ILLINOIS POLLUTION CONTROL BOARD
December 15, 1988

ROGER TATE, LYNETTE TATE, BARBARA KELLEY AND JOSEPH KELLEY,	)	
Petitioners,	)	
v.	)	PCB 88-126
MACON COUNTY BOARD AND MACON COUNTY LANDFILL, CORPORATION,	)	
Respondents.	)	

THOMAS L. KILBRIDE, KLOCKAU, MCCARTHY, ELLISON & MARQUIS, P.C. APPEARED ON BEHALF OF THE PETITIONERS;

THOMAS H. MOODY, FIRST ASSISTANT STATE'S ATTORNEY, MACON COUNTY, APPEARED ON BEHALF OF RESPONDENT MACON COUNTY; and

JON D. ROBINSON, HULL, CAMPBELL & ROBINSON, APPEARED ON BEHALF OF RESPONDENT MACON COUNTY LANDFILL CORPORATION.

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

This matter comes before the Board on a third party appeal filed pursuant to Section 40.1(b) of the Act on August 15, 1988, by Roger Tate, Lynette Tate, Barbara Kelley and Joseph Kelley (Objectors). The Objectors contest the site location suitability approval granted July 6, 1988 pursuant to Section 39.2 of the Act by the Macon County Board (County Board) to Macon County Landfill Corporation (MCL). Hearing in this Board's docket was held on October 19, 1988. The Objectors brief was filed on November 1, 1988, and both the County and MCL filed briefs on November 9, 1988.

Procedural History

It should be noted here that the County adopted no special filing or other procedures for its SB172 proceeding.* The only procedures articulated were articulated by the Committee and related only to the hearings.

At its March 23, 1988 Committee meeting, rules of procedure, generally those of the County Board and Robert's Rules, were adopted. (C-122,126). At hearing, the hearing officer, Mr. Orville Kahn, simply gave the order of

* The term "SB172" refers to the Senate bill adopted and signed into law in 1981 (P.A. 82-682, effective Nov. 12, 1981) that initiated the siting process for new regional pollution control facilities; the term is a commonly used "shorthand" reference.

testimony as follows: County Board, applicant witnesses, neighborhood opposition, invited experts and staff, general audience, applicant rebuttal, neighborhood rebuttal, and general audience rebuttal. Everyone could cross-examine. (I. 37-39). The actual order of testimony was more flexible. For example, Decatur's Mayor testified prior to the applicant's witnesses, and the last day of hearing, June 2, 1988, was held primarily to accommodate an Objectors' (Petitioners') witness who could not attend earlier. The record also indicates that there was no general public testimony; the neighborhood opposition testified at the behest of Objectors' counsel.

There is nothing in the Act requiring the County Board to establish specific procedures, although the courts have upheld the County's right to do so. Waste Management of Illinois, Inc. v. The Pollution Control Board et al., (2d Dist. 1988), No.2-88-0212. The Board also notes that the last sentence of Section 39.2(d) provides that: "The public hearing shall develop a record sufficient to form the basis of appeal of the decision in accordance with Section 40.1 of the Act." Since the County adopted no special filing requirements, the Board will look to the statute for guidance.

The SB172 proceeding was initiated when MCL filed an amended petition with the County on January 15, 1988. The petition essentially requests permission to accept non-hazardous special wastes and to increase the design height of the landfill. A Landfill Siting Committee (Committee), composed of seven County Board members, held seven hearings in 1988, on April 21, April 27, May 5, May 12, May 18, May 19, and June 2, 1988.*

The Committee also took a formal 40 minute tour of the MCL site on May 24, 1988, accompanied by the Operator, Paul McKinney, and one of the Objectors, Roger Tate. (C-239)

Final arguments were presented on the last hearing day, June 2, 1988. The Committee further met on June 9, 1988 (C-245-246), June 16, 1988 (C-248-249), June 23, 1988 (C-250-257, June 30, 1988 (C-259-268, and July 6, 1988 (C-271-278). The minutes of the meetings were detailed and often appear to be almost verbatim. On July 6, 1988, the Committee voted unanimously to recommend approval with five numbered conditions and one narrative condition (12 numbered conditions were considered).

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* The transcripts for each hearing day restarted at p. 1; therefore, references to the seven hearing days will be designated as roman numerals I-VII followed by the page number, e.g. IV-25. County exhibits will be designated as County Ex. ____; Applicants Exhibits will be designated as Pet. Ex. ___; Objectors' exhibits will be designated as Obj. Ex. ___. Also, the 297 page "Macon County Board Site Hearing and Index" file pages will be designated as C-1 through C-297, as appropriate. These files were part of the public record. The County also submitted an unbound miscellaneous file that appears to be included in the C-1 through C-297 file; this file will not be referenced.

On July 12, 1988, the County Board, by resolution, concurred in total with the Committee's recommendation that MCL be permitted to accept special non-hazardous waste and to increase the design height of the landfill 40 feet, subject to the following conditions: 1) an increase in the number (from 3 to 9) and depth of the monitoring wells, 2) a 10 foot clay liner compacted to "a 10 to the minus 7" (C-291), noting that the present site has no liner, 3) pipeline relocation and vacation of present easement, 4) removal of existing pipeline, and 5) the entire landfill area be out of the flood plain or be flood proofed.

The County Board resolution also contained a narrative Committee recommendation that MCL be required "to develop and submit to the Macon County Board for review, a ten year plan for waste disposal, including a plan for alternatives to landfill use and they be required to update this plan every two (2) years" (C-292). As the resolution is drafted, this narrative recommendation also appears to be a condition.

Background clarification

MCL had originally petitioned for site location approval on November 9, 1987 (C-27). The amended petition on January 15, 1988 essentially altered the original petition only insofar as reducing the acreage requested from 42 acres to 25 acres. The amended petition, excluding the legal description and notices, is only three pages long. It requests an "extension of its existing landfill", makes brief affirmative assertions regarding each of the six statutory siting criteria*, and asserts that because it has filed no request or related documents with the Illinois Environmental Protection Agency (Agency), regarding the application, no other documents are submitted. (C-68-70)

The facility extension in question encompasses what is called Sites No. 3 and 4 (Site 4 is only 2 acres). Immediately to the east of Site 3 is an existing active landfill operation of 25 acres called Site No. 2. Site No. 2 has been in operation since 1971 and is permitted to take general and special waste. Further east, on the other side of Site No. 2 is a closed 20 acre facility, Site No. 1, originally opened in 1960. Throughout the record these Site numbers are also referred to as "phase" or "area" numbers (e.g. C-233).

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* At the time of the amended filing, the criteria in Section 39.2 of the Environmental Protection Act had been amended to remove the Department of Transportation's role in Criterion 4. Also, Criterion 7 was inapplicable, since it affected only hazardous waste. Finally, Criterion 8 regarding recharge areas was inapplicable since it requires Board specification which has not yet occurred. The Board also notes that what is now Criterion 9, was effective July 1, 1988, and thus became effective after the hearings but before the County Board decision. Criterion 9 refers to a county board solid waste management plan, which Macon County does not have, so even if construed as applicable, Criterion 9 would not apply in this case.

To the west of Sites 3 and 4 is about 30 acrea of undeveloped pasture land owned by MCL. To the north across Hill Road, are homes. To the south is the Sangamon River and to the east of Site No. 1, across the interstate, are the sludge pits of the Decatur Sanitary District.

Some initial confusion occurred as to what constituted a new regional pollution control facility at the MCL site. In 1977, 1978 and 1979, MCL had applied for, and received, development permits and supplemental development permits for Sites 3 and 4 (See Pet. Ex. 10-16). These development permits allow disposal only of general waste, not special waste and limit the height of the landfill to 40 feet below what is requested in the SB172 application.

Less than a month after filing the amended application, on February 9, 1988, MCL notified the County Board that it had discovered that SB172 had a "grandfather clause" that exempted from the SB172 process those facilities which earlier had been issued development permits. (C-77).* The letter then states that MCL is "only requesting approval to fill the unpermitted area with non-hazardous special waste and/or liquid waste, and to increase the permitted elevation of this site so as to be the same as the adjoining landfill" (C-78; see also Sec. 3.32(b) and (c) of the Act). The letter stated that it hoped to proceed on the existing Amended Petition.

