part (1985) 107 Ill. 2d 33, 481 N.E.2d 664.) Therefore, the local decision maker, in a landfill siting procedure would be similar to an administrative agency acting as an adjudicatory decision maker. Therefore, the Board finds that the Village lacks the authority to reconsider its decision in this matter and MRC could not have raised the issue in a motion to reconsider. The Board accordingly finds the waiver argument without merit with regards to MRC's challenge of unfairness on the reports.

With regards to MRC's arguments alleging "misstatements" in the Wight Report, the Board notes that MRC addressed each of the alleged "misstatements" of the Wight report in its comment on the report. (C. 3429-3430.) MRC did not argue unfairness in its post-hearing comments; rather, MRC pointed out that the Wight report contained "misstatements". The Board finds that MRC has waived a claim of unfairness with regards to the alleged "misstatements" of the Wight report as MRC had the opportunity to raise the issue below.

Fundamental Fairness

Section 40.1 of the Act 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. (Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163.)

MRC argues that the Village hearing was fundamentally unfair to MRC because:

> (i) the reports of the Village's experts were not submitted into evidence, and (ii) the Village's decision on criterion no. 2 was based largely on perceived deficiencies in the site investigation, despite the fact that the investigation was conducted in cooperation with the Village's own expert.

(P. Br. at 15-16.)

In support of its first assertion, MRC states that the Wight report was prepared by Mr. Scott Sanderson, an employee of Mr. George Wight at Wight Consulting Engineers, and Mr. Wight, who is also the Village engineer. The report was prepared in a lengthy drafting session between Friday, November 13, 1992, and Sunday, November 15, 1993, at Wight's office in Barrington. (P. Br. at 13.) None of the several experts retained by the Village were physically present during the drafting of the report. (PCB Tr. at 263.) Mr. James Morrin, counsel for the Village, was present during the drafting. (P. Br. at 13.) The report contains several sections; however, the only sections at issue here are section III and the conditions stated in section IV regarding the statements in section III. The final draft of Section III of the report was not sent to Dr. Nolan Aughenbaugh or Dr. John Rockaway. (P. Rep. at 11; PCB Tr. at 264, 283.) Drs. Aughenbaugh and Rockaway are experts retained by the Village who prepared individual reports. MRC maintains that the reports are favorable to its position. (P. Rep. at 6-7.)

The abstract of the Wight report states:

> The following is our report for the Regional Pollution Control Facility, Route 47, Lake in the Hills, IL.
>
> Our report encompasses the application filed by the petitioner, Material Recovery Corporation, the public

> hearings commencing 9/14/92 and culminating on 10/26/92, the findings of the consultants retained on behalf of the Village of Lake in the Hills, and the various documents that were entered into the record during the public hearings.
>
> This report details the information presented in requirements for siting a Regional Pollution Control Facility, the findings of the Village Consultants, and the additional conditions that the Consultants deem necessary for consideration of the siting committee.
>
> * * *
>
> This report is the culmination of a long and arduous process that commenced on 6/4/92 and continued through the date of this report and public comment period of 11/13/92 and this report of 11/16/92.

(C. 310.)

MRC maintains that the report "neither encompasses the findings of the Village experts, nor accurately summarizes their conclusions and opinions". (P. Br. at 19.) MRC points to the conclusions of Dr. Aughenbaugh and Dr. Rockaway which appear to support the siting of landfill as evidence that the Wight report was "unfair". (P. Br. at 20-21 and 22; Pet. Exh. 6 at 3 and Pet. Exh. 12 at 5-6.)

In summary MRC maintains that:

> In this case, it was fundamentally unfair to the Petitioner for the Village to hire independent experts to assist in the decision-making process, and then to withhold the experts' reports and positive conclusions from the Trustees.

(P. Br. at 28.)

In support of its second assertion, MRC states that meetings with Village engineer George Wight, Scott Sanderson, and Andrews Engineering personnel, the firm retained by MRC, took place in April of 1991, more than one year prior to the filing of the application. (P. Br. at 3.) MRC states that Mr. Wight stated "he would help coordinate the site investigation and determine whether there was any additional information they would need to be satisfied". (P. Br. at 4; PCB Tr. at 139-140.)

