ILLINOIS POLLUTION CONTROL BOARD
October 5, 1995

SIERRA CLUB, MADISON COUNTY CONSERVATION ALLIANCE, and JIM BENSMAN,	)	
Petitioners,	)	
v.	)	PCB 95-174
	)	(Pollution Control Facility Siting Appeal)
CITY OF WOOD RIVER, WOOD RIVER PARTNERS, L.L.C.,	)	
Respondents.	)	

WAYNE FREEMAN APPEARED ON BEHALF OF THE SIERRA CLUB, ILLINOIS CHAPTER;

JEAN BOWERS AND KATHY ANDRIA APPEARED ON BEHALF OF THE MADISON COUNTY CONSERVATION ALLIANCE;

JIM BENSMAN APPEARED ON HIS OWN BEHALF;

CHRISTINE ZEMAN, LADONNA DRIVER AND RENIE BASSETT APPEARED ON BEHALF OF THE CITY OF WOOD RIVER;

JANE PIGOTT APPEARED ON BEHALF OF WOOD RIVER PARTNERS, L.L.C.

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

On June 19, 1995 the Sierra Club, Madison County Conservation Alliance, and Jim Bensman (petitioners) timely filed the instant petition for hearing and review of a siting decision with the Pollution Control Board (Board). Petitioners contest the May 15, 1995 decision of the City of Wood River (City) approving the site application of Wood River Partners, L.L.C.'s[1] (Wood River Partners) pollution control facility. The facility at issue is an incinerator.

The Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1994)) provides that before the State may issue a permit for

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[1] The filings refer to Wood River Partners, L.L.C. as the applicant. However, at various places in the record (e.g., Bd. Tr. at 19-20) the applicant is also identified as Polsky Energy Corporation. Wood River Partners is a wholly-owned affiliate of Polsky Energy Corporation. (WRP Br. at 1.)

operation of a new pollution control facility[2], the permit applicant must obtain siting approval from the appropriate unit of local government. The conditions under which this local site approval is to be sought and the conditions under which the local decision is to be made are specified at Section 39 through 39.2 of the Act (415 ILCS 5/39 to 39.2 (1994)). In the instant matter Wood River Partners sought and obtained approval from the City for siting its proposed incinerator.

The Board's responsibility in this matter also is provided for in the Act. The Board is charged there with responsibility for hearing appeals of local siting decisions. The conditions under which an appeal may be brought to the Board, and the conditions under which the Board is required to make its decision, are specified at Section 40.1 of the Act (415 ILCS 5/40.1 (1994)). In the instant matter petitioners appeal the siting approval granted by the City.

Based upon the reasons below, the Board finds the City's siting process was not fundamentally unfair, and the City's decision granting siting to Wood River Partners was not against the manifest weight of the evidence. Therefore the Board herein affirms the City's decision.

PROCEDURAL HISTORY

By order dated June 22, 1995 the Board found the instant petition was properly before the Board. The Board accordingly set the matter for hearing. Notice of hearing was published in the Alton Telegraph.

Hearing was held on August 17, 1995 before Board hearing officer Michael Wallace in Edwardsville, Illinois. Post-hearing briefs were filed by Wood River Partners and the City on September 5, 1995, and by petitioners on September 8, 1995; the Madison County Conservation Alliance (MCCA) filed a separate post-hearing brief on September 6, 1995.

BACKGROUND

On December 12, 1994 Wood River Partners filed an application with the City for siting approval of a pollution control facility called the Wood River Energy Center, located in the Lewis and Clark EnviroTECH Business Park in Wood River,

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[2] A pollution control facility, pursuant to definition in the Act at Section 3.32 (415 ILCS 5/3.32 (1994)), includes incinerators.

Illinois. (R. at C01102.)[3] The Energy Center will be a wood-to-energy facility, receiving shipments of waste wood, shredded tire chips, and paper pellets, and converting these fuels into energy via thermal combustion. It will produce 32 megawatts (gross) with net electrical output of 28 megawatts to be sold to Illinois Power Company. (R. at C00015.) The facility will burn a maximum of 310,000 tons per year of waste fuel at approximately 750 tons per day. (R. at C00015.)

A public hearing was held by the City of Wood River Pollution Control Hearing Committee (Hearing Committee) on March 14 and 15, 1995. Petitioners attended the March 14 and 15, 1995 hearings. In addition, petitioners, in the persons of Kathy Andria and Jean Bowers representing the Madison County Conservation Alliance, Jim Bensman representing himself, and Wayne Freeman representing the Piasa Palisades Group of the Sierra Club, presented testimony to the Hearing Committee. Petitioners engaged in multiple instances of examination of the citizens who provided public comments and of the applicant.