There is no indication in the record that this post-filing clarification of the scope of the County's authority per se was challenged.

Jurisdictional issues

Objectors raised an issue of jurisdiction both at the County hearings concerning MCL's Pet. Exhibits 10-16, and also before this Board, except that only Pet. Exhibits 10, 11, 13 and 15, were challenged before the Board. The issue raised by the Objectors concerns the proper construction of the language of Section 39.2(c) of the Act.

The first paragraph of Section 39.2(c) states the requirements for filing of a siting request as follows:

> c. An applicant shall file a copy of its request, accompanied by all documents submitted as of that date to the Agency in connection with its application except trade secrets as determined under Section 7.1 of this Act, with the county board of the county of the governing body of the municipality in which the proposed site is located. Such copy shall be made available for public inspection at the office of the county board or the governing body of the municipality and may be copied upon payment of the actual cost of reproduction.

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* The applicable language in Section 3.32 of the Act defines a new regional pollution control facility as "initially permitted for development or construction after July 1, 1981."

It is agreed that MCL did not at any time submit any documents to the Agency regarding the height increase or special wastes. Citing the Fifth District Appellate Court's Opinion in Daubs Landfill, Inc. v. Illinois Pollution Control Board, 166 Ill. App. 3rd 778, 520 N.E.2d 977, (1988) and other cases, objectors contend that, insofar as MCL did not file its September 23, 1977 permit application and other materials submitted to the Agency in 1977-1979, relative to the existing landfill operations with its siting, the siting request is fatally defective and thus failed to vest jurisdiction in the Macon County Board. Objectors note that MCL's witness, Gregory D. Kugler, acknowledged that there was a "connection" between its present siting application and the materials previously filed with the Agency (III 29; Objector's Br., p. 9). MCL concedes there is such a "connection" but asserts that these previously filed documents were not submitted "in connection with" its siting application; MCL notes that there was no such thing as a location approval requirement at the time the materials were submitted to the Agency. (MCL Br., pp. 3-4).

The Board is not persuaded that Section 39.2(c) mandates the result that Objectors insist upon. Clearly, the requirements of Section 39.2 relative to filing are jurisdictional, as Daubs and a host of cases decided to date by the courts make clear. As such, these requirements are, as the Objector suggests, strictly construed; "substantial compliance" is not sufficient to confer jurisdiction, Daubs at 978. Viewed in this context, it is clear to the Board that Objectors' interpretation of the Act would require something other than a strict or literal construction. The statutory language requires only that the siting request be accompanied by all documents submitted to the Agency "in connection with its application" (emphasis added). No other such documents have been filed with the Agency in connection with MCL's siting application. The Board therefore finds that the filing was not defective. The Board notes that it has previously held, in an analogous situation, that an abbreviated siting application (one without technical supporting documents) is acceptable where, as here, such materials were available prior to the close of the hearing process. Town of St. Charles v. Kane County Board and Elgin Sanitary District, PCB 83-228, 229, 230 [consolidated], 57 PCB 203, 204 (March 21, 1984), vacated on other grounds sub nom. Kane County Defenders v. PCB et al, 129 Ill. App. 3d 121, 472, N.E. 2d 150 (3rd Dist. 1984).

The Board's construction is further buttressed by a recent amendment to that same language. P.A. 85-945, effective July 1, 1988, amends Section 39.2(c) in pertinent part as follows:

> "The request shall include 1) the substance of the applicant's proposal and 2) all documents, if any, submitted as of that date to the Agency pertaining to the proposed facility" ... (emphasis added).

The Board also notes that the Objectors' attorney, when requesting the technical data at the first hearing, asserted that after the above amendment becomes effective on July 1, 1988, information such as that requested would be required with any siting application, acknowledging that at the present time the County Board possessed an implied power to require such information based

on fundamental fairness principles. No mention was made of jurisdiction at that time. (I.157).

The Objectors present another alternative argument regarding the exhibits. The Objectors argue, alternatively, that, if the Board rules that the issue is not jurisdictional, the Board should strike the MCL's Exhibits 10-16 as irrelevant if it finds no connection between the prior Agency filings and this proceeding.

The Board does not find that there is no connection between MCL's Exhibits 10-16 and this proceeding. The Board sees no reason to reverse the hearing officer's refusal to dismiss the exhibits on relevancy grounds. The Board finds only that the documents did not have to be filed with the petition, as a matter of jurisdiction.

Objectors' second argument as to jurisdiction relates to the giving of public notice. It appears to be based upon two alleged failures. First, Objectors' counsel asserted that it is "not totally clear" that MCL issued all the notices to surrounding property owners as required by Section 39.2(b) of the Act (R.13). There was an apparent problem in locating the certificates of publication of notice with regards to MCL's amended petition (R.27). Since there were no further arguments on this point in Objectors' closing brief, and since the record on its face discloses no such obvious defects, the Board assumes that this matter has been clarified to Objectors' satisfaction.

The next alleged failure in notice asserted by Objectors is the County's "failure" to publish a notice of public hearing for the second of the seven days of hearing in this proceeding, April 27, 1988. Objectors cite this Board's opinion in Clutts and Siegfried v Beasley, et al., PCB 87-49, (August 8, 1987) to the effect that the notice requirements of Section 39.2 are essential to ensuring that the affected public can prepare for the public hearing. Further, they assert that, consistent with this Board's opinion in Guerrettaz v. Jasper County, PCB 87-76, (January 21, 1988) defects in notice deprive a county board of jurisdiction "no matter how slight the deviation and without weighing any prejudice caused by the notice". This being so, Objectors argue that the County thus lacked jurisdiction to receive evidence on that day; further, they suggest that, to the extent that this second hearing included the "bulk" of MCL's evidence on criteria one, three, five and six (of Section 39.2(a)), the County's decision as to these four criteria is without support in the record and is therefore against the manifest weight of the evidence (Objectors' Br. at 12). MCL counters that the only public notice required was that given by the County before the first hearing. MCL argues that "the only error made by the Macon County Board was that it republished notice of several of the subsequent sessions even though the initial hearing was merely adjourned from time to time" (MCL's Br., pp. 6-7). No party asserts that it did not have actual notice of the second session, and it is clear from the transcript (R.II) that Objectors participated fully in that session.

The record contains evidence that the first hearing was noticed and, indeed, all other hearings, except for the April 27, 1988 hearing, were noticed, albeit with short time frames, in a newspaper published daily. (C-

142, 185, 228, 232, 238, 244). Section 39.2(d) of the statute requires that at least one public hearing be held and that it be noticed. On April 21 and at all subsequent hearings, the hearing was continued and the next hearing date was entered into the record. Seven hearings were held between April 21 and June 2, 1988. County Board decision was due July 12, 1988, and the Committee spent the weeks between June 2 and July 6 discussing in open meeting (also noticed) the proposal and preparing a recommendation. The Board finds that in this closely scheduled proceeding no notices were required after the first notice was published. To construe the statute, with its tight time frames, as requiring separate notice of each hearing day would be totally unrealistic, even when there is a delay newspaper; the number of hearing days available would surely be lessened. The Board itself does not and cannot notice every hearing day continued on the record in proceedings where they occur in close sequence. The Board also notes that at the first few hearings the hearing officer specifically inquired if anyone was there who had not been at a prior hearing; no one so indicated. The Objectors were quite aware of the hearing and participated fully. The record contains nothing about anyone being confused as to when the hearing days were.

The Board finds that this jurisdictional argument is without merit and, indeed, compliments the Committee on its extra notice efforts concerning its meetings before, during, and after the hearings.