MRC also asserts that Dr. Nolan Aughenbaugh's role, as explained to MRC, was "to review documentation and data submitted

to him by MRC engineers[3]; make comments and observations to the MRC engineers regarding testing procedures and site investigation; and, in consultation with Wight Consulting Engineers, suggest to the MRC engineers any additional information which should be furnished before the Application was filed". (P. Br. at 5; PCB Tr. at 252.)

MRC maintains that Dr. Aughenbaugh stated to the MRC engineers that "he would take a critical view of the site and proposed facility; that he would play the role of devil's advocate for the Village, because he was familiar with the area and knew what the problems were; and that he would help Wight Consulting Engineers determine the suitability of the site". (P. Br. at 6; PCB Tr. at 141.)

MRC explains that the site investigation began in September of 1991. Data from the site investigation was forwarded by MRC to Dr. Aughenbaugh and Wight Engineers. (P. Br. at 6.) The extent of the tests and borings were a subject of compromise between Andrews Engineering, Mr. Wight and Dr. Aughenbaugh. (P. Br. at 6.) In addition, Dr. Aughenbaugh made several specific requests regarding borings and the design of the facility; some of these were implemented, while others were discussed and a compromise was reached. (P. Br. at 7-8.) MRC further asserts that the Village attorney told the president of MRC, Mr. James Veugeler, that the "Village Engineers were satisfied that there were no additional tests necessary to determine site suitability". (P. Br. at 18; PCB Tr. at 58-59.)

In summary MRC argues:

> It is fundamentally unfair for a local hearing body to retain its own engineer and an independent expert to assist an applicant in defining the parameters of a site investigation and to suggest elements of the facility design, and then deny a siting request because the applicant failed to utilize "conventional means of studying subsurface conditions"; failed to perform "routine test"; and failed to obtain and evaluate "basic information...long before the application was filed".

(P. Br. at 19.)

The Village maintains that MRC has failed to establish any basis for a finding that the local hearing procedures denied MRC fundamental fairness. (V. Br. at 12.) The Village states that:

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[3] The term "MRC engineers" refers to Doug Andrews and Dan Freezor of Andrews Environmental Engineering and Dr. Rauf Piskin of Hydropoll, Inc.

> What is being objected to, however, is not that the petitioner was unfairly prevented from adducing evidence, but rather that the respondent Village failed to put certain reports into evidence, the inescapable implication being that a Section 39.2 siting authority is under some duty to adduce evidence to assist an applicant in meeting its burden of proof on the nine criteria established under the Environmental Protection Act.

(V. Br. at 13.)

The Village argues that Dr. Aughenbaugh was only provided a "fraction of the materials which were contained in the final application" (V. Br. at 13), and that based on those "limited materials", Dr. Aughenbaugh and Mr. Wight stated that the balefill siting "was worth pursuing". (V. Br. at 14.) The Village further maintains that MRC seems to argue that Dr. Aughenbaugh's participation and pre-hearing comments "precluded the Siting Committee from finding any deficiencies in the record to Section 39.2 criterion no. 2". (V. Br. at 14.)

The Village maintains that case law holds that:

> the decision-making authority rests solely with the local government, and a local government's consultant report, even if accurately characterized as urging approval is not binding on the decision-maker. Hediger v. D & L Landfill, Inc., PCB 90-163 (February 25, 1990) p. 14 citing McLean County Disposal, Inc. v. The County of McLean, PCB 89-108, 105 PCB 203, 207 (November 15,1989).

(V. Br. at 14-15.)

Thus, the Village argues even if the Village attorney had indicated to MRC that the Village engineers were satisfied, which the Village attorney does not recall doing, it would not matter. Neither the Village engineers, nor the attorney, nor Dr. Aughenbaugh determine whether siting is appropriate. (V. Br. at 15.)

The Village states that George Wight decided not to submit individual reports. (V. Br. at 18.) Mr. Wight stated that the report:

> is a compilation of the [sic] what, ten or fifteen or twenty people who had some -- something to do , and the specific experts which are there. It is a compilation of their positions and my interpretation of those, obviously, as we put them together into one report.

