

ILLINOIS POLLUTION CONTROL BOARD
April 6, 1989

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 88-190
	)	
LAKE COUNTY BOARD,	)	
	)	
Respondent.	)	
	)	

MR. DONALD J. MORAN, PEDERSEN & HOUP, APPEARED ON BEHALF OF PETITIONER,

MESSRS. FRED L. FOREMAN, MITCHELL L. HOFFMAN, AND LARRY M. CLARK, LAKE COUNTY STATE'S ATTORNEYS OFFICE, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board on the November 23, 1988 petition for appeal filed by Waste Management of Illinois, Inc. ("WMII") pursuant to Section 40.1 of the Environmental Protection Act (Ill. Rev. Stat. ch. 111-1/2, par. 1040.1 (1987) ("Act")). WMII appeals the November 1, 1988, decision of the Lake County Board ("LCB") denying local siting approval to WMII's proposed landfill in Lake County, Illinois.

WMII contends that procedures used by the LCB in reaching its decision were fundamentally unfair, and that the decision of the LCB in denying WMII's Application for Site Location Approval For a Nonhazardous Sanitary Landfill ("Application") is against the manifest weight of the evidence.

Based on the record before it, this Board finds that the hearing below was conducted in a fundamentally fair manner. We additionally find that the decision of the LCB to deny WMII's Application based on failure of WMII to meet its burden of proof on the statutorily-defined criteria is not against the manifest weight of the evidence. The decision of the LCB is accordingly affirmed.

HISTORY

On May 6, 1988 WMII submitted its Application to the LCB for approval pursuant to Section 39.2 of the Act. In its Application WMII proposed to design, construct, operate and own a solid waste

landfill located on approximately 160 acres of land northeast of and adjacent to the intersection of State Route 83 and Peterson Road in Fremont Township, Lake County, Illinois. The Chairman of the LCB appointed a special hearing panel, The Regional Pollution Control Hearing Committee of the Lake County Board ("Committee"), consisting of seven county board members. Between August 15, 1988 and September 1, 1988, 13 public hearings were held with the Committee receiving testimony and evidence as well as oral and written public comment.

Prior to the commencement of hearing, Mr. William Alter and A.R.F. Landfill, Inc. filed appearances in opposition to a grant of the Application. Also prior to the commencement of hearing, WMII filed a motion to disqualify a portion of the members of the LCB from hearing the case. Specifically, WMII moved to disqualify County Board Members F.T. "Mike" Graham, Bruce Hansen, Norman Geary, and C. Richard Anderson on the grounds that they were biased and prejudiced against WMII (see following). The motion was argued on the first day of hearing where WMII also questioned the four challenged members. The LCB subsequently considered and denied WMII's motion.

On October 25, 1988, after the hearings and post-hearing comment period were complete, the Committee issued its findings and recommendation to the full LCB. The Committee found that WMII had satisfied its burden of proof regarding one of the statutory criteria, criterion #4, but had failed to satisfy the remaining five criteria, #1, #2, #3, #5, and #6. The Committee recorded separate findings and votes on each of the six applicable criteria, and voted 6-1 for denial of the Application. On November 1, 1988, the full LCB by a vote of 16-5 accepted the Recommendations of the Committee as its own resolution ("Resolution") and denied the Application. The LCB, by the same vote, resolved to adopt the findings of the Committee as the findings of the full LCB.

On November 23, 1988, WMII filed the instant appeal. Hearing before this Board was held on February 3, 1989, in Waukegan, Illinois. Briefs were filed by WMII on February 15, 1989 and by the LCB on February 24, 1989. WMII filed a Reply Brief on March 6, 1989.

REGULATORY FRAMEWORK

Requirements for the siting of new regional pollution control facilities are specified in the Act. Section 39(c) of the Act provides that "no permit for the development or construction of a new regional pollution control facility may be granted by the [Environmental Protection] Agency unless the applicant submits proof to the Agency that the location of said facility has been approved by the County Board of the county if

in an unincorporated area *** in accordance with Section 39.2 of this Act". The six applicable criteria¹ set forth in Section 39.2(a) are, in pertinent part:

- (a) The county board *** shall approve the site location suitability for such new regional pollution control facility only in accordance with the following criteria:
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 minimize the effect on the value of the surrounding property;
 4. the facility is located outside the boundary of the 100 year flood plain, or the site is flood proofed;
 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.

Section 40.1 of the Act charges this Board with reviewing the LCB's decision. Specifically, this Board must determine whether the LCB's decision was contrary to the manifest weight of the evidence. E&E Hauling, Inc. v. Illinois Pollution Control Board, 116 Ill.App.3d 586, 451 N.E. 2d 555 (2nd Dist. 1983), aff'd in part 107 Ill.2d 33, 481 N.E.2d 664 (1985); City of Rockford v. IPCB, 125 Ill.App.3d 384, 386, 465 N.E.2d 996 (1984);

¹ At the time of the filing of the Application, Section 39.2(a) of the Act contained eight criteria. Since the proposal is for a non-hazardous waste facility, and criterion #7 covers hazardous waste facilities, that criterion is not applicable. Criterion #8 is inapplicable because it covers requirements regarding location within a regulated recharge area, for which, at the time of filing of the Application, no such requirements were yet adopted.

