ILLINOIS POLLUTION CONTROL BOARD
January 26, 1984

TOWN OF OTTAWA,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 83-135
	)	
LASALLE COUNTY BOARD and STATES LAND IMPROVEMENT CORPORATION,	)	
	)	
Respondents.	)	

VILLAGE OF NAPLATE,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 83-136
	)	
LASALLE COUNTY BOARD and STATES LAND IMPROVEMENT CORPORATION,	)	
	)	
Respondents.	)	

MR. TIMOTHY J. CREEDON III, OF HOFFMAN, MUELLER & CREEDON, APPEARED ON BEHALF OF PETITIONER TOWN OF OTTAWA.

MR. ROBERT M. ESCHBACH, OF HOWARTER & ESCHBACH, APPEARED ON BEHALF OF PETITIONER VILLAGE OF NAPLATE.

MR. LOUIS J. PERONA, ESQUIRE, APPEARED ON BEHALF OF LASALLE COUNTY BOARD.

MR. JAMES I. RUBIN, OF BUTLER, RUBIN, NEWCOMER & SALTARELLI, APPEARED ON BEHALF OF RESPONDENT STATES LAND IMPROVEMENT CORPORATION.

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

Pursuant to the Environmental Protection Act (Act) (Ill. Rev. Stat. 1981, ch. 111-½, par. 1001 et seq.), specifically Section 40.1, (Ill. Rev. Stat. 1982, Supp., ch. 111-½, par. 1040.1), the Town of Ottawa (Town) and the Village of Naplate

(Village) on September 16, 1983, separately petitioned to the Illinois Pollution Control Board (Board), appealing the decision of the LaSalle County Board's (County) approval of site location suitability to applicant, States Land Improvement Corporation (States Land) for construction of a new regional pollution control facility to accept, handle, and dispose of municipal and non-hazardous special waste in unincorporated Ottawa Township. Nine County hearings were held, generating transcripts totalling over 1900 pages and exhibits. (Cited as R.).

The proposed site is composed of 38 acres, 25 of which may be suitable for landfilling. It is an old strip-mined area with spoil piles on the property. This site has a projected useful life of 11½ years. The expansion of the existing landfill of States Land, ½ mile away, was limited due to the condemnation proceedings for a county highway. The existing landfill was to close approximately at the end of December, 1983. The proposed site is intended to replace the existing site. Other uses in the area include the Carus Chemical landfill, the closed Brockman landfill, railroad tracks and a quarry pit.

In its resolution of August 15, 1983, the County approved the site location suitability with conditions A through N, inclusive, and on September 12, 1983, withdrew the prior resolution and adopted a second resolution which deleted conditions M and N. The Town and Village each brought a third party appeal to the Board pursuant to Section 40.1(b) and petitioned for a hearing within 35 days. These cases were consolidated for hearing by order of the Board on its own motion dated September 23, 1983. The County Clerk filed with the Board a certified record of the proceedings below on October 14, 1983. The Board held a hearing on November 30, 1983 in accordance with Section 40.1(a) and Section 32.

The legal issues to be decided before the Board will be grouped under three headings: JURISDICTION AND WAIVER, FUNDAMENTAL FAIRNESS, and MANIFEST WEIGHT following a more detailed discussion of proceedings at the county level.

THE RECORD DEVELOPED BY THE COUNTY

The legislature has mandated in Section 39.2(a) that the County or local governing body consider the six criteria when deciding to grant or deny site location suitability of any new regional pollution control facility and give reasons therefor:

"The County Board...shall approve the site location suitability for such new regional pollution control facility only in accordance with following criteria:

(I) the facility is necessary to accommodate the waste needs of the area it is intended to serve;

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

(III) the facility is located to as to minimize incompatibility with the character of the surrounding property.

(IV) the facility is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation, or the site is flood-proofed to meet the standards and requirements of the Illinois Department of Transportation and is approved by that Department.

(V) 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

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

Criterion #1 was addressed by the testimony of David Beck, a technical specialist for Andrews Environmental Engineering, Inc. and a former Illinois Environmental Protection Agency (Agency) landfill inspector. He cited approximately 6 landfills that were either outside the general service area of the proposed site or were within but would not accept additonal and/or special wastes. (R34-40) His testimony is buttressed by that of others: Richard Kuhn (R. 357), Robert Miller (R. 324), John Roberts (R. 290), Chris Knudsen (R. 391, 395) and by letters from the landfills stating that they would not accept additional and/or special wastes (R. 34-40). Criterion #2 will be addressed later.