Objectors' third argument as to jurisdiction was first raised in the closing brief (pp. 2,8-10). Objectors assert that, insofar as the siting application fails to accurately describe the location of the site with respect to the flood plain criterion (Section 39.2(a)(4) of the Act), the application fails the jurisdictional requirements of Section 39.2(b) of the Act. Objectors point to correspondence from MCL's attorney to the County Board's chairman (C-77) conceding that the description of the site in MCL's Exhibit 4 (C-69) as being located outside the 100-year flood plain may not be accurate. Citing McHenry County Landfill, Inc. v. Illinois Environmental Protection Agency 154 Ill. App. 3d 89; 506 N.E.2d 372, (2nd Dist. 1987) Kane County Defenders, Inc. v. Pollution Control Board 139 Ill.App. 3d 588, 487 N.E. 2d 743, (2nd Dist. 1985) and Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc., 144 Ill. App. 3d 334, 494, N.E.2d 180 (2nd Dist. 1986) to the effect that the purpose of the 14-day notice under Section 39.2(b) is to encourage comment by the public (a point not contested by MCL), Objectors argue that MCL's failure to describe accurately the proposed location of the site is a "qualitative" jurisdictional failure no less important than would be a failure to satisfy the "quantitative" jurisdictional requirement of a 14-day notice. MCL, citing Daubs, suggests that "practicality and reasonableness" considerations do not support Objectors' position, insofar as the legal and narrative descriptions of the proposed location supplied in the application were accurate. In any event, MCL observes, "there is no requirement in Section 39.2(b) that the written notice specify anything as to the site location with reference to the 100-year flood plain" (MCL's Br., pp. 5-6).

Again, the Board agrees that statutory provisions governing jurisdiction shall be strictly construed. However, the Board finds that Objectors' argument fails to meet the test of such strict construction. Section 39.2(b) requires only that notice shall provide "the location of the proposed site"

(emphasis added). No mention of flood plains is made in this subsection and no such mention can be fabricated by this Board.

The Objectors assert that the MCL's Exhibit 4 described the location of the extension as located outside the flood plain. Exhibit 4 gives a narrative and legal description of the location; there is no language concerning the flood plain. The Objectors also cited C-69, a page of MCL's amended application. The Board notes that the amended application refers to a Department of Transportation determination, which has been deleted from the statute. The Objectors fail to say what connection this page has to its notice arguments.

The Objectors also point to MCL's February 9, 1988, letter to the County to argue alternatively, that the Applicant's evidence should not be construed as satisfying any flood proofing criteria. The problems concerning which of the various and conflicting maps accurately delineate the flood plain was a matter thoroughly aired at hearing and will be discussed on its merits later in this opinion. The Board finds that there is no jurisdictional issue here.

Fundamental Fairness

Having affirmed that the County had jurisdiction in this proceeding, the Board turns now to Objectors' arguments suggesting that Objectors' were not accorded fundamental fairness by the proceedings conducted by the County.

The Board notes in passing that the Objectors also raised a fundamental fairness argument concerning the exhibits just prior to and at the first hearing, when the Objectors requested pre-submittal of technical data and expert witnesses (C-205). MCL refused, saying the County could have the information, but that the opposition was not entitled to it, and noted that the opposition did not offer to pre-submit anything in return. The assistant state's attorney at that point in the proceedings stated that principles of fundamental fairness do not include the rules of discovery. He further stated that "about all we can do in these proceedings is try to be as open as possible" (I.158-159). The committee chairman and two committee members felt that the request could delay hearings and cause additional prejudice and, in any event, more hearings could be held. The hearing officer noted that at that late time the rules did not allow ordering such a request. The hearing officer noted that after the documents were introduced, they would go from there. (I.160-163). The Board again concludes, as it did in the Town of St. Charles case mentioned earlier, that the availability of such documents prior to the close of the hearing process controls. In any case, the Objectors did not later pursue the issue as one of fundamental fairness, but as one of jurisdiction (see pg. 9 above).

Objectors' first "fundamental fairness" contention is that members of the Macon County Board may have met ex parte with representatives of the Landfill prior to hearings (R.8). The only support for this contention produced by Objectors was a newspaper clipping. No testimony was proffered by Objectors. The States Attorney for Macon County asserted that he had no knowledge of any such meeting (R. 19). Committee members affirmed this. As a matter of law, this Board cannot reach a finding for which no credible

evidence has been offered and admitted; hence, the Board finds that Objectors have failed to meet their burden of going forward with regards to this contention.*

Objectors next contend regarding "fundamental fairness" that on numerous occasions, Objectors were wrongfully denied the right to present evidence (R. 9-10; Objector's brief, pp. 26-30). This contention seems inextricably intertwined with Objectors' contention regarding the participation and influence of Thomas H. Moody, Assistant State's Attorney for Macon County over the Macon County Board (see following). In a nutshell, Objectors assert that the "Chair" of the County hearings ruled in error on several occasions so as to deny Objectors the right to present certain evidence (the reference to the "Chair" apparently is intended to refer to Mr. Kahn, a private attorney employed by the County to serve as "Hearing Officer" of the County hearings). These rulings, not specified in either the Board hearing record or the Objectors' brief, allegedly hindered Objectors' efforts to adduce evidence regarding the authority of the County to impose standards "which exceeded the minimum requirements of the Environmental Protection Agency" (R.9-10). The Board has searched the records of the seven hearings held in this matter, and has identified but three offers of proof tendered by Objectors. These are introduced in the record of the May 18, 1988, hearings at pages 6, 81 and 108, respectively (V. 6,81 and 108). Of these, only one appears to address matters regarding "standards which exceeded the minimum requirements" then in place. This was the offer of proof recorded commencing on page 108, which related to the possible imposition of a plastic liner requirement by certain other local governments. The MCL refers to Objector's brief in this regard as making it "difficult to tell" whether the Objectors' concern is on the second criterion or whether it is limited to procedural fairness. The State's Attorney suggests that, insofar as the Objectors' witness was able to testify in response to questions from the State's Attorney on the record and outside an offer of Proof) that the County could impose more stringent criteria "than imposed by the E.P.A." (sic), no prejudice occurred (County's Br., fifth-sixth pages).

The Board agrees that Objectors suffered no fundamental unfairness in these proceedings in this regard. First, as the County has noted (Ibid), the central point raised by Objectors was allowed into the record without resort to an Offer of Proof. Second, as to any other matters falling within the subject matter of the contention, the Objectors have not made an Offer of Proof. In this particular, the Board notes with approval the holding of A.R.F. Landfill, Inc. v. Pollution Control Board (1987), 528 N.E. 2d 390, to the effect that where fundamental fairness questions are not raised at hearing, they are waived (see MCL's Br., pp. 17-18).

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* Regarding ex parte communications, the Board notes that, in the 90 days prior to hearing several letters were sent to the County Board, including letters from MCL and the Objectors (C-77,C-205). All such communications were placed in the public files, made a part of the record, and were often referred to at hearing.

Finally, Objectors assert that the nature of participation in proceedings before the County by the States Attorney "colors the impartiality of the County Board" as the adjudicative tribunal, and hence denied Objectors the "fundamental fairness" to which they were entitled (R.110). Essentially, the Objectors assert that the Assistant State's Attorney took sides and argued for the applicant's position and opposed the Objectors' positions (Objectors' Br., pp. 26-27). This, Objectors assert, "undoubtedly tainted the hearing process" and "unfairly prejudiced Objectors' rights of fundamental fairness" (ibid, p. 27). This contention is controverted by the County in its brief (second through sixth pages) which addressed each of the 15 instances of ostensibly prejudicial argumentation by the Assistant State's Attorney (Mr. Moody). The County also cites this Board's holding in Waste Management, Inc. v. Lake County Board, PCB 87-75 (December 17, 1987) to the effect that participation by county agencies and State's Attorneys in siting hearings does not constitute fundamental unfairness (County Br., sixth page).

The Board is persuaded that Mr. Moody's participation in these proceedings did not have the effect of denying Objectors' right to fundamental fairness. Nothing in the record of this proceeding suggests that Mr. Moody or anyone else has such a control over the deliberative faculties of the Macon County Board as to overcome the presumed impartiality of the County Board. Moreover, as the MCL observed, no objection to Mr. Moody's presentation was made at hearing and may be viewed as constituting a waiver of the right to raise this issue on appeal (MCL's Br., p. 17, citing the A.R.F. Landfill, Inc. case).

Issues Relating to the Statutory Criteria

The objectors appealed the County's approval of all six applicable criteria. The six criteria of Section 39.2(a) applicable to this proceeding are:

1. the facility is necessary to accommodate the waste needs of the area it is intended to serve;

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

3. the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

4. the facility is loctaed outside the boundary of the 100 year flood plain or the site is flood-proof;

5. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents; and

6. the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows.

Manifest weight is the standard that the Board will apply when reviewing Macon County's desision as based on the record of the proceedings. A.R.F. Landfill v. Pollution Control Board, N.E. 2d 390 (1988); Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, 528, 513 N.E. 2d 592 (1987).