Waste Management of Illinois, Inc., v. IPCB, 122 Ill.App.3d 639, 461 N.E.2d 542 (1984). The standard of manifest weight of the evidence is:

A verdict is ... against the manifest weight of the evidence where it is palpably erroneous, wholly unwarranted, clearly the result of passion or prejudice, or appears to be arbitrary, unreasonable, and not based upon the evidence. A verdict cannot be set aside merely because the jury [County Board] could have drawn different inferences and conclusions from conflicting testimony or because a reviewing court [IPCB] would have reached a different conclusion ... when considering whether a verdict was contrary to the manifest weight of the evidence, a reviewing court [IPCB] must view the evidence in the light most favorable to the appellee.

Steinberg v. Petra, 139 Ill. App. 3d 503, 508 (1986).

Consequently, if after reviewing the record, this Board finds that the LCB could have reasonably reached its conclusion, the LCB's decision must be affirmed. That a different conclusion might also be reasonable is insufficient; the opposite conclusion must be evident (see Willowbrook Motel v. IPCB, 135 Ill.App.3d 343, 481 N.E.2d 1032 [1985]).

Additionally, this Board must evaluate whether the LCB's procedures used in reaching its decision were fundamentally fair, pursuant to Section 40.1 of the Act (E&E Hauling, supra). Since the issue of fundamental fairness is a threshold matter, the Board will consider this matter first.

FUNDAMENTAL FAIRNESS

Ill. Rev. Stat. 1986 ch No. 111 1/2 par. 1040.1 requires that this Board review the proceedings before the LCB to assure fundamental fairness. In E&E Hauling, the first case construing Section 40.1, the Appellate Court for the Second District interpreted statutory "fundamental fairness" as requiring application of standards of adjudicative due process (116 Ill.App.3d 586). A decisionmaker may be disqualified for bias or prejudice if "a disinterested observer might conclude that he, or it, had in some measure adjudged the facts as well as the law of the case in advance of hearing it" (Id., 451 N.E.2d at 565). It is also important to note that in an analysis of bias or prejudgment elected officials are presumed to be objective and to act without bias. The Illinois Appellate Court discussed this issue in Citizens for a Better Environment v. Illinois Pollution Control Board, 152 Ill. App. 3d 105, 504 N.E.2d 166 (1st Dist. 1987:

In addressing this issue, we note that it is presumed that an administrative official is objective and "capable of judging a particular controversy fairly on the basis of its own circumstances." (United States v. Morgan (1941), 313 U.S. 409, 421, 85 L. Ed. 1429, 1435, 61 S. Ct. 999, 1004). The mere fact that the official has taken a public position or expressed strong views on the issues involved does not serve to overcome that presumption. (Hortonville Joint School District No. 1 v. Hortonville Educational Association (1976), 426 U.S. 482, 49 L. Ed. 2d 1, 96 S. Ct. 2308). Nor is it sufficient to show that the official's alleged predisposition resulted from his participation in earlier proceedings on the matter of dispute. (Federal Trade Commission v. Cement Institute (1948), 33 U.S. 683, 92 L. Ed. 1010, 68 S. Ct. 793).

504 N.E.2d at 171.

A decision must be reversed, or vacated and remanded, where "as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect" (Id., 451 N.E.2d at 571). Finally, adjudicatory due process requires that decisionmakers properly "hear" the case and that those who do not attend hearings in a given case base their determinations on the evidence contained in the transcribed record of such hearings (Id., 451 N.E.2d at 569).

WMII claims that the process by which the LCB considered and ruled on WMII's Application was fundamentally unfair because certain county board members had prejudged the Application. Specifically, WMII claims that before hearing on the Application, eight county board members had in some measure adjudged the facts of the Application, and had more than a mere predisposition against the Application. The eight which WMII named are Norman C. Geary, F.T. "Mike" Graham, Bruce Hansen, C. Richard Anderson, Deloris Axelrod, Carol Calabresa, John Reindl, and James E. Dolan.

Initially, the Board finds that of these eight LCB members, WMII challenged only four, Geary, Graham, Hansen, and Anderson, in its motion to disqualify presented before the LCB. The record does not indicate any allegations of bias and prejudice as to other than these four prior to WMII's raising the issue before this Board. Upon examination of the record and case precedent, the Board finds that WMII has waived any claim of bias or prejudice against LCB members Calabresa, Reindl, Dolan and Axelrod. (see, Waste Management of Illinois, Inc., v. PCB, 175 Ill. App. 3d 1023, 530 N.E.2d 682 (2nd Dist. 1988); and E & E Hauling, 481 N.E. 2d at 666). Even if the Board were to consider

the allegations regarding these four, the statements alleged to indicate bias, if made, were either stated outside the timeframe of the instant proposal, were vague as to timeframe, or were indicative of strong views held by the speaker but insufficient to establish that the speaker had prejudged the facts and law. Therefore, the statements would either have no bearing on this proceeding or are not relevant to a determination of bias. The Board will proceed to address the fundamental fairness issues relating to those four LCB members which were not waived, i.e., those pertaining to members Geary, Graham, Hansen, and Anderson.

WMII argues that LCB members Geary, Graham, Hansen, and Anderson were biased and prejudged its Application, and presents certain statements allegedly made by these members in support of its contentions. The Board finds that of these alleged statements, most have no bearing on the this proceeding because they were stated outside the timeframe of the instant proposal, during the LCB's consideration of other landfill applications. Moreover, these statements were reviewed by this Board and subsequently by the appellate court in the siting appeal proceedings of these earlier landfill applications. Of the other alleged statements relied upon by WMII, some are vague regarding content or timeframe, and some are indicative of strong views held by the speaker, but are not sufficient to establish that the speaker had prejudged the facts and law. (See, WMII v. PCB, PCB 87-75, Slip Op. December 17, 1987, and Ash v. Iroquois County Board, PCB 87-29, Slip Op. June 16, 1987).