This hearing was recorded by a court reporter and a transcript of the hearing (local hearing transcript) was filed with the City on April 6, 1995 and became part of the record before the City. The local hearing transcript was made available to the public beginning at least April 7, 1995. Additionally, the City informed the public that a copy of the local hearing transcript could be purchased directly from the court reporting service at $1/page. Wood River Partners purchased an additional copy of the local hearing transcript and provided it to petitioner Bensman on April 10th at no charge.

The public hearing was followed by a 30-day period during which the City accepted written public comment on the application[4]. The public comment period closed on April 14,

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[3] Petitioners' petition will be cited as (Pet. at __); petitioners' post-hearing brief will be cited as (Pet. Br. at __); the City's post-hearing brief will be cited as (City Br. at __); Wood River Partners' post-hearing brief will be cited as (WRP Br. at __); the Madison County Conservation Alliance's post-hearing brief will be cited as (MCCA at __); the record before the City will be cited as (R. at __); the transcript before the City will be cited as (Tr. at __); and the transcript before the Board hearing officer will be cited as (Bd. Tr. at __).

[4] The 30-day public comment period is statutorily required at Section 39.2(c) of the Act: "(t)he county board or governing body of the municipality shall consider any comment received or postmarked not later than 30 days after the date of the last public hearing". (415 ILCS 5/39.2(c) (1994).)

1995. The Sierra Club, Madison County Conservation Alliance, and Jim Bensman filed a joint 39-page comment (R. at C01950-92) with attachments (R. at C01993-2073). Ms. Bowers and Ms. Andria filed separate short comments (R. at C01949 and C02077-8, respectively).

On April 3, 1995 the City, through its attorney and special siting counsel, submitted a Summary Statement into the record stating that "(i)n consideration of the information contained in the application, the testimony provided by the applicant at the siting hearing, as well as the recommendation of the city's consultant" all statutory siting criterion were satisfied, "subject to the assurances expressed". (R. at C01886-94, C01894.)

On May 1, 1995 the Hearing Committee issued a recommendation to the City that conditional siting approval be granted, and that the City's April 3 Summary Statement be adopted as the City's Findings of Fact. (R. at C02121-2.) On May 15, 1995 the Wood River City Council granted conditional siting approval in Resolution No. 1266, finding Wood River Partners had satisfied all nine criteria required in Section 39.2 of the Act, and adopted the Summary Statement as the City's Findings of Fact. (R. at C02128-47.)

MOTION TO CORRECT CERTIFICATE OF RECORD

As a preliminary matter, the Board notes that on August 24, 1995 the City filed a Motion to Correct Certificate of Record on Appeal. Petitioners have not filed a response to this motion.

The City contends that the list of exhibits for Section III inadvertently gives the same title for Exhibits 18 and 19. The City notes that the correct title for Exhibit 19 should be "Wetlands Plantings", and moves that the title be so corrected. The motion is hereby granted.

FUNDAMENTAL FAIRNESS

The Board is charged under its authority to hear appeals of local siting approval, to consider "the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision" (415 ILCS 5/40.1(a) (1994); see also Concerned Citizens of Williamson County v. Bill Kibler Development Corp. (January 19, 1995), PCB 94-262. In the instant case, petitioners assert that the City's decision granting local siting approval to Wood River Partners should be overturned because it is fundamentally unfair and violates due process based upon three arguments: the unavailability of the

City's hearing transcript, the conduct of the City's hearing, and the City's Findings of Fact[5].

Availability of the Transcript

It is well established that a local siting authority must make the siting documents available for public viewing as a requisite to a fair proceeding. The Appellate Court in Tate v. Illinois Pollution Control Board warned, for example, that "county boards should be aware that the failure to honor a request to produce documents could jeopardize the fundamental fairness of the proceedings". ((4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176, 1191.)

At issue in the instant case is petitioners' contention that the City failed to provide a copy of the transcript of the local siting hearing at its "actual cost of reproduction" as required pursuant to Section 39.2(c) of the Act, and as a result that petitioners were prejudiced because they did not have the transcript when writing their post-hearing comments, or had insufficient time to prepare their public comments. (Pet. Br. at 1-9.)

Initially we must address whether the City was required to provide a copy of the hearing transcript at all. Section 39.2(c) states in relevant part:

> An applicant shall file a copy of its request, with the county board of the county or the governing body of the municipality in which the proposed site is located. 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 . . . All such documents or other materials on file with the county board or governing body of the municipality 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. (415 ILCS 5/39.2(c) (1994) (emphasis added).)

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[5] The Board notes that at the Board's hearing petitioners raised for the first and only time some additional allegations of unfairness, including failure of the City to provide objectors with seating and work space equivalent to that provided to Wood River Partners and to City staff. (c.g., Bd. Tr. at 42-43, 48.) Inasmuch as these allegations have not been properly pled in petitioners' petition for review, the Board is unable to give them further consideration.

Although Section 39.2(c) does not specifically mention the local hearing transcript, the local hearing transcript was clearly a "material on file" with the City, and hence subject to the availability requirement of Section 39.2(c).