This Board may only disturb the Macon County decision if the petitioner objectors have proven that the decision is against the manifest weight of the evidence on each of the six criteria appealed. Section 1040.1(a). Therefore affirmance is mandated if Petitioners' have failed to prove Macon County's decision was against the manifest weight of the evidence on any single criterion. See Waste Management of Illinois, Inc. v PCB, 123 Ill. App. 3d 1075, 1083, 1091, 463 N.E.2d 969, 976, 981 (2d Dist. 1984), cert. denied. As stated by this Board in the past:

> Manifest weight of the evidence is that which is the clearly evident, plain and indisputable weight of the evidence, and in order for a finding to be contrary to the manifest weight of [the] evidence, the opposite conclusion must be clearly apparent.
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> Industrial Salvage, Inc. v. County Board, No. PCB 83-173, 59 PCB 233, 236 (Aug. 2, 1984) (citing Drogos v. Village of Bensenville, 100 Ill. App. 3d 48, 426 N.E.2d 1276 (2d Dist. 1981) and City of Palos Heights v. Packel, 121 Ill. App. 2d 63, 258 N.E.2d 121 (1st Dist. 1970)).

With one exception, the Board will first summarize the County record in the order the testimony was presented, rather than criterion by criterion, since each person's testimony and exhibits include one or more of the criteria, often in no particular order. The exception is Criterion #4, regarding the flood plain. This issue was complex and involves the wording of the County's condition; it will be addressed separately in the Board Conclusion segment of this Opinion.

Before summarizing the testimony on the criteria, the Board notes that the stated intent of MCL is, if the County approves, to operate the new acreage in the same manner as the existing acreage and to continue to accept general as well as special waste as MCL is doing now; absent approval, MCL will develop the expanded acreage to accept only general, household waste as allowed by their pre-SB172 permits, except that without the increased height, the expanded acreage will last only five years, not the 10 years stated in their request.

First to present testimony were individuals invited by the County Committee.

Mr. Lee Holsapple, since 1986 the Sheriff of Macon County, (22 years in the sheriff's office prior to that), testified (I. 7-12) that: MCL is two or three miles southwest of Decatur, and stated that regarding traffic, he received no complaints about MCL in the past two years; over the years he recalls only complaints of refuse blowing out of vehicles on the highway, but

always received cooperation from MCL to resolve the problem; he knows of no existing traffic problem from the refuse trucks. The Sheriff acknowledged that his office logs complaints only when there are follow-up investigations or arrests, and that complaints possibly made to other officers had not come to his attention.

Mr. Gary Fogerson, for eleven years the Coordinator of the Macon County Emergency Services and Disaster Agency, testified (I. 12-18) that: the only complaint to his office regarding MCL involved a truckload of paint filters, a hazardous waste, which was erroneously shipped to the landfill by company employees, but was retrieved before they had to take action. He also noted that the "board office" files contain information on kinds of wastes MCL presently reveives.

Mr. Charles Burgener, for 17 years the Engineering Technician for the Macon County Highway Department, testified (I. 19-35) that: his office has no knowledge of traffic problems in the landfill area, including Hill Road (north of the site); the traffic count on Bear Road, a North-South Township road intersecting with Hill Road near the entrance to the site is 150-399/day, - a moderate township road traffic count; and that a state roadway map shows about 40-45 homes in the area, although he acknowledged that some homes appear to be located in the existing landfill (County Ex. 1). He also noted his traffic counts were taken from a 1985 Macon County traffic map, which include traffic counts in the County averaged on a 24/hour basis, prepared by the Illinois Department of Transportation in cooperation with the U.S. Department of Transportation (County Ex. 2).

Mr. Steve Gambrill, since 1967 the Chief Officer of the Harristown Township (within which MCL is located) Fire Protection District, testified (I. 39-57) that: the department has received no traffic complaints at the intersetion adjacent to the MCL entrance; records compiled since 1984 show that they have answered 8 calls to MCL's operations, i.e., 5 trash fires, 2 vehicle fires, all occurring at night, and one injured worker call. (I. 41) He testified that trash fires were extinguished with dirt; the vehicle fires involved a garbage truck with a hot load and a tractor; the landfill people basically use their own personnel under the supervision and assistance of the department; they've had no trouble working with MCL, and there have been no spills.

Mr. Paul McChancy, for 13 years the County Planner with the Macon County Planning and Zoning Department, testified (I. 58-96) that: there are four landfills in Macon County: MCL, Rhodes, Bath Inc. and McKenny (Waste Haulers, Inc.). He presented a 1983 air photo used for tax mapping and kept updated based on property tax and building permit records. He used it to identify home sites, with those within a 1/2 mile radius from the borders of the site, and those built since 1975 coded separately. (I. 63-65, 92,93 County, Ex. 5) He testified that: twenty six homes were built since 1975, of which eight are within the 1/2 mile radius; Forty nine homes in all are within the 1/2 miles radius; the area is fairly rural and is served by private wells; (I. 69-70) the only complaints he received about MCL's operations occurred after the landfill filed its first petition and were referred to the County Health

Department and the EPA; the complaints concerned blowing litter, digging activities in the expansion area, and an alleged natural spring in the area.

Mr. Richard Rosetto, for 14 years a sanitarian with the County Health Department, testified (I. 96-133) that: he inspects all four landfills monthly; MCL is the only one handling liquid waste; Decatur is an industrial town; 18 residents within a mile and one-half had their wells tested in 1987 by the Illinois Environmental Protection Agency (Agency) and the tests show no contamination (Pet. Group Ex.1, I.99); he has received complaints about road dust and litter, which MCL promptly responded to, and a complaint about trucks at night a couple of years ago; and MCL's operations are well above the other three landfills, especially because MCL is well equipped.

Mayor Gary Anderson, not a County witness but, rather, on behalf of the City of Decatur testified (I. 164-168) that: the City supports the landfill request; that the dumping fees in Macon County have increased 50% in the past two years, forcing increases in collection and disposal fees; and that Agency staff had told his staff that MCL has a good record.

MCL presented the following witnesses:

Mr. James Holderread, for one year Executive Director of the Macon County Economic Development Foundation, testified (II. 6-17) that industry needs expansion of MCL, and that they are competing for a major new $50 million plant which will not be located in Decatur unless there is enough industrial waste, including liquid waste, capacity.

Mr. Paul McKinney, the President of MCL Corporation, testified (II. 17-67, 69-122) that: he also operated Waste Hauling until he sold out in 1980, is familiar with its capacity, and that Waste Hauling can accept waste only a little over two years. (II. 19-23) Regarding MCL, he testified that the existing site can accept general and special waste for about two years.(II. 24) He testified that the Bath landfill is the only landfill that will be able to accept wastes for more than three years, but only demolition waste; the landfill can't accept general waste now. He stated that only two landfills in the County, one being MCL, accept general waste. He further states that if MCL's siting request is not approved, industrial liquid waste will have to be hauled as far away as Peoria, or to the Clinton site if it gets permits.

He also testified that: MCL accepts 92% of its waste from Macon County and the bulk of the non-County waste is from Monticello; (II. 25) estimated that MCL takes about 70-75 percent of the waste in Macon County; (II. 83) estimated that he received about 50% municipal and 50% special, (II. 91) although that changes, depending on market conditions; for any waste sent outside the city limits (Decatur's population dominates the 125,000 population of Macon County) as the distance increases, so do the hauling costs.

Mr. McKinney stated that he contacted two real estate appraisers, both of whom decined to give their opinion as to whether the expansion would improve or lower property values, because they said they couldn't prove it. He added, however, that of the 10 new homes built since 1975, he built and sold three

himself, as well as one lot in his subdivision, and had no trouble selling them even though real estate was not selling well generally. (II. 30-32, 47)

The landfill hours are 7-4, six days a week generally, although he will accept late requests under special circumstances, such as when ADM had a breakdown. (II. 59)

Particularly regarding night fires, he hands out cards to the immediate neighbors with his, the foreman's, and other Corporation board members' phone numbers. He noted and agreed with the Fire Chief's testimony. He stated that he had $1 million worth of equipment, including crawlers, loaders, tractors, dirt moving, two power brooms to sweep dust, water pumps and a fire truck in operating order.