The Board finds, however, that the statements which are attributed to LCB member Geary involving an alleged conversation between Geary and Richard Whittington are particularly troublesome. The testimony regarding the conversation is conflicting. Whittington claims that the conversation took place subsequent to the filing of the Application, but prior to the commencement of the hearings on the Application. Geary denies that the conversation took place. (Pet. Exh. 10 of PCB Hearing at 27-31, and Tr. at 58²). However, it is apparent that if the

²Transcripts of the Hearing before this Board are cited as "Tr.". Transcripts of the hearing held before the LCB are referenced herein by the designation "R.". Numbering of pages in the transcripts of the LCB hearings was restarted with each day of hearing. Additionally, on some occasions renumbering was started after recesses within a single day of hearing. To accommodate this situation, transcripts of the hearing before the LCB are referred to herein by date as well as page number, and include reference to the session in question where there is more than one numbered transcript per day. Thus, for example, "R. 8/22 P.M. at 25" cites to page 25 of the August 22, 1988 afternoon hearing.

conversation took place, no other LCB members were present, and there is no evidence that information regarding this conversation was ever conveyed to other LCB members prior to their vote. Notwithstanding any bias which may or may not be attributable to Geary, the Board finds that the record does not show that the actions or statements of LCB member Geary, or of any other of the challenged LCB members, were sufficient to taint the decision making process so as to prejudice other members' votes and thus affect the final action of the LCB.

The Board finds that the proceedings before the LCB were conducted in a fundamentally fair manner and will proceed to the merits of the Application.

STATUTORY CRITERIA

WMII claims that the LCB's conclusions as to criteria #1, #2, #3, #5, and #6 are against the manifest weight of the evidence, and that the LCB's decision should be reversed and site location approved. We will review each of these criteria in turn.

Criterion #1

Section 39.2(a)(1) of the Act requires that the applicant establish that "the facility is necessary to accommodate the waste needs of the area it is intended to serve". Relevant case law from the Second District Appellate Court provides guidance on the applicable analysis of this criterion:

Although a petitioner need not show absolute necessity, it must demonstrate an urgent need for the new facility as well as the reasonable convenience of establishing a new or expanding an existing landfill. ... The petition must show that the landfill is reasonably required by the waste needs of the area, including consideration of its waste production and disposal capabilities.

Waste Management of Illinois, Inc. v. PCB,
175 Ill. App. 3d 1023, 530 N.E. 2d 682 (2nd
Dist. 1988); citing Waste Management of
Illinois, Inc. v. Pollution Control Board,
123 Ill. App. 3d 1075, 463 N.E. 2d 969
(1984).

In support of its Application, WMII presented testimony at the LCB hearing of Mr. Richard W. Eldredge, a registered professional engineer. Mr. Eldredge testified that he prepared a written report contained in the Application which summarizes his analysis and conclusions on the issue of need. This report,

which is contained on pages 1-1 to 1-78 of the Application, consists of text, graphs, tables and maps which identify current waste disposal facilities and projections of future disposal capacities.

In his report, Mr. Eldredge examined six landfills within Lake County (BFI, ARF, Lake County Grading, Land and Lakes, Zion Municipal, and Lake Bluff), and five landfills outside Lake County which are closest to the County (Pheasant Run, Veugeler, Woodland, Mallard Lake, and Lake).

Mr. Eldredge testified that that Lake County generates waste totalling approximately 1,586,163 yd³/yr, that 3,524,381 yd³/yr is disposed of in Lake County, and that the remaining disposal capacity in Lake County is 9,809,670 cubic yards; he further stated that these figures are included in the Illinois Environmental Protection Agency's ("Agency") document entitled "The Available Capacity for Solid Waste in Illinois", prepared in 1987³ (R. 8/18 A.M. at 66-68). He stated that he also conducted an independent determination of the data provided in the Agency report by calling the operators of the sites (Id. at 75). Mr. Eldredge stated that he further examined a report prepared by H.D.R., an engineering firm retained by the Lake County Joint Action Solid Waste Planning Agency and that the figures contained therein were in close agreement with the Agency report (Id. at 69).

Mr. Eldredge concluded that sometime between 1991 and 1993, "probably closer to 1991", Lake County will have an inadequate capacity for waste disposal (Id. at 70-71). Mr. Eldredge's report specifically states that "Lake County's waste generation (at 5.5 ppd) will exceed Lake County's disposal capacity by 22.4% in 1989 and Lake County by itself will exceed Lake County's and 5 closest landfills [sic] capacity by 57.6% in 1991" (Application at 1-30; emphasis in original). Based on examination of the remaining capacity in Lake County and the rate of existing disposal, Mr. Eldredge opined that there is a need for this facility in Lake County (R. 8/18 A.M. at 71).

On cross examination, Mr. Eldredge stated that information on landfill capacity for those facilities outside Illinois was obtained from communications with the operators. Of these, he noted that the Pheasant Run Landfill located in Bristol, Wisconsin, is included in Figure 1-22 of his report; Mr. Eldredge concluded that this facility disposes of 1,300,000 gate

³This Agency report was amended in October 1988. The amended report was not available at the time of the LCB's consideration of the Application and hence is not a proper factor in this review of the LCB's decision.

yards/year and will be available until approximately the year 2001 at this rate (Id. at 78). He did not draw any further conclusions regarding the impact of the existence and availability of this facility to Lake County.