Michael Crowley, a real estate appraiser, testified as to criterion #3. He described the property surrounding the proposed site, including railroad tracks to the south and east, a quarry, the Carus landfill to the west, further west the existing States Land site and the Brockman site, and wooded hillsides and ravines to the north (R. 274). Crowley also gave his expert opinion that the proposed use of the site was compatible with Criterion #3 (R. 274). Additionally, he opined that there would be no detrimental effect on market values of neighboring properties (R. 277).

Evidence as to criterion #4 was addressed by Andrew Rathsack, who testified that the proposed site was outside the

100 year flood plain (R. 600). Additionally, Dames & Moore (D & M), the experts hired by the County stated that they had no concern as to criterion #4 (R. 1303).

As to criterion #5, minimizing danger to the surrounding area, D & M had no concern (R. 1303). It was stipulated that organic solvents, which are usually flammable, would not be landfilled. Heavy equipment also would be on hand for any contingencies. Dayal Saran and Steven Martin, employees of D & M, were concerned about the danger of explosion from hydrogen cyanide gas evolved from one generator's waste sludge containing cyanide. (R. 1285). Later, it was shown by letters from the City of Spring Valley and from their consultant that the D & M report was based on a sample from 1979. Since then, cyanide has been eliminated from the sludge (R 1717, 1718). Evidence showed that the plan was designed to minimize the danger to the surrounding area.

Beck also testified as to criterion #6. After a study of traffic in the area, he was of the opinion that there would be no significant change or impact on existing traffic flow (R. 43). Paul DeGroot, president of States Land, felt that since the proposed site was replacing their existing site the traffic count would remain the same (R. 904). In condemnation proceedings involving some of the property of States Land, the County gave States Land an access to the proposed site, which was needed due to the new County highway bisecting States Land property (R. 958). This included an agreement to allow heavy equipment to cross the highway. Vincent Dettore, the Highway Commissioner of Ottawa Township, testified that this access point was muddy on rainy days and further, that because the view of approaching motorists was blocked by a hill, the entrance should be moved (R. 1087). Upon cross-examination, Dettore admitted that States Land cleans the road voluntarily and that mud tracking was minimal (R. 1097). A prior witness stated that when heavy equipment was being moved, large warning signs were posted on the highway in both directions.

Criterion #2 concerns the public health, safety and welfare. The hydrogeology expert retained by States Land, Rauf Piskin, testified that the facility would meet criterion #2 (R. 175). He also made the following suggestions: that 4 monitoring wells be installed (R. 175); that the installation of the liner be verified by permeability and compaction tests (R. 172); that a 10 foot clay liner be placed where the coal seam is exposed over the St. Peter sandstone (R. 170). He agreed with Andrews' civil engineer that combination gas-leachate vents be used to facilitate the release of degradation gases and to siphon off any leachate if the need arose (R. 793-4).

The hydrogeology experts of D & M questioned Piskin. It is the opinion of D & M that field permeability tests should be performed on the liner and cover (R. 768) but they agreed that all that is required by the Agency is laboratory tests (R. 774). They also recommended that as an alternative to field testing, a minimum thickness of 2 feet of controlled fill should be placed on the liner bottom and on the sides where the shale is exposed (R. 1306). D & M originally recommended that the upper foot of the 10 foot liner be disked and recompacted (R. 774). There is a difference of expert opinion here. As to a leachate collection system, D & M agreed that it is not needed at this site (R. 1320-1). Also, it is not required by law in this situation. Dames & Moore agreed with the use of combination gas-leachate vents (R. 1323). The County, through D & M (R. 1337-1339), and States Land (R. 1683) agree that some type of additive, such as lime and/or compost, will be used to enhance vegetative growth on the final cover. States Land will also supply as-built plans to the County as suggested by D & M (R. 1683).

Eric Zimmerman, a geotechnical engineer, testified for the Town. As his testimony provides the primary basis for petitioner's manifest weight arguments, it will be discussed in detail in that section of this Opinion. It was his opinion that criterion #2 was not met because the proposed site was deficient in several respects.