(PCB Tr. at 443.)

The Village submits that the Aughenbaugh and Rockaway reports total 45 pages and contain several overlapping conclusions, "many unfavorable to petitioner, and several of them highly critical of petitioner's proofs". (V. Br. at 20.) Mr. Wight testified that he believes that the report, when read with the list of recommendations, fairly reflects the consultants' opinions. (PCB Tr. at 232, 451-452.)

Finally the Village states:

> The record in these proceedings is utterly devoid of any evidence that George Wight was pre-disposed to any decision. Indeed, Wight testified that he viewed the Wight Report as favorable to the balefill. (PCB Tr. at 232, 451-452.) Likewise, there is no evidence of undue influence or ex-parte communications with interested parties. Petitioner's unhappiness with Wight's reasonable editorial decisions simply do not fall within the ambit of Hediger, supra, E & E Hauling, Inc. v. Pollution Control Board, (2nd Dist. 1983) 451 N.E.2d 55, Tate v. Macon County Board, PCB 88-126 (December 15, 1988), nor any other case in which this Board has addressed the issue of fundamental fairness.

(V. Br. at 21.)

The amicus filing states that "the whole premise of the Petitioners argument is premised on the theory that there was some requirement that the Village Board be provided with the reports of the individual experts." (Am. Br. at 4.) The amicus asserts that the failure to submit the reports into evidence could result in reversible error only where there was an obligation to do so or where failure to release the reports resulted in a prejudicial determination. (citing Waste Management v. PCB, (2nd Dist. 1988) 175 Ill.App.3d 1023, 125 Ill.Dec. 524.) (Am. Br. at 4.) The amicus also cites to McLean County and the proposition that a municipality is not bound by the opinion or reports of its experts or consultants. (Am. Br. at 4.)

The amicus also argues that the Wight report included the positive aspects of the Dr. Aughenbaugh's and Dr. Rockaway's individual reports but not the negative aspects. (Am. Br. at 5, 7.) Thus, the amicus seems to argue that by not including the individual reports, the Wight report was more favorable to the applicant. (Am. Br. at 8.)

The amicus further argues that MRC placed reliance on what MRC perceived to be the "acquiesce [sic] of certain individuals as if those individuals had the ability or authority to control

the decision of the Village Board". (Am. Br. at 11.) However, according to the amicus, the "facts contained in the record do not indicate the Village, its personnel or its retained experts defined the parameter of the testing or actually determined the type of testing to be employed". (Am. Br. at 11.)

The key issue for the Board to examine is whether the actions of the Village experts prior to filing the application and in submitting a single final report resulted in a proceeding which was fundamentally unfair. The Board notes that the issue is not whether the individual reports could have been submitted; rather, it is whether the individual reports were required to be submitted. For the reasons delineated below, the Board finds that the procedures followed by the Village were not fundamentally unfair.

First, the Board notes that the activities which are claimed to be unfair arise from interaction with Village employees but not members of the Board of Trustees; and in fact Mr. James Veugeler, president of MRC, testified that it was never represented to him that the trustees had made "a decision, an approval, a conclusion with respect to the balefill". (PCB Tr. at 77.) MRC has provided no evidence that the consultants ever represented that they spoke for the Board of Trustees. Further, MRC has provided no authority for the proposition that the Trustees were bound by the action of their consultants or that the consultants' reports should have been filed. Alternatively, the Village and the amicus properly cite to McLean County. In that case the court clearly stated that the decision-maker is not bound by an advisor's recommendation. (McLean County at 505.)

The Board points out that a recent decision in the Appellate Court of Illinois, Third District, held that the actions of the Will County state's attorney led to a fundamentally unfair proceeding before the Village of Romeoville. The state's attorney was not acting on behalf of the decision maker, the Village of Romeoville, but on behalf of the citizens of the county. (Land and Lakes Company v. Pollution Control Board, (3rd Dist. May 27, 1993) No. 3-92-0496, slip op.) In that case, the state's attorney "failed to disclose to the Village's hearing officer that Will County was taking legal action to prevent the reopening of "a landfill in the area that Land and Lakes sought to locate its facility. (Land and Lakes slip op. at 2.) The state's attorney then used the fact that the landfill could reopen to challenge Land and Lakes on Section 39.2(a)(1), the needs criteria. (Land and Lakes slip op. at 3.) A motion for rehearing is currently before the Third District on Land and Lakes. The facts of Land and Lakes differ significantly from this matter in that the compilation of the individual reports did not lead to misinformation being given to the decision maker.