Mr. Eldredge also stated that his study examined only those sites which were already permitted to receive waste and those sites which had already been granted approval for expansion (Id. at 95). He agreed that subsequent to the preparation of his report, the Woodland facility in Kane County was granted expansion which extended its longevity for approximately six years, and that the Techny or Lake Landfill has received an expansion approval which increases the life of that landfill for about 3 years (Id. at 95-7). He also agreed that the landfill at East Troy, Wisconsin has opened, but stated that he contacted its operators who told him that they have not been taking Lake County Waste, and "didn't see that they would." (Id. at 99).

Mr. Eldredge stated that when estimating remaining life, he chose the most conservative numbers which were those contained in the Agency report (Id. at 125). He said that the years remaining at the BFI facility were calculated by the Agency as 3 years, and the operator reported 6 years remaining (Id. at 124-5).

There were no other witnesses presented to testify on the issue of need.

The LCB found that WMII failed to establish that the facility is necessary to accommodate the waste of the area it is intended to serve with any credible evidence, stating that Mr. Eldredge's analysis was not credible for the following reasons:

- A) He failed to do a complete analysis of the remaining capacity of the landfills in and around the Lake County Area.
- B) He failed to take into consideration the Lake County Joint Action Solid Waste Planning Agency plan for recycling, composting and other technologies designed to minimize the need for landfill capacity.
- C) He included in his analysis for need, garbage being taken in from other than Lake County, but excluded areas outside of Lake County that accept Lake County garbage.

Mr. Eldredge admitted that there remains over six (6) years capacity in existing Lake County landfills.

Resolution at 3

The Board finds that its evaluation of the LCB's decision on Criterion #1 is a difficult call, especially in light of the fact that there were no witnesses presented to rebut the testimony offered by WMII. However, the Board also believes that it is necessary for its analysis in this instance to place the decision of the LCB in the context in which it was made. As this Board observes from its examination of the record in this proceeding and as the LCB points out (LCB Brief at 51-53), the issue of waste disposal programs and capacities in Lake County is hardly a matter of first impression for the LCB. The LCB has reviewed several applications for landfill siting within recent years, including a 1987 decision on an application by WMII for the identical site herein at issue. (The prior WMII application is partially distinguishable from the instant application in that the former included an incineration facility along with the proposed landfill facility.) These prior reviews included extensive analyses of waste disposal capacity with substantial portions of the records directed to the issue of the need for a landfill. These prior reviews, in most cases, were further appealed to this Board and the Second District Appellate Court. Moreover, during the time that the LCB has handled these reviews there has been minimal change in the composition of the siting committees and board itself.

Additionally, Lake County has itself been actively engaged in waste disposal planning through its agency, the Lake County Joint Action Solid Waste Planning Agency ("SWAP"). Although SWAP did not testify before the LCB in the instant record (as it had in prior LCB siting proceedings), it did submit a public comment fully reiterating its position, and concluding that the WMII proposed landfill is not a necessary facility.

Taken together, these observations demonstrate that the LCB is a body well-versed on the issue of need for waste disposal capacity in Lake County. The LCB asked pointed questions, which indicated that the witness failed to consider matters among those noted in the LCB's conclusions. The LCB demonstrated acute knowledge of criterion #1 issues, and was clearly not satisfied with the answers received, specifically regarding the availability of disposal options at other facilities, and the extent to which the Pheasant Run facility actually impacts upon Lake County's future waste disposal situation.

As noted above, the LCB found that WMII failed to establish that the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve, finding WMII's witness' testimony incredible. At first blush, the deficiencies noted by the LCB may seem less weighty than the evidence presented. It may even be said that upon review of the same evidence this Board or another reviewing court may have reached a different conclusion. However, under the manifest weight standard and given the understanding of criterion #1 issues

exhibited by the LCB as noted above, as well as the fact that the LCB was in the best position to judge the credibility of the evidence presented, the Board finds that the LCB's findings on Criterion #1 are not contrary to the manifest weight of the evidence.

Criterion #2

Section 39.2(a)(2) of the Act requires that the applicant establish that "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected".

Matters pertaining to Criterion #2 encompass more than half of the Application and the majority of the Appendices to the Application. They also elicited the largest amount of testimony among the criteria at hearing, including being addressed during eight of the Committee's evidentiary sessions by at least one or more witnesses. Among the principal WMII witnesses addressing criterion #2 were J. Christopher Lannett (R. 8/17 at 45 et seq.) Robert B. Kewer (R. 8/18 P.M. at 4 et seq.), William R. Schubert (R. 8/19 at 45 et seq.), and Dale R. Hoekstra (R. 8/22 at 4 et seq.). Among principal County witnesses addressing criterion #2 were Dr. Nolan Aughenbach (R. 8/24 at 4 et seq.), George Noble (R. 8/29 at 37 et seq.), and Herbert F. Harrison (R. 8/30 at 31 et seq.).

Criterion #2 encompasses, by its nature, a wide variety of location, design, and operational issues, of varying nontechnical and technical nature. Among locational issues is the matter of whether the landfill is proposed to be located at a physically suitable site, in consideration of at least local geology and hydrogeology. Design elements relate to protective features of the landfill design, such as a landfill liner, leachate collection system, gas control system, groundwater monitoring system, and surface water control system. Also encompassed in criterion #2 are a variety of proposed operational elements, including type and frequency of monitoring of air, land, and water, daily operational plans, and closure and post-closure maintenance.

Apparently not all of the many potential issues related to criterion #2 were found by the LCB to enter into its decision. Rather, the LCB cites only a limited number of issues which it contends contributed to WMII's failure to carry its burden of proof with respect to criterion #2.