JURISDICTION AND WAIVER

Section 39.2(e) states that "[i]f there is no final action by the county board or governing body of the municipality within 120 days after the filing of the request for site approval, the applicant may deem the request approved." Initially, the 120 day time period was extended by stipulation of both parties to expire on August 17, 1983. It is alleged by the Town and Village that the County was without jurisdiction to delete conditions M and N because the 120 days which were extended by stipulation had expired, and alternatively, even if the County had the jurisdiction, that its reconsideration was fundamentally unfair and resulted in undue prejudice. (See Fundamental Fairness). Similarly, Section 40.1(b) provides that the petition be heard "in accordance with the terms of Section 40.1(a). Section 40.1(a) provides that "[if there if no final action by the Pollution Control Board within 90 days, petitioner may deem the site location approved... Read together, the 120 day time period is construed as a waiver provision for the benefit of the applicant. If the time period elapsed with no final action by the Board, the site location would be deemed approved.... Village of Hanover Park v. County Board of DuPage, et al., PCB 82-69, rev'd on other grds, E & E Hauling, Inc., et al. v. Pollution Control Board, 116 Ill. App. 3d 586, 451 NE 570 (2nd Dist. 1983). Additionally, Section 40(a) provides for a 90 day

final action period and in conjunction with a 40(b) grant of RCRA permit by the Agency, Section (40)(a) has also been construed as a waiver provision for the benefit of the petitioner. PCB 83-135/136 Order, September 23, 1983, citing Alliance for a Safe Environment, et al. v. Akron Land Corp. et al., PCB 80-184, October 30,1980. Herein, the 120 day period for final action by the County in Section 39.2 likewise is construed as a waiver provision inuring to the benefit of the applicant to protect its rights.

FUNDAMENTAL FAIRNESS

What will be analyzed here are the allegations of the Village and Town that because of procedural improprieties and ex parte contacts they were denied statutory fundamental fairness.

As stated under JURISDICTION AND WAIVER in this Opinion, the Board construes the 120 day time period as a waiver provision for the benefit of the applicant. This is not a rigid time period; therefore, there is no fundamental unfairness inherent in 39.2(e) as applied to petitioners Ottowa and Naplate.

A hearing was held on November 30, 1983 pursuant to Section 40.1(b), which provides that the Board follow Section 40.1(a) procedures. Inter alia, subsection (a) states the following:

"... such hearing shall be based exclusively on the record before the County...;

... no new or additional evidence in support of or in opposition to any ... decision of the county board ... shall be heard by the Board."

Additionally, Section 40.1(a) provides that the Board consider "the fundamental fairness of the procedures used by the county board ... in reaching its decision."

It is alleged that the applicant's resolution received more consideration than the resolutions of the petitioners but no meaningful evidence was presented to substantiate this allegation. The main contention by petitioners is that due to ex parte contacts, their right to a fundamentally fair proceeding was prejudiced. The facts underlying this contention are threefold: (1) that on the day of reconsideration by the County a telephone conversation took place between the president of the applicant to the County chairman, initiated by the applicant; (2) that because of this conversation, a letter from the attorney for the applicant was delivered to the County; (3) that because of this letter the County deleted two conditions. Ex parte contacts are those contacts that take place without notice and outside the record between one in a decision-making role and a party before that person or body. In E & E Hauling, the County held additional public meetings after the hearing but before the site approval decision with the applicant in attendance. There was no

effective public notice that the siting issue would be discussed. Because of the lack of effective public notice and the resulting inability of the other party to participate in the decision-making process, the Court deemed them ex parte contacts.

Herein, the telephone call by applicant was short and for the purpose of obtaining procedural information. It was not an ex parte contact. The letter to the County was not ex parte because all parties were furnished with a copy and there was effective public notice that the County would hold a public meeting. Counsel for applicant, by distributing copies of the letter to the petitioners, also gave notice, albeit short notice, of his intentions and his contact with the decision-maker. All the information, including differing proposed resolutions, were already before the County. As there were no ex parte contacts, there is no need to discuss whether they so irrevocably tainted the County's decision-making process so as to render the decision fundamentally unfair. E & E Hauling, citing PATCO v.Federal Labor Relations Authority, 685 F. 2d 547 at 564-65 (D. C. Cir. 1982). Additionally, the petitioners were given the chance for argument at the September 12 meeting, which they declined. Since the Town and Village failed to meet their burden of going forward at the Board hearing with enough evidence to show ex parte contacts, there is no finding of fundamental unfairness.

The petitioners allege that there was fundamental unfairness in that, even if there was jurisdiction, the County could not reconsider the August 15 resolution and delete conditions M & N on a subsequent date. This point was discussed in E & E Hauling, wherein the Court compared the County function in SB 172 (P.A. 82-783) hearings as both adjudicative - in the decision to approve or deny with reasons - and legislative - in the holding of a public hearing to amass information. Id. at 13, slip op. Since the imposition of conditions is a legislative function, so is the deletion. Id. at 14, slip op. Because of this distinction, herein the County Board could reconsider their prior resolution and amend/delete under their rulemaking powers. Id. at 18,: slip op., citing the Illinois Supreme Court in Monsanto v. Pollution Control Board, 67 Ill. 2d 276 (1977).