The Board also notes that the applicant was given an opportunity to respond to the compiled report and did so. The record clearly shows that after hearing several aspects of the application had been called into question. MRC's response could have addressed the additional concerns expressed by opponents and the Wight report.

Finally, Dr. Aughenbaugh testified that MRC's exhibits 6-8 are one report and should be read together. (PCB Tr. at 536.) Dr. Aughenbaugh also indicated that he had written his report and told Mr. Wight that the report could be used as a chapter or appendix or it could be taken apart and reused in any way. (PCB Tr. at 551.) Mr. Wight testified that he compiled the report and resolved any inconsistencies while staying in contact, and sharing drafts, with the various experts via phone and fax. (PCB Tr. at 436-441.) Therefore, after an examination of the individual reports, the Board believes that the Wight Report did include most of the technical provisions found in the individual reports. Clearly, any material which may have been left out did not prejudice the applicant. It is true that the report does not include recommendations regarding the approval of the site. However, the Wight report does appear to be a balanced comment on the technical data and in fact, some findings which were against the siting were also omitted. (Am. Br. at 5-8; Pet. Exh. 7 at 4; Pet. Exh. 12 at 12.) Therefore, the Board finds that the consultants' individual reports were not required to be filed in this case as a necessary condition of fundamental fairness.

Manifest Weight

As noted above, when reviewing a decision on the criteria, the Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal v. County of McLean (4th Dist. 1991), 207 Ill. App. 3d 352, 566 N.E.2d 26.) 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, (1983) 115 Ill.App.3d 762, 71 Ill. Dec. 547, 451 N.E.2d 263.) The province of the hearing body is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses. A reviewing court is not in a position to reweigh the evidence, but can merely determine if the decision is against the manifest weight of the evidence. (Tate v. Pollution Control Board, (1989) 188 Ill. App. 3d 994, 136 Ill. Dec. 401, 544 N.E.2d 1176 quoted in Fairview Area Citizens Task Force v. IPCB, (3rd Dist. 1990) 144 Ill. Dec. 659, 555 N.E.2d 1178.)

The Village's decision states that the recommendations in the Wight report "remind the Committee of the many questions which were left unaddressed by the Applicant in its application and in the subsequent hearing testimony". (C. 3465.) The decision further states:

> But neither the Applicant's failure to accurately determine water levels in ground water wells nor the unanswered questions about adequate clay materials being present at the site represent the most significant failing of the Applicant to demonstrate protection of the public health and welfare. The most significant deficiencies mostly relate to the fact that the site overlays an aquifer which may be presently used as a drinking water aquifer by the adjacent town of Huntley, and which is under consideration by this Village to meet its own drinking water needs in the near future. (C. 3465.)

The decision then delineates five specific shortcomings relating to groundwater. Those shortcomings are:

1) the nature of the several soil types which overlay the aquifer;

2) the groundwater flow in the surficial soils;

3) the actual *in situ* soil permeability of site soils;

4) current, periodic water levels in the site wells (to assist in a determination of groundwater movement); and

5) the presence of frequency of vertical fracturing within the soil formations.

(C. 3465-3466.)

MRC argues that the decision of the Village on criterion no. 2 under Section 39.2 of the Act is against the manifest weight of the evidence. With regard to point 1 from above, MRC maintains that over 32 borings have been drilled on the site and the classification and engineering properties of the soils were determined by field tests for unconfined compressive strength, and laboratory analysis of soil permeability, grain size, Atterberg limits, cation-exchange capacity, and moisture content. (P. Br. at 33; C. 118-240.)