It is uncontested that WMII's soil borings showed that some sands occur within the dominantly mixed sand-silt-clay (glacial till) materials underlying the proposed site. It is equally uncontested that the nature of these sands, as for example their geometry and number, whether they are thick or thin, and whether

they are interconnected or isolated, are integral to the issue of whether the site location poses a potential for groundwater contamination.

Mr. Kewer, a hydrogeologist testifying on behalf of WMII, characterized the sands as occurring in "seams" which are "very sporadic" and discontinuous (R. 8/18 P.M. at 6). Indeed, the soil boring data (Application at 2B-1 to 2B-94) and the corresponding laboratory test data (Application at 2C-1 to 2C-99) reveal that the geologic materials underlying the proposed site are dominated by fine-grained, predominantly silty-clay materials. All such observations are consistent with the conclusion that the dominant material into which the landfill is proposed to be developed is glacial till.

Glacial till, if it is sufficiently thick and stratigraphically homogeneous, generally forms a suitable host material for an otherwise properly designed landfill. The thickness of the glacial till beneath the proposed site does not appear to have been an issue with the LCB. However, the stratigraphic homogeneity of the till is an issue.

A principal feature of stratigraphically homogenous glacial till is its typically low hydraulic conductivity. The significance of this relationship is that landfill leachate, should it escape the landfill site, will migrate only very slowly through the glacial till and thus reduce the possibility that the leachate will contaminate nearby aquifers. However, it is common that glacial till is not stratigraphically homogeneous, but rather is interstratified with well-sorted materials (sands and gravels, collectively termed outwash) which have high hydraulic conductivities. These interstratified, high-hydraulic conductivity materials may act as conduits by which escaped leachate gains access to groundwater supplies and contaminates them.

The LCB argues that WMII was not able to prove that the admittedly existing sands were of such nature as to not constitute potential pathways for groundwater contamination. In support thereof, the LCB notes the testimony of Dr. Aughenbaugh, a geotechnical engineer and expert in glacial depositional processes (R. 8/24 at 3-6). Dr. Aughenbaugh questioned the assumption of WMII that the sands beneath the proposed site are discontinuous. He noted, based on his studies of active glacial deposition, that "it's more common and more probable that these pockets of sand [encountered in glacial till] are not discontinuous or isolated but in fact continuous" (Id. at 18). He further noted that sand bodies encountered in glacial till often have a sinuous geometry, and that therefore WMII's contention that failure to find individual sands consistently between bore holes is not evidence of lack of continuity of the sand bodies (Id.).

WMII contends that Dr. Aughenbaugh's supposition of the continuity of the sand bodies is inconsistent with both field permeabilities tests and piezometric data (Reply Brief at 28, citing Application at 2-50 to 2-55). However, this Board's own review of the relevant portions of the record fails to confirm this inconsistency. In fact, there appears to be many interpretations of the data which are reconcilable with Dr. Aughenbaugh's supposition.

Dr. Aughenbaugh further questioned whether WMII conducted a sufficient number of borings to adequately characterize the geology of the site. In particular, he concluded, based upon analysis of WMII's soil boring data, that the nature of the geologic materials changes across the site, with more sand and silt occurring in the southeast of the site than elsewhere (Id. at 21). From this observation the LCB argues that the southeast section is potentially more susceptible to contamination, and therefore requires special investigation which WMII did not provide.

A principal element in this Board's review of the LCB decision is whether, in light of the manifest weight of the evidence standard, the decision of the LCB was "palpably erroneous, wholly unwarranted, clearly the result of passion or prejudice, or appears to be arbitrary, unreasonable, and not based upon the evidence" (Steinberg v. Petra, supra) given the nature of the testimony.

Despite attempts to call into question the expertise of both Mr. Kewer and Dr. Aughenbaugh, this Board in its own technical review of the materials presented in the record, cannot find fundamental fault with the pertinent conclusions drawn by these witnesses. Where conflicting testimony exists, it is in controlling part disagreement among apparently qualified and competent individuals. Moreover, given this conflicting testimony, it is not against the manifest weight of the evidence that a majority of the LCB found that WMII had not carried its burden of proof with respect to geologic and hydrologic aspects of criterion #2. Accordingly, this Board must affirm the LCB's decision on criterion #2.

This analysis of the geologic and hydrogeologic aspects of criterion #2 is dispositive of this matter. However, for the record, this Board notes that the LCB included additional factors in its decision on criterion #2. These include considerations of leachate management, post-closure care, litter control, application of daily cover, and proposed handling of special wastes (Resolution at 4-5). This Board does not find that the LCB's decision on these additional factors, in their aggregate, is against the manifest weight of the evidence.

Criterion #3

Section 39.2(a)(3) of the Act requires that the applicant establish that the proposed facility is located so as to minimize incompatibility with the surrounding area and to minimize the effect on the value of the surrounding property.

On the issues of minimization of incompatibility with the surrounding area and minimization of the effect on the value of the surrounding property, WMII presented J. Christopher Lannert (R. 8/17 at 45 et seq.) and William A. McCann (R. 8/17 at 160 et seq.). WMII also presented two witnesses, Christopher Robertson and Thomas Hinesly, who testified regarding the shade effects of proposed facility (R. 8/19 at 3 et seq.). The County presented Robert Mosteller (R. 8/24 at 167 et seq.), George Noble (R. 8/29 at 37 et seq.), and Herbert Harrison (R. 8/30 at 4 et seq.). William Alter, one of the objectors, presented Neil King (R. 8/29 at 3 et seq.). The LCB found that WMII failed to satisfy this criterion.