He has never had a spill, hazardous or oil, and nothing has discharged to the stream. He has been the Road Commissioner of Harristown Township for 12 years; there has been no change in the existing traffice pattern or access road. (II. 33-37)

He noted that MCL paid $60,000 in 1978 to pave Bear Road after an increase in traffic caused by the new interstate, and that the state's contribution was to design the road for garbage truck weights. (II. 38-41)

Regarding vehicle mud, he is now building a 1/2 to 3/4 mile white rock road within the site before the trucks can exit.

Regarding litter, he has seven people available to pick up paper, and permanent and portable fences; and paper is confined to his property unless a strong, 40 mph south wind causes it to blow over the north fences. (II. 42-62)

There is a pipe line under the property that will have to be moved; that is a condition of the Agency permit, and negotiations are in progress with the pipelines owners. He did not know whether the pipeline is in use. (II. 45)

He stated that he has liability insurance with a $1 million umbrella policy on top of everything else. (II. 100) He also stated that as soon as he gets through this expansion, he will be actively looking for future space, that Decatur will be in trouble again in 10 years and cited the problems of Champaign/Urbana, which has been working 10 years to solve their problems and have not been able to. (II. 113)

If the expansion is denied, only seven years remains (2 on the existing site and five on the new) and he's only talking about solid waste. He noted that if the situation gets tight, the Corporation stockholders who are waste haulers might have to get preferential treatment. (II. 118-119)

Mr. Richard Lutovsky testified (II. 123-130) in favor of the expansion on behalf of the Metro. Decatur Chamber of Commerce after a Task Force study of their members.

Mr. Greg Kugler, a technical specialist for Andrews Environmental Engineering (Andrews), testified (III. 5-14) as follows:

Referring to Exhibits 10-16, the Applications and the Development Permits for the site, he testified that:

Fires, spills, and other operational accidents are covered; a 10 foot clay liner, compacted as necessary to a permeability of $1x10^{-7}$ cm/sec. is required as well as soil tests on a 200 foot grid. (III. 12)

There are currently seven monitoring wells, and three more were required for the new site; Andrews is involved in the pipeline issue; it was involved in testing of the 18 private wells (they took split samples but after the positive EPA results never tested them). (III. 13-21)

Regarding the possibility of hauling waste 40-50 miles as suggested by the objectors Mr. Kugler stated that this might be acceptable for a small town, but for Decatur, with a population of 100,000, this would be a tremendous hauling burden. He stated that Decatur is courting a problem to depend on another County and a site in Clinton County, about 25 miles from Decatur, which recently received SB172 approval to expand, is not yet permitted and is thus speculative. (III. 103-122)

He testified that Andrews used the Agency publication Available Disposal Capacity for Solid Waste in Illinois (Objectors' Ex. 11), to determine landfill capacity in Macon County and the surrounding counties. Andrews determined that the surrounding counties had very little capacity to take added waste from MCL: the Bath landfill plus MCL's would have less than one year; the Water Sanders landfill in Logan County would have less than one year; the Lovell landfill in Moultrie County would have less than one year; the Sangamon Valley landfill in Sangamon County would have about five years; and the Christian County landfill would have less than three years. (III. 22-24)

He testified that the permits do not require a leachate collection system or gas migration controls, but all comply with existing regulations. (III. 24, 80, 84)

It was noted that the plans are not final in many respects; for example, the vertical expansion is conceptual and gas vent trenches would be considered if there were to be a problem; and they are reviewing the adequacy of the monitoring wells and the monitoring program, which were designed by another firm. (III. 84-95)

Mr. Greg Kugler believes that Decatur needs to establish plans for at least 10 years, reviewable yearly, since site capacities are shifting so much. Andrews has clients who doubled their landfill price and cut volume in half to extend the life of the sites. He stated that each year there are fewer sites and that McLean County, for one, won't accept special waste from outside the County. (III. 105-112, 122, 134)

He also sees nothing wrong with looking to the Agency for technical guidance; most counties do and to move in another direction can be a waste of money. (III. 131)

Mr. Gordon Dill, a consulting engineer, was hired by the County to study and make recommendations concerning the proposed site. He testified (IV. 12-108) that: he reviewed the testimony and records concerning all four sites, including Agency documents regarding design and requirements for Sites 3 and 4, including relocation of the pipeline, the bottom and sidewall liner requirements, and the requirement that any sand layers be removed before recompation, as well as the site entrance and traffic patterns.

He recommended that the site be approved, (IV. 23, lCounty Ex. 8) stating that MCL will have to remove the pipeline, have 10 foot clay soil liner on the bottom and sides to a maximum permeability of $1x10^{-7}$ cm/sec. both vertically and horizontally, have upgradient and downgradient monitoring wells to allow checking for groundwater, provide for litter and fire controls, and for sweeping and wetting down the entrance road. He stated that the entrance road (Bear Road) was designed by IDOT 10 years ago to handle loaded garbage trucks and that the traffic pattern will not change. He included one condition, that the pipeline be removed from the site prior to construction of the 10 foot thick berm.

He noted that many design aspects will be precisely determined in response to surveys and soils problems found during the development and operational stage. For example, he felt that it is sufficient to know at this stage that any sand layers will have to be removed - the dirt will have to be removed anyway to get proper recompaction. (IV. 71) He agreed that field tests are preferable to laboratory tests, and that the monitoring wells should be at the correct elevation to assure proper sampling . He essentially felt that, although the soil sample and other data before the County Board presently does not contain all of the material, it is clear that MCL will have to gather sufficient data to assure that these goals are met before an operational permit will be issued.

He also noted that the existing traffic pattern won't change unless there is a radical change in the growth of Decatur and its industries. (IV. 91-93) He also noted that on his site visit he saw one person picking up some blowing litter. (IV. 91)

The Objectors' witnesses testified as follows:

Mrs. Becky Hand, who has resided 1/2 mile from the Hill Road to the west for about 30 years, testified (V. 4-12) that: there has been a change in the quality and quantity of her well water over the last 10-15 years, but acknowledged that "Rube and Merle's", which she believes is a illegal dump, is located directly to the south of her house and that she has fought it for years.

Mrs. Barbara Kelley, who is one of the Petitioners in this case, who has lived about ten years two to three blocks from the landfill to the west on Hill Road and whose property line is about 250 feet away testified (V. 13-43) that: the landfill doesn't protect her health; there is road mud and thick dust; there are odors; there is no screening of the view; and that litter blows on her property, endangering horses she raises for show. She presented pictures taken starting in November of 1987 (Obj. Gr. Ex. 4-7) depicting the

dust, uncovered garbage left overnight, vectors, large semi-trucks in the area, standing water on Site 3, debris in the area, the fence on Site 2 and the landfill height as compared to her barn. She acknowledged that: the fence was there when she moved in 1977 but is closer now; the nearby Decatur Sanitary District sludge pits smell but not as bad as the landfill; the prevailing winds are away from her house; and that for two years prior she made only one complaint, about dust, which was watered down for two or three days only.

Mr. John Thompson, of Champaign County, and for about four and one-half years Executive Director of Central States Education Center and the Central States Resources Center, has a Bachelor's of Science degree in Chemical Engineering and testified (V. 44-113) that: he reviewed the computer printout of Agency manifests regarding Rhodes, Clinton, Waste Hauling, Waste Control and MCL landfills. He introduced as Objectors' Exhibit 11 the Agency book titled "Available Disposal Capacity for Solid Waste in Illinois", commonly called the "Green Book" and referred to earlier by Mr. Kugler. He calculated that, if the County Board denies the expansion, Site 3 and 4 would have, not five, but 8 1/2 to 9 1/2 remaining years, because the Agency permitted lowering the bottom elevation 25 feet, plus the two years remaining on Site 2. (V. 52-61)

Mr. Thompson next turned to the waste disposal site in Clinton. Regarding the Clinton site, in DeWitt County which has received its SB172 approval, the hearing officer sustained MCL's objection that absent an Agency operating permit, Clinton County's waste capacity cannot be considered because it is speculative. The Objectors asserted that it ought to be considered because the County could prospectively condition its approval on whether the Clinton site is permitted.