On point 2, MRC states:

> The Wight Report agreed with Dr. Piskin's characterization of the "small size and extent" of the surficial sands. For this reason, and because "a variety of pollutional sources such as agricultural fertilizers and natural surface contaminants" could render the surficial sands unfit as a potable water source, the Wight Report concluded that the surficial sands would generally not be considered an aquifer. In addition, Dr. Rockaway, in his individual report,

> disputes the contention of one of the objectors' experts that the surficial sands are in "partial communication" with the creek bordering the site.

(P. Br. at 35.)

On points 3 and 4, MRC argues that testing was done and the testing was "sufficient". (P. Br. at 35-36.) Finally, on point 5, MRC argues that the proposed design, which calls for construction of a liner, "diminish[es] the significance of soil fractures". (P. Br. at 36.)

The Village argues:

> Both by questioning their own experts and by cross-examining petitioner's experts, the Objectors raised issues of availability of sufficient till at the site to construct the liner; the sufficiency of petitioner's hydrogeological characterization of the aquifer underlying the site; the degree of fracturing of site soils; questions regarding the direction of the groundwater flow at the site; a possible connection between the Huntley drinking water well and the aquifer underlying the site; the failure of the applicant to perform slug and bail test at the site, opting instead for a less accurate laboratory permeability model; the lack of sufficient piezometer data from the monitoring wells at the site; and numerous other issues from which the trier of fact could have concluded that the petitioner had failed to meet its burden.

(V. Br. at 29.)

Further, the Village points out that the Board's manifest weight of the evidence determination must be made on the Village record. Thus, the Village argues when MRC's arguments "are shorn of discussions" of evidence outside the Village record or upon MRC's "alleged compliance with" Board regulations, "there is little left other than a request by the petitioner that the Board engage in impermissible weighing of the evidence". (V. Br. at 30.)

The amicus maintains that MRC "again refers to statements made by certain of the experts retained by the Village in an attempt to somehow claim that these opinions are binding upon the Village". (Am. Br. at 13.) The amicus states that the record indicates that the MRC site investigation, testing, and conclusions were fundamentally flawed. (Am. Br. at 13.) The amicus brief then discusses several points in the individual reports prepared by Drs. Aughenbaugh and Rockaway which describe deficiencies in the application. (Am. Br. at 13-16.) The amicus also delineates portions of the testimony at the Village hearing

which also points to flaws in MRC siting application. (Am. Br. at 16-32.) Finally, the amicus states that:

> A review of the totality of this record clearly demonstrates the failure of the Petitioner to meet its burden of proof. The review of that evidence undeniably establishes that the findings and decision of the Village Board as to Criteria no. 2 was correct and is supported by the manifest weight of the evidence.

(Am. Br. at 32.)

The Village record is replete with evidence concerning the issue of whether MRC demonstrated that the facility would be designed, located and proposed to be operated so that the public health safety and welfare will be protected. As stated above, the Board cannot reweigh the evidence. Thus, issues regarding the credibility of any witness who testified at the Village hearing are not for the Board to determine. Further, the issue of which technical experts are more "expert" are also not for the Board to determine. Rather, the Board must examine the record and determine if the Village's decision is against the manifest weight of the evidence.

MRC's experts were questioned extensively concerning the site at hearing, calling into question the integrity of the studies undertaken. Further, the opponents provided extensive testimony, also questioning the integrity of the site investigation. Therefore, the Board finds that the Village's decision is not against the manifest weight of the evidence as a different result is not "clearly evident, plain, or indisputable from a review of the evidence".

CONCLUSION

MRC challenged the decision of the Village asserting that the proceedings were fundamentally unfair and the decision was against the manifest weight of the evidence. After extensively reviewing the record in this case, the Board finds that the Village's decision was not fundamentally unfair and the decision was not against the manifest weight of the evidence. Therefore, the Board affirms the denial by the Village of Lake in the Hills for the siting of a new regional pollution control facility.

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

ORDER

The Board affirms the Village of Lake in the Hills December 15, 1992, denial of the Material Recovery Corporation's request for siting of a new regional pollution control facility in McHenry County, Illinois.

IT IS SO ORDERED

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. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 1st day of July, 1993, by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board