J. Christopher Lannert, a landscape architect and urban planner, testified that the facility is so located as to minimize incompatibility with the character of the surrounding area. Lannert summarized his position, stating that on the basis of the landform, the setbacks, the screening berms, the limited number of adjacent uses, and the landform's location within the horizon (sic), the landfill has been located so as to minimize any incompatibility with the surrounding area (R. 8/17 at 53-4). He described how the facility is proposed to be designed, and stated that there would be two landforms separated by the Commonwealth Edison easement. He described various setbacks from adjacent roadways and a right-of-way which range between 140 feet to 470 feet. He also described various high points ranging from 114 feet to 131 feet (Id. at 51-4).

On cross examination, Lannert described in further detail the various proposed screening berms, and well as intermediate cover, to be placed next to the operational face of the landfill. He stated that the landform will be visible, but the actual operation of the active face of the landfill will be hidden from view (Id. at 66). He stated that the highest elevation of the proposed landfill would be 950 feet which is higher than the current ARF landfill and slightly higher than the ARF proposed expansion (Id. at 69). He said that along Route 83, the landform itself will be screened by the placement of approximately 800 lineal feet of berms and vegetation on the perimeter of the property. He stated that the berms will average between 6 to 8 feet in height and will undulate (Id. at 131). He also described additional setbacks ranging between 470 and 600 feet, with a minimum setback of 100 feet from the property line (Id. at 77-8).

WMII also presented additional testimony that the shade effects of the proposed facility would be minimal. (See testimony of Mr. Christopher Robertson, the Energy Services Manager for the Springfield municipal electrical utility, (R. 8/19 at 1 et seq.) and Thomas Hinesly, professor of agronomy at the University of Illinois, (Id. at 22 et seq.)). This evidence was not rebutted.

Robert Mosteller, Deputy Director of the Lake County Department of Planning, Zoning and Environmental Quality, testified that he reviewed the Application primarily for the visual impact that the proposed landfill would have on the area. He stated that he reviewed the topography maps of County Exh. 12, and viewed the area from differing locations. He opined that the proposed landfill would have a very substantial and detrimental effect on the visual character of the surrounding property. He based his opinion on the location of the proposed site, the elevation and slopes of the two landfills, as well as the bulk of the landfills (R. 8/24 at 167-9, 179). He described the location of the site as comparatively higher above sea level than the vast majority of Lake County and stated that the maximum height of the proposed landfill between 948 and 950 feet is slightly lower than the present highest point in Lake County, which is Gander Mountain at 957 feet, located in the extreme northwest corner of Lake County (Id. at 170-1).

On cross examination, Mosteller admitted that he was unaware of the provisions to maintain vegetative cover over the proposed landfill that have been proposed as part of the Application. He stated that from the north, there are points where the site would be blocked from view by the ARF landfill, and by trees (Id. at 187-8). When asked what further steps could be taken in order to minimize visual impact, he answered that to reduce the size and slopes of the landfill, and perhaps to increase the height of the berms (Id. at 192-3).

George Noble, environmental consultant, testified on behalf of the County. He opined that the proposed facility does not minimize the effect on the character of the surrounding area (R. 8/29 at 37). He based his opinion on various matters related to mitigation measures (Id. at 39-40). He also stated that the proposed landfill, at approximately 120 feet above the existing elevation, would be much higher than any other landforms in the surrounding two-mile area (Id. at 48). He did not appear to take into consideration the pre-existing ARF landfill at this point, however, on cross examination, he said that he did (Id. at 125).

William McCann, a real estate appraiser and licensed real estate broker, testified for WMII that the proposed facility is located so as to minimize any incompatibility with the surrounding area and to minimize the effect on property values (R. 8/17 at 160-3). He based his opinion on the fact that the

location is basically rural, is substantially influenced by sparse developments and agricultural use, and on the results of his studies as noted below (Id. at 163). Mr. McCann stated that the area contains a manmade buffer zone comprised of a railroad right-of-way, and is largely influenced by the pre-existence of a landfill in the area (Id. at 164).

The bulk of McCann's testimony was directed to the issue of effect on property values. Mr. McCann stated that he analysed property transfers and trends within the most approximate residential subdivisions, together with evidence on whether the existence of a present and historic landfill within the area has had an adverse impact on the value, marketability or ordinary rate of appreciation of any property values in the area (Id. at 164-5).

On cross examination, McCann stated that the thrust of his study was to determine whether or not an existing landfill within this vicinity has shown any evidence of a deterrent to the value and marketability of other residential property in the vicinity. He said that considering other studies he has made in similar situations, he found that landfills generally do not deter development, right up to their peripheries (Id. at 190). He stated that various factors impact upon marketability, including the condition of the property, its location, the price, the availability of financing, the motivation of the seller, the motivation of the buyer, among others (Id. at 202-3). He said that he did not find a large dissimilarity between subdivisions further removed from a landfill and those closer in proximity (Id. at 207).

He stated that he believes that there has been little significant impact on the real estate values in the area due to the ARF landfill, although he did not study impact prior to the start of operations of the ARF facility. He explained, however, that the ARF facility began operations about 30 years ago, and that in his opinion, going back that far in time would not be germane to the issue. He said this is so because there have been many other occurrences within the area such as growth, rezoning, sewer installations, development of schools and roads, among other factors that would be too difficult to isolate from the influence of a landfill, if any. He believes that his studies have indicated that there is no discernible information that shows property values have stagnated, declined or experienced any substantially different rate of appreciation than they would under situation where there was no landfill (Id. at 210-2).

McCann admitted that although he sees nothing wrong with the height of the facility as proposed, he thinks there would be some additional minimization of impact on the surrounding property values from a landfill which is lower in height (Id. at 246).