The Board has previously held that an Agency permit, even an experimental permit, would be sufficient for the County to consider the waste capacity of such a site. Waste Management, Inc. v. Will County Board (E.S.L. Landfill), PCB 83-41 (June 30, 1983) Aff'd, 122 Ill. App. 3d 639, 961 N.E. 2d 542 (3d Dist. 1984). The Clinton County site, however, has no Agency permits at all, and the Board agrees that Macon County need not consider evidence concerning the Clinton site. The Board notes that to conclude otherwise suggests that even local zoning approval of non-regional pollution control properties throughout the County would have to be considered by the County Board or the applicant before activity to initiate any development of any site could occur. This could present an extraordinary burden for applicants, particularly since local approval, while necessary, is only a preliminary step. This is equally true for the instant MCL application. The Objector's offer of proof will not be considered. (See V. 58-62, and Obj. Ex. 16)

Mr. Thompson then presented calculations on the special waste needs generated inside Macon County and disposed of at MCL for which there are special waste permits in 1988 and beyond, as well as special waste needs generated outside Macon County but disposed of at MCL, and the miles involved (Obj. Ex. 12,13). Similar calculations were also presented for the Waste Hauling landfill (Ex. 13,14). Mr. Thompson asserted that the special waste volume at MCL does not represent 20, 30 or 50% of the total; using the "Green

Book", he concluded it is more like 5%. The two main generators are Staley and ADM in Decatur. He asserted that special waste has a larger service area and that the Villa Grove landfill in Douglas County, 40 miles away, accepts special waste, but acknowledged that Champaign/Urbana waste presently goes to Villa Grove and Danville. (V. 66-78)

Regarding Criterion #2, Mr. Thompson testified that: there is no design in the record for expansion; there are no leachate estimates, special waste needs to have a more strenuous design; a leachate collection system is needed; there is no specific information as to where the soils needed to cover the waste is sufficient; and there is no plastic liner, although acknowledging that they supported an Urbana expansion that had no plastic liner. (V. 79-86, 98)

Regarding Criterion #3, Mr. Thompson noted there are no plans to add more screening to accommodate the requested increase in height. Mr. Thompson also noted that three monitoring wells appear to be located in the Sangamon River flood plain. (V. 86,87)

Regarding the County sanitarian's inspections, he reviewed the inspection reports from April 1986 to April 1988 for the four County landfills. Leachate seeps were noted more than at the other landfills. (V. 87-90, 104)

Mr. Michael Duffin of Central States Education Center and also a geologist employed by the University of Illinois looked at 31 of MCL's borings, old Agency statements and maps in relation to potential, usable acquifer sediments and leachate protection and testified (VI. 5-56; Obj. Ex. 18-19) that: the geological data is highly speculative, the borings are discontinuous; and attenuation tests are lacking. He felt the data is not sufficient to say, either way, regarding minimizing leachate migration. He acknowledged that the development permits require additional test borings before an operating permit will be issued; that any sand pockets have to be removed although they could cause problems outside the fill area; and that he is concerned that field testing is not specified. He said that the glacial till area from Kankakee south to Decatur to Springfield generally has sand and firmly agrees that Central Illinois is not all that good for locating landfills. (VI. 5-56, Obj. Ex. 18 and 19)

Ms. Thelma Reed has lived, for 16 years, 25 feet from Site 3 and testified (VI. 57-61) that: she fought the expansion in 1973 and 1975; there is dust, dogs, and vectors at the landfill; she rented land to MCL for offices and is appearing as their landlord, but not for the proposed site.

Mr. Roger Tate, one of the Petitioners in this appeal, has been for 31 years, a resident of property located approximately 1000 feet west on Hill Road. He testified (II. 61-101) that: incompatibility can't be minimized; it is incompatible because the landfill is the tallest place in the area; for the first time in 30 years he killed four rats at his house; the noise and smell is bad; water is not safe even if the Agency said it was asserting that the Agency checked only 60-80 things (parameters) in the private well tests, but there are 60,000 chemicals; (VI. 61-68) the traffic is bad; he went into the ditch trying to pass an earth mover on Hill Road, but the sheriff didn't

answer his call; (VI. 70,72) his private well tests (Obj. Ex. 20) showed bacterial contamination; the pipeline will be moved to where his screening trees are; (VI. 82) the inspectors do nothing; he has complained for many years to his County Board representative, his State representative, the County Board of Health, the Attorney General's office, the Agency , the road Commissioner and the Sheriff and very little is done to improve things. (VI. 92)

Mr. Tate feels property values have diminished because five years ago he was only able to get a $1500/acre loan to buy property at auction that MCL paid $2000/acre for; he acknowledged that the Federal Land Bank won't loan 100% of property value and that he opposed rezoning the land to residential at a County hearing. (VI. 89-91, 98)

Mr. Tate acknowledged that he sells dirt by leasing the southeast part of his property. That dirt is removed by backhoe and trucked out; he said, however, that the trucks weren't as big as garbage trucks. (VI. 94, 95)

He stated he can't use his water for drinking and cooking except for four gallons a day from a reverse osmosis system. (VI. 99)

Ms. Reed testified again (VII. 5-20) that, subsequent to her prior testimony the water from her faucet was dirty after being excellent for 45 years; that she took pictures (Obj. Ex. 22) down toward the River showing a large pond where MCL was removing earth and, although her well is upgradient, her well was affected when the equipment was active. (VII. 5-20)

The last witness for the Objectors was Dr. Valocci, an associated professor for seven and one-half years of Civil Engineering at the University of Illinois. He conducts basic and applied research in groundwater hydrology and contaminant movement in soils and aquifers. After reviewing the Petitioners' Exhibits 7 and 10-16, Dr. Valocci testified (VII. 21-50) that: the existing groundwater monitoring system is inadequate; laboratory permeability tests are inadequate and he believes the landfill has a high potential to degrade local groundwater resources. He asserted that the monitoring wells are not deep enough and would detect only side leakage, water flows to the Sangamon cannot be assumed if leachate mounding occurs; upgradient wells could be affected; Ms. Reed's well problem might have been affected if a permeable unit was ruptured during excavation; and that high concentrations of organics can affect clay permeability, but is not as likely on recompacted clay. (VII. 21-50).

Criterion #4. As noted earlier the testimony concerning Criterion #4 is summarized separately as follows:

With respect to the fourth siting criterion of Section 39.2(a) ("the facility is located outside the boundary of the 100 year flood plain or the site is flood-proofed"), the MCL application (Exhibit 4, C-69) states simply as follows:

6. that the proposed landfill extension is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation.

Subsequently, Assistant State's Attorney Moody stated that the reference to the Illinois Department of Transportation had been removed from the law (I.6). Absent such a definitive authority to declare the boundaries of the 100-year flood plain, several witnesses testified as to the approximate boundaries of the flood plain in relation to the landfill's areas 3 and 4 (see following). As will be noted, there was some disagreement as to the present boundaries of the 100 year flood plain. There was general agreement that the current flood plain would have to be determined in a new topographical study; such a study was underway at the time of the County Board proceeding (III. 11,43; IV. 46).

On this subject, the County Board first heard from Mr. Paul McChancy, County Planner with the Macon County Planning and Zoning Department. Mr. McChancy had prepared two maps based upon the official flood plain maps for Macon County as prepared by the Federal Emergency Management Agency (FEMA); these maps were identical except for scale and were identified in the record as County Board Exhibits 3 and 4. (I. 60-61) These maps, McChancy testified, are relied upon by his department and by developers in the County (I. 63).

Mr. McChancy also referred to a map based on aerial photos taken in 1983 and updated on property tax records. This map was identified in the record as County Board's Exibit 5 (I.63). This map was identified by McChancy as relied upon by Macon County for tax purposes (Ibid.) Exihibit 5 did not purport to indicate the 100-year flood plain, however (I.67).

Based on Exhibit 3, McChancy indicated that the flood plain level in the general area of the landfill ranges from 599 feet above mean sea level (MSL) to 600 feet MSL. He estimated the flood plain level in the immediate area of the proposed expansion area (areas 3 and 4) to be 599.25 feet above mean sea level (I.68). He stated, however, that he did not know "how much the elevation is below 100 year flood plain at the south edge fo the proposed landfill" (sic:I.69). He did, at MCL's request, mark County Board's Exhibit 3 to indicate the southern most boundary of the area, 1400 feet from the center of Hill Road. He testified that he had also marked on the map the flood plain level at the west boundary of the proposed expansion (area 3) of the landfill. Using these markings, he then indicated that the difference (i.e., the portion of area 3 overlapped by the flood plain) at that point is 210 feet (I.76-79). Under cross-examination, he estimated the amount of acreage within the proposed site which is actually in the flood plain as he had drawn it to be 7 acres (I.84). He acknowledged that his mapping only represented where the flood plain lay as of 1984 (I.87) and that the contours of the flood plain as shown on the map could vary 50 to 100 feet (I.89).