MANIFEST WEIGHT

Section 40.1(b) in conjunction with Section 40.1(a) provides that the burden of proof as to each of the criteria is on the petitioner and that the Pollution Control Board hearing be based exclusively on the record before the County. The standard of evidence to be used by this Board is the manifest weight of the evidence standard--that the decisions of the County are to be reversed only if they are against the manifest weight of the evidence. City of East Peoria, et al., v. Pollution Control Board, et al., 117 Ill. App. 3d 673, 452 N.E. 2d 1378 (3rd Dist

1983) citing Landfill, Inc., v. Pollution Control Board, 74 Ill. 2d 541, 387 N.E. 2d 258 (1978) and Mathers v. Pollution Control Board, 107 Ill. App. 3d 729, 438 N.E. 2d 213 (1982). Accord, E & E Hauling, Inc., citing, inter alia, Wells Mfg.Co. v. Pollution Control Board, 73 Ill 2d 226 (1978). Criteria #1, 3, 4, 5, and 6 were all decided on the record in favor of States Land by the County. Those decisions were not seriously challenged in this appeal, and after reviewing the record, the Board does not find them to be against the manifest weight of the evidence.

The evidence concerning Criterion #2 is that most contested by Ottawa and Naplate. The Zimmerman testimony regarding Criterion #2 was that the proposed site was deficient in that (1) plans for final cover should be submitted (R. 1119); (2) rainwater should be collected and sent away for treatment rather than being allowed to mix with the fill (R. 1120); (3) state of the art requires a leachate collection system (R. 1121); (4) the stated ion exchange capacity was too high because rather than 100% availability of the liner, only 3% to 4% of the liner would be available for attenuation (R. 1115); (5) the combination gas/leachate system would not work (R. 1136); and (6) that leachate could contaminate the New Richmond aquifer and subsequently the drinking water supplies by well pipes acting as conduits. (R. 1136). On cross examination it was shown that Zimmerman had visited the site only once, the morning of the testimony (R. 1179); that he was aware that the ion exchange capacity calculations took into account the worst case (R. 1194).

Other potential problems were addressed during the hearings relating to the number of area wells and whether there were timbers and logs buried on site. If the timbers/logs were present, they might act as conduits for leachate migration (which might be further accelerated by decomposition of the wood). The testimony was inconclusive as to the presence of timbers/logs where 2 former site owners disagreed with each other. (R. 1521, 1667-8, 1672). Their former crane operator agreed with one former owner in that he never buried any logs (R. 1674). The testimony of one former owner advocating the presence of logs was weakened by cross-examination (R. 1537, 1542-3). It is not up to the Board to reweigh the evidence, only to consider the decision in light of the manifest weight standard. Waste Management of Illinois,Inc. v. Board of Supervisors of Tazewell County, PCB 82-55, rev'd on other grds, City of East Peoria et al. v. PCB, et al., No. 82-648, (3d Dist., 1982). The testimony as to the wells was inconclusive. Based on the testimony as to the site, conditions (a-l) inclusive were added to the approval of the site. Condition (i) requires that the sandstone test boring to be insulated by a 10 foot berm or be covered with the liner. Additionally, condition (l) requires that the Contingency Plan for Detection of Pollutant Migration be followed. The County

found in favor of States Land as to criterion #2. The Board finds that the decision of the County was not against the manifest weight of the evidence.

Finally, the petitioners ask for reversal of the findings of the County because of an alleged failure to include specific written findings of fact pursuant to Section 39.2(e). An appellate court has stated that "the County Board need only indicate which of the criteria, in its view, have or have not been met." E & E Hauling at 616. Although the Board would continue to prefer to see more detailed reasons for the County's decision, the Board finds that the County has complied, albeit minimally, with the standard enunciated in E & E Hauling.

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

ORDER

Upon the review of the September 12, 1983, decision of the County of LaSalle conditionally approving the application of States Land Improvement Corporation as to site location suitability, it is the Order of the Pollution Control Board that the decision of the LaSalle County Board be affirmed.

IT IS SO ORDERED.

Chairman Jacob D. Dumelle dissented.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 26th day of January, 1984 by a vote of 6-1.

Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board