Herbert Harrison, M.A.I., a real estate appraiser, testified that he was appointed by the County to evaluate the material and testimony presented by WMII regarding Criterion #3, to determine if the material and testimony supported the opinions and results reported (R. 8/30 at 5-7). Mr. Harrison stated that in his opinion, Mr. McCann's conclusions were not warranted because there is insufficient data to support his opinions (Id. at 8). He then pointed to various areas where he found deficiencies in McCann's report, including the methodology of the statistical study, lack of adjustment for factors such as the changing value of the dollar for different time frames used, lack of distinction between types of sales, and incomplete comparison information from other sites (Id. at 12-14).

Harrison testified that in order to have a calculation of appreciation which is reflective of impact, one must have the information prior to the introduction of the element in question, as well as information after its introduction. From this he stated that once the impact has been introduced on a given property, price will move from that point, up or down, according to the economy (Id. at 10).

Harrison stated that it is an appraiser's job to study the total market of the subject property and reflect that market from an unbiased perspective and from the position of an informed purchaser. He opined that McCann did not do this based on what he viewed as a faulty statistical study and the fact that McCann rendered opinions on need (Id. at 20).

On cross examination, Harrison stated that in order to determine whether this facility is so located to minimize the effect on the value of the surrounding properties, he would have taken two locations where multiple landfills are located and perform assessments before and after the introduction of each landfill (Id. at 42-44).

Neil King, a real estate broker and appraiser, testified on behalf of William Alter. Most of Mr. King's testimony echoed the concerns which Herbert Harrison had with the McCann study.

The LCB found that WMII failed to show that the facility is located so as to minimize the incompatibility with the surrounding area and to minimize the effect on the value of the surrounding property. The LCB based its findings upon its review of the McCann study contained in the application and the testimony of McCann and Harrison, finding that Harrison proposed "a better test" for the determination of effect of a landfill on surrounding values, by considering values both before and after the introduction of a landfill. The LCB further found, according to the testimony of George Noble and Robert Mosteller, and evidence regarding the height of the proposed landfill, that height of the landfill would adversely impact the visual character of the surrounding area.

Criterion #3 calls for the facility to be located so as to "minimize" incompatibility -- but does not allow for rejection simply because there might be some reduction in value. ARF Lanfill, Inc. v. Lake County, PCB 87-51, Slip Op. 10/1/87 at 24; citing Watts Trucking Service, Inc., v. City of Rock Island (citation to be added). More is required of an applicant than a de minimus effort at minimizing the facility's impact. An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. Waste Management of Illinois, Inc. v. IPCB, 123 Ill. App. 3d 1075, 1090 (2nd Dist. 1984).

The Board finds that the LCB's findings on criterion #3 are not against the manifest weight of the evidence. Regarding the examination of the valuation of the surrounding property, the Board again cannot find fundamental fault with the conclusions drawn by the witnesses who testified on behalf of WMII and the County. In the briefs, both the LCB and WMII debate the propriety of examination of property values before and after the introduction of a landfill into the area. The Board finds that the witnesses held differing but viable views on this aspect, as well as other aspects of evaluation of impact on property. There is also conflicting evidence on the issue of minimization of the impact upon the character of the surrounding area and whether the minimization efforts as proposed are sufficient. Because there is viable testimony on both sides of the criterion #3 issue, the Board finds that determination of the LCB on criterion #3 is not against the manifest weight of the evidence.

Criterion #5

For criterion #5, the LCB determined whether the WMII had proposed a plan of operation which is "designed to minimize the danger to the surrounding area from fire, spills or other operational accidents."

The only witness presented to testify to this criterion was Mr. Dale Hoekstra, who testified on behalf of WMII. He stated that he is general manager of the Settler's Hill Landfill. He testified that based upon his experience and his review of the Application, he believes that the plan of operations has been designed to minimize any potential danger to the surrounding area from fire, spills, or other operational accidents (R. 8/22 A.M. at 9). He stated that he bases his belief upon that fact that employees have been trained in landfill fire procedures and the use of equipment, there is annual fire extinguisher training for employees, a water truck with hose will be kept on site, soil stockpiles will be easily accessible, and buildings will be inspected annually for compliance with the fire code. In addition, he stated that the Grayslake Fire Department would be called if needed (Id. at 10).

He stated that spills are highly unlikely because the site will not accept liquid waste. He stated that employees are trained in the identification of waste, and that a safety program will be in effect at all times to update employees on safety practices (Id. at 10-11).

On cross examination, when asked if there are any provisions for what would happen should leachate spill on the property, Hoekstra answered that a spill protection plan will be written prior to the beginning of operations. He admitted that there was no such plan at present (Id. at 14).

The LCB found that WMII did not present a plan of operation for the facility which is designed to minimize the danger to the surrounding area from fire, spills or other operational accidents. The LCB stated that WMII presented no clear plan for dealing with spills of any hazardous materials which may occur, and presented no contingency plan to deal with leachate which tests hazardous, or for hazardous gas condensate.

In its brief, WMII argues that the LCB's decision is against the manifest weight of the evidence and quotes portions of the Application regarding a protocol for accidental spills:

Spills will not present any danger at this site. The site will not receive liquid wastes. Any waste spilled will be cleaned up and disposed of in the landfill. Fueling of vehicles will be limited to an area around the maintenance building and will not be allowed at the working face or near any active part of the landfill. All site vehicles will be equipped with two-way radios for communications in case of an emergency.