The next witness heard by the County on this criterion was Mr. Paul McKinney. Mr. McKinney testified, without elaboration, that he agreed with Mr. McChancy's characterization of the FEMA map as relatively inaccurate and that it could vary between 50 and 100 feet (II. 44). On cross-examination, Mr. McKinney testified based on personal knowledge that the actual flood plain

is located "right along the 1400 foot line", that is, the southern boundary of the site. He indicated that he based his conclusion upon an aerial map prepared by one of MCL's former engineers from a 1970 aerial photograph, updated in 1977 by an MCL ground crew. He acknowledged, however, that (as Objectors' counsel suggested) the "flood plain map" (sic) could move from time to time because of conditions of water flow and change in soil surface (II.71-72).

The County Board then heard testimony on this subject from Mr. Greg Kugler, a technical specialist for Andrews Environmental Engineering, a consulting engineering firm retained by MCL. Mr. Kugler testified that the current landfill permit required the facility be located outside the estimated 100-year flood plain of 599 1/4 feet (III.10). Utilizing another map (identified in the record as Petitioner's Exhibit 17), he indicated that the current developmental permit allows the applicant to start its berm construction no lower than 600 feet above mean sea level. He affirmed that the berm which is to be constructed prior to commencement of landfilling operations, must be constructed above the 100-year flood plain; the significance of this, he explained, is that the berm serves as an outside "initial barrier", diverting surface water runoff and allowing the landfill operator to establish exactly where his fill boundaries are. The berm is constructed of "clay soil compacted to meet the EPA requirements of "10 to the -7 centimeters per second" (III. 10-12). He concluded that with the berm there will be no filling within the 100-year flood plain (III. 12), although he acknowledged that a portion of the overall site, not including the fill area, lay within the flood plain (III. 42-44). He indicated that a new aerial survey was in progress in order to accurately delineate the current 100-year flood plain (III. 43). He would not indicate the southern boundary of the fill area, other than in relation to the 600 foot MSL benchmark, which is described as being "at the very southern portion of the area well below all areas of indicated fill" (III. 46).

The final witness on this criterion for the County was Gordon E. Dill, a registered civil engineer. Mr. Dill is the author of a letter dated April 13, 1988 to the President of the Macon County Board, which letter was entered in the record of the County proceedings as County Board Exhibit 7. Under cross-examination, Mr. Dill referenced his statement in said Exhibit 7 to the effect that an engineering analysis of the 100-year flood plain would be required. Alluding to the topographical survey in progress, he stated that such necessary data would not be needed until the developmental and operational stage; he specifically indicated that such data was not needed at the present time (i.e., during deliberations by the County) (IV. 46-47). He joined Mr. Kugler in asserting that the berm at the southern end of the landfill would not be within the 100-year flood plain (IV. 96).

Two witnesses addressed this criterion on behalf of the Objectors. The first was Mr. John Thompson, whose testimony on other than Criterion #4 was summarized earlier. Mr. Thompson, based on his review of the exhibits then in the record, stated his conclusion that these documents failed to specify the exact locations of the monitoring wells. Based on his review of other EPA documents for the site, he stated that it appears that three of the monitoring wells for sites 3 and 4 of the landfill would be located within the flood

plain of the Sangamon River. He indicated that having these wells "submerged under water" in a flood would be undesireable (IV. 86-87).

The final witness on this subject was objector Roger Tate, who resides approximately 1,000 feet west of the proposed expansion of the landfill (area 3). Mr. Tate, based on his thirty years of living and farming in the area, described the general area as flooding frequently. He stated that "I don't know anything about a 100-year flood plain, but I do know where that river floods because I have seen it time and time and time again" (VI. 72-73). He indicated on County Board Exhibit 5 the extent of the highest flooding he has experienced; he testified that this point was "probably 1,500 feet" from the Hill Road (i.e., from the northern boundary of the landfill) (VI. 74-76).

In their final arguments on this point (VII. 71-85), Objectors contend that the record demonstrates that the site will be located within the flood plain and that MCL's imprecision in identifying the southern boundary of the fill area, the location of the berm and the current 100-year flood plain boundary means that MCL failed to meet its burden of demonstrating compliance with this criterion. Objectors' counsel also characterized MCL's attitude on this criterion as suggesting that all of the county's concerns "would be addressed down the road when they go to the EPA". He stated that this is not true "because some of the objections we made are not required (by the EPA)" (R. 85).

In the hearing before this Board, Objectors' counsel repeated these assertions (R. 14-17) suggesting that the statute clearly requires the county board to decide either that the landfill site is outside the 100-year flood plain or that, if the landfill is within the 100-year flood plain, "they [the county board] have to make a determination that there are adequate flood proofing plans" (R. 14).

Objectors again raised these arguments in their final brief (Petitioner's Br. pp. 12-16). Specifically, Objectors contend that the County Board's condition number five, which requires the proposed landfill expansion "be out of the flood plain or be flood-proofed" (C-292; emphasis added) means that "the County Board has therefore delegated criterion four ... to the applicant" and "explicitly demonstrates that the applicant never satisfied the flood plain criterion" (Petitioner's Br., p. 13). They repeat their claim that the County Board is obligated to determine that the facility is either located outside the 100-year flood plain or that the facility is flood-proofed (Ibid), and conclude that the County Board "simply had no evidence" to support either finding (Petitioner's Br., pp. 15-16, citing the E & E Hauling, Inc. case).

The County does not address this criterion in its final brief. However, MCL's brief (pages 7-8) describes Objectors' argument as a technical one, "which stresses form over substance". MCL asserts that condition number five of the county's site approval resolution is expressly permitted under Section 39.2(e) of the Act (pg. 7); MCL also cites as support the Waste Management of Illinois, Inc. case and the County of Lake case (pg. 8). MCL also states that "in the County Board's decision, no approval is given for any landfill within the 100-year flood plain" (pg. 8).

The Board notes that petitions from the landfill area supporting the expansion were introduced and that opposing petitions from the area were also submitted.

Board Conclusions:

At the outset, the Board notes that there was argument over whether the County Board was abdicating its responsibility to the Agency, particularly regarding criteria #2 and #4. The record clearly shows that, while the County expected the Agency to oversee the aspects of site development contained in the permits, it did independently review the evidence. For example, Committee Chairman Smith affirmatively stated that they had no intention of abdicating their responsibility (VII. 122) and the post-hearing discussions and conditions placed in the resolution of approval regarding the pipeline, the liner, the flood plain, and the monitoring wells are indicative of their understanding of their role.

The Board, consistent with its manifest weight standard of review, affirms the County's decision that the six criteria were met. Whether or not the Board might have reached a different conclusion were it the County decisionmaker is not relevant. As noted earlier, it is the Board's duty to determine whether, based on the record, that a conclusion opposite to that reached by the County must be clearly apparent.

Criterion #1

The Board now turns to the first criterion of Section 39.2(a) ("the facility is necessary to accommodate the waste needs of the area it is intended to serve").

As noted previously, the amended application (Petitioner's Ex. 4; C-69) simply restates the statutory language as a positive assertion. The County Board's decision on this Criterion is attacked by Objectors' counsel in his final arguments (VII. 69-71) and in the brief (Petitioners' Br., pp. 16-21). His arguments essentially are based on two principles:

1. That the testimony from Messrs. McKinney and Kugler on behalf of MCL was based on hearsay, on an erroneous understanding of the definition of "special waste" and on erroneous assumptions (see, e.g., Petitioner's Br., pp. 16-18). He characterized the testimony of Objectors' witness (Mr. Thompson), as "unrefutted" (sic: Ibid at pgs. 19 and 20).

2. That the evidence of significant potential capacity for waste at the Clinton Landfill in DeWitt County was erroneously excluded. This was the substance of the offer of proof (V. 60-61) which the Board has, as noted above, already rejected.