A protocol will be setup (sic) for accidental spills or fires. This protocol will include the contacts to be made with specific employees of the County, IEPA, local fire officials, and firms which have the necessary capability for emergency response. This protocol will be posted in the Administrative office at the site, and those individuals and agencies which would be contacted will be made aware of its existence.

(Application at 2-76).

The Board notes that WMII proposes to set up a protocol for the handling of spills or fires as outlined in the Application, including a requirement that only trained personnel will handle leachate (Application at 2-80). Although there is some conflicting testimony in the record regarding a lack of a plan

for handling leachate spills at the site, the Board believes that WMII has submitted a plan which addresses the concerns of the LCB as outlined in its Resolution and as argued in the briefs. The Board notes that the Act only requires that the applicant propose a plan which is designed to minimize the danger to the surrounding area from fire, spills or other operational accidents. The Board concludes from examination of the evidence, even in the light most favorable to the LCB, that WMII could have done little more to minimize the danger to the surrounding area than what it has proposed here. The Board therefore finds that the decision of the LCB on criterion #5 was against the manifest weight of the evidence.

Criterion #6

For Criterion #6, the LCB determined whether the applicant proposed a plan in which "the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows."

WMII presented the testimony of Mr. Robert Hamilton, a registered professional engineer practicing in the area of civil and traffic engineering. The traffic section of the Application was prepared by Gewalt-Hamilton Associates, of which Mr. Hamilton is the president. At hearing, Mr. Hamilton explained the methodology of the traffic engineering study his firm prepared, and outlined his basic recommendations, specifically recommending the use of a right turn deceleration lane, a left turn lane and rumble strips for mud removal (R. 8/22 P.M. at 5-8). When asked whether he had an opinion regarding whether the traffic patterns are designed so as to minimize any impact on existing traffic loads, Mr. Hamilton testified that in his opinion, there would be minimal impact upon the traffic at the site, particularly during peak hours (Id. at 10-11).

He also stated that wheel washers will not be required by the Illinois Department of Transportation (IDOT) (Id. at 11). On cross examination, he testified that although the Application indicates that wheel washers were initially recommended by IDOT, their recommendation changed subsequent to submittal of the Application and prior to hearing (Id. at 13). He further stated that IDOT reserves the right to require the installation of wheel washers if at sometime in the future they deem them necessary (Id. at 82). He stated that he did not recommend inclusion of a wheel washer because of problems experienced with such devices in cold weather (Id. at 13).

Hamilton testified that for his study he assumed the waste would come to the facility from throughout Lake County based upon population projections. He stated that he did not assume any would come from Cook County. He further stated, however, that should the directional distribution of vehicles be skewed

tremendously for some reason, the impact would be negligible because the vehicles would not be on the roadways during peak hours (Id. at 31-32).

Hamilton testified that the recommendations he made were to WMII. When asked whether WMII had accepted his recommendations, he stated that it is "pretty conclusive that they have accepted it", and that as he understands it, all of his recommendations have been accepted (Id. at 17, 25). He further stated, however, that he has not been authorized by WMII to commit to anything (Id. at 17). He also stated that if his recommendations were not accepted, his opinion would change, noting that if the improvements were not installed, particularly the deceleration lane and left turn bay, he would have serious safety concerns (Id. at 23). In its brief, WMII points to a statement in the Application regarding these recommendations as evidence of its commitment to implementation of the recommendations. The quoted portion reads: "[s]everal recommendations as to entrance design and roadway improvements were made and incorporated by the Applicant in the project design" (Application at 6-i).

Hamilton further testified on cross examination that he also estimated the number of vehicles making trips to the site for purposes other than waste hauling. He estimated 88 trips per day for recycling and 10 trips per day for employees, but did not estimate the number of tanker trucks for leachate removal or trucks for compost. He said he did not estimate any maintenance vehicles moving to and from the site because he anticipated that most of that activity is on-site already (Id. at 46-47).

The LCB determined that WMII failed to sustain its burden regarding Criterion #6. The LCB specifically noted deficiencies in the information presented by WMII, including the fact that it is unclear whether the recommendations of Mr. Hamilton would be implemented by WMII, the fact that a wheel washer device was not included as recommended by IDOT, the fact that the traffic report does not include estimates on traffic coming from areas other than Lake County, and that the application does not consider the number of vehicles arriving at the site for recycling operations, maintenance and leachate removal.

From examination of the record and arguments presented in the briefs, the Board finds that WMII adequately addressed the matters which were of concern to the LCB, namely the wheel washer situation, the directional flow of traffic, and the number of vehicles entering and exiting the site. Although there is some conflicting evidence in the record regarding whether WMII will accept and implement the recommendations of Mr. Hamilton, the Application contains language that the recommendations were incorporated by the applicant into the project design. The Board notes that the Act only requires that the traffic patterns to and from the facility be so designed as to minimize the impact on

existing traffic flows. The Board therefore finds that the decision of the LCB on criterion #6 was against the manifest weight of the evidence.

Having found that the LCB's decision on criteria numbers 1, 2 and 3 are not against the manifest weight of the evidence, the Board must affirm the LCB's decision to deny WMII's application.

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

ORDER

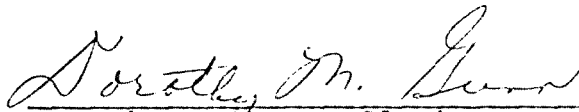
The November 1, 1988, decision of the Lake County Board denying site-suitability approval to Waste Management of Illinois, Inc., for Petitioner's proposed landfill is hereby affirmed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111¹/₂ par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Members Joan Anderson, John Marlin and J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 6th day of April, 1989, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board