While Macon County did not specifically address these contentions, MCL responded somewhat in its final arguments (VII. 54-58) by suggesting that MCL's evidence that only some two years' capacity remained in Macon County was "uncontroverted" and that the County might encounter problems if it assumed

other countries would accepts its wastes ("Gentlemen, who do you suppose is going to accept our waste. Do you suppose Springfield ... or Peoria ... or Danville wants our waste. All of these cities are going to be encountering the very same problems that you have before you today." Ibid, p. 58). In its brief (MCL's Br., pp. 8-11), MCL asserts that "the cases on the standard for "need" indicate that showing an absolute necessity for additional landfill space is not required" (MCL's Br., pg. 10, citing Waste Management of Illinois v. Pollution Control Board, 463 N.W.2d 969 at 976 (1984) and E & E Hauling, Inc. v. Pollution Control Board, 451 N.E. 2d 555 (1983).

The Board finds, as to this point, that the arguments raised by MCL are persuasive. The record indicates that neither party can claim unrefuted or uncontroverted testimony. It was clear, however, that the County Board could, as it obviously did, find the testimony and assumptions of MCL's witnesses more compelling than that of Objectors' witnesses. The testimony by the Mayor of Decatur and the Chamber of Commerce, and the several allusions to the long regulatory lead-time between application for and final approval of a landfill operation was also before the County Board. In view of these considerations, the Board suggests that the County Board could have reached its conclusion even if Objectors' offer of proof had been accepted.

The County clearly could have concluded that the expansion was necessary for both general and special waste needs. They could easily have concluded that they could be at a great disadvantage, in the next few years by losing nearby capacity and recognizing the unstable capacity availability outside the County for their large amount of general and special waste were they to deny MCL's expansion.

Criterion #2

Regarding the second criterion of Section 39.2(a), the Board, having already concluded that the conduct of Assistant State's Attorney Moody did not deny the Objectors fundamental fairness, similarly must find that the County Board could have found, based upon the evidence, that the facility's design, location and operation would be protective of the public health, safety and welfare. Clearly, the evidence adduced by MCL and the County's own witnesses were an adequate basis for the County Board's decision. This Board cannot reconcile Objectors' contradictory assertions that, on the one hand "the County Board improperly restricted its assessment of the statutory criteria" (Petitioner's Br., pg 29) and on the other hand, "the County Board heard substantial evidence involving criteria two, indicating applicant deficiencies in areas which exceeded existing regulations but would provide greater protection for the public health, safety and welfare" (Petitioner's Br., pg. 28). It would appear, as Objectors thus noted, that the County Board did consider the evidence proffered by the Objectors. This being so, and particularly in light of the significant body of testimony describing many years of generally favorable experience with the existing MCL landfilling operations in Macon County, this Board finds that the County Board could reasonably have found for MCL on this criterion.

Criterion #3

Regarding minimizing incompatibility, and effect on property values, the Board finds that the County could have concluded, based on the record, that the facility extension is located so as to minimize incompatibility with the character of the surrounding area, and so as to minimize effects on property values. In addition to statements and exhibits on the record, the County Board committee conducted its own tour of the site. While no real estate appraisers testified, Mr. McKinney gave unrebutted testimony regarding home sales; new houses have continued to be built within the area, and Mr. Tate's testimony on a lowering of farmland prices could have been viewed as unpersuasive.

Criterion #4

The threshold question squarely presented to this Board is whether Section 39.2(a)(4) requires a County Board to conclusively determine the current boundary of a flood plain. If not, it would appear obvious that the Act could not be construed as prohibiting the type of flexible condition imposed as "condition five" by the Macon County Board.

This Board is convinced that Section 39.2(a)(4) cannot be read as requiring such a result. It is clear from this record that the County Board thoughtfully considered this issue and was satisifed with the level of proof before it, even in the absence of more or less "precise" delineation of such boundaries (C-275-276).

It is emphatically not the role of this Board to reweigh the evidence presented to the County. A.R.F. Landfill, supra. The record of the County Board proceedings contains, on this criterion alone, the testimony and exhibits of four witnesses in support of the proposed siting. These witnesses, as noted above, identified within general limits the boundaries of the 100-year flood plain. The exhibits upon which they relied are routinely used by federal and state planning agencies and by developers. Objectors presented no evidence compelling the conclusion that current flood plain data will vary radically from the 1977 and 1984 - based flood plain data relied upon by MCL's witnesses. Certainly neither witness presented by Objectors compelled a contrary conclusion. Mr. Thompson surmised that three monitoring wells "appeared" to be located within the flood plain; he did not address the areas to be filled. Mr. Tate's testimony placed the highest point of the flood plain at approximately 1500 feet from Hill Road, which would appear to be approximately 100 feet further from the landfill extension than the most distant point suggested by any witness for MCL (Mr. McKinney, who suggested that the flood plain was "right along the 1400 foot line" emphasis added). In light of these facts, and in view of the testimony of Mr. Kugler and Mr. Dill to the effect that more precise data on the flood plain boundary was not necessary prior to the development stage (i.e., preparation for the Agency permit application), the Board cannot say that the County Board's reliance on MCL's 1977 and 1984 flood plain data was against the manifest weight of the evidence or contrary to law.

There remains the issue as to whether the County's condition number five amounts to a delegation of the County's responsibilities to the applicant. In the Board's view, this presents a closer case than is arguably warranted by the facts adduced or the intentions expressed by either the County or MCL.

The Board states from the outset that it believes that Section 39.2(e) of the Act is dispositive in this matter. On its face, this Section embraces the concept that a County Board retains authority under the Act to impose reasonable and necessary conditions, not inconsistent with Board regulations. The requirements imposed by condition five appear to be reasonable (they are, after all, virtually identical with the language of Section 39.2(a)(4) of the Act). They clearly do not conflict with any Board regulations.

Our difficulty with condition five stems, rather, from its "either/or" form. It could be argued, as Objectors have done, that there is virtually no support in the record for the County Board to approve the "flood proofing" of the proposed facility. Nowhere has MCL indicated that the flood proofing option would be utilized. Flood proofing is not employed presently at the landfill. There are neither narrative plans nor specifications for flood proofing of any kind. The farthest reaches of the fill area, the southern berm, are emphatically described by the applicant's witnesses as being outside the flood plain.

Nevertheless, we cannot say that the Macon County Board's condition five requires that we reverse its siting approval in this regard. Where, as here, the clear intent of the applicant (Petitioner's Br., p.8), and the County Board committee (C-256, item #4) is that no filling shall take place within the 100-year flood plain, it is not unreasonable to conclude that the flood-proofing "option" was inserted into condition five merely to track the County Board's understanding of the minimal requirements of the Act and the Environmental Protection Agency. Viewed in this context, the terms of condition five can be considered an acceptance by the County Board of the notion that these minimal requirements are sufficient to meet the County's legitimate interests in regard to this criterion. In any event, given the clarity of expression of MCL's intent in this regard, the inclusion of the flood proofing reference can be viewed, at worst, as de minimus error.

Criterion #5

The record clearly indicates that the County could have concluded the plan of operations of the facility is designed to minimize fire, spills, and operational accident dangers. Testimony shows that the site is well equipped, the local Fire Department has a response arrangement, and the operator's history and plans in this area show affirmative arrangements to minimize dangers.

Criterion #6

The record contains ample evidence sufficient for the County to conclude that the traffic patterns to and from the facility are designed to minimize impact on existing traffic flows. There is evidence that the truck routes,

the road conditions and usage, and the access gate all are conducive to minimizing the existing traffic impacts. The operator additionally plans to extend the on-site exit roadway to minimize road mud.

In summary, the Board finds that the Macon County Board had jurisdiction to consider this matter pursuant to Section 39.2 of the Act, that the County Board accorded the Objecttors (Petitioners) fundamental fairness in its proceedings and that its decisions regarding the six siting criteria were sufficiently supported by information in the record as to not be contrary to the manifest weight of the evidence.

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

ORDER

The July 6, 1988 decision of the Macon County Board to grant site location suitability approval to Macon County Landfill Corporation with conditions pursuant to Section 39.2 of the Environmental Protection Act is affirmed.

IT IS SO ORDERED.

Board Members J. D. Dumelle, B. S. Forcade and M. L. Nardulli dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 15th day of December, 1988, by a vote of 4-3.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board