We next address the issue of whether the local hearing transcript was made available in a manner provided for in Section 39.2(c). The pertinent facts are that the transcript was received by the City from the court reporter on April 6, 1995; that a copy of the transcript was available at the offices of the City for public review and use there beginning at least on April 7, 1995; that on April 7, 1995 petitioners who inquired were told by the City Clerk that the cost of reproducing additional copies of the transcript was $1 per page[6], the cost charged by the court reporting service for additional copies; that on April 7, 1995 and no date thereafter did petitioners choose to obtain a copy of the transcript at the $1 per page rate; that on April 10, 1995, the next working day following April 7, 1995, petitioners in the person of Mr. Bensman were given a copy of the transcript at no charge to petitioners.

It is uncontested that the City did make available a copy of the local hearing transcript at City Hall for public viewing, and that this copy was indeed reviewed by the public beginning at least on April 7, 1995. (Bd. Tr. at 74.) However, petitioners did not, or contend that they could not due to personal conflicts, utilize this copy.

The issue is then whether the City should also have provided carry-away copies of the transcript, and that these copies should have been provided at a cost less than the $1 per page quoted to petitioners by the City Clerk.

Petitioners contend that the "actual cost of reproduction" was the City's cost to copy the transcript using its own copying resources, which according to the testimony of City Clerk Jean Bruce, would normally be five cents a page. (Bd. Tr. at 76-77.) Respondents contend, conversely, that the "actual cost of reproduction" is the cost to the City of obtaining any additional copies from the reporting service. (City Br. at 7; WRP Br. at 6.)

The Board believes that the simple intent of the provision within Section 39.2(c) that calls for payment of the "actual cost of reproduction" is to allow the local siting bodies to recovercosts that they legitimately incur in providing copies of

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[6] The full local hearing transcript is 677 pages in length, including indices.

records[7]. With this as the underlying principle, we find that the City did provide for copies of the local hearing transcript at the actual cost of reproduction. Therefore the City fulfilled its obligation under Section 39.2(c).

The City was charged by the court reporting service at a rate of $2.85 per page for the original copy and $1 per page for each additional copy. (Bd. Tr. at 76, Res. Exh. 2.) Within the Board's experience these are not atypical or unreasonable charges. Similarly, given the time, personnel, materials, and equipment necessary to reproduce a document as lengthy as the local hearing transcript, we cannot find that a $1 per page charge makes the City's procedure fundamentally unfair. The City's action in requesting from petitioners a per page payment equal to the per page charge the City would incur in obtaining any additional copies of the local hearing transcript and is in accordance with Section 39.2(c) of the Act. did not make the siting procedure fundamentally unfair.

Further, we do believe that it is significant that, the City's representations of April 7, 1995 aside, a copy of the transcript was provided to petitioner Bensman at no charge on April 10, 1995[8]. This was the next working day, and we can find no fault with the City's vigor in obtaining a copy of such a lengthy document in such short order no matter whether copied in-house or otherwise. Upon receipt of the transcript copy, Mr. Bensman signed a receipt which allowed for other citizens who contacted him to read the transcript at a time mutually convenient. (R. at C01925.) Mr. Bensman testified at hearing that "Polsky was willing to buy a transcript for us if I shared it with others and I agreed to that". (Bd. Tr. at 15.) According to the record, none of the other participants utilized Mr. Bensman's copy prior to submitting their public comments.

Even if this Board was compelled to find that the City erred in limiting public access to the local hearing transcript, we would not be able to find that the error made the City's proceeding fundamentally unfair because we do not believe that petitioners have demonstrated prejudice. (See Citizens Against Regional Landfill v. County Board of Whiteside County and Waste Management of Illinois, Inc. (1993), PCB 92-156.)

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[7] The Board notes that for requests made by third parties for copies of Wood River Partner's application, the City had the application copied outside at a commercial establishment, and charged the exact price charged to them by the commercial copier. (Bd. Tr. at 68.).

[8] Petitioner Bensman's copy was paid for by Polsky Energy. (R. at C01925.).

Petitioners contend that they required personal copies of the local hearing transcript in order to prepare their post-hearing public comments due no later than April 14, 1995. (Bd. Tr. at 16, 30-31, 36, 47.) Moreover, they contend that they required the transcript on Friday April 7, 1995 so as to allow for its use over the weekend of April 8 and 9, 1995. (Bd. Tr. at 16, 36.)

While Mr. Bensman received a copy of the transcript on Monday, April 10th, as opposed to Friday, April 7th, arguably limiting its substantial use in formulating petitioners' comments, petitioners were sufficiently afforded other independent safeguards to consider the City's proceeding fundamentally fair. For instance, petitioners attended and actively participated in the public hearing (Bd. Tr. at 20-21, 32-35, 48), petitioner Ms. Andria tape recorded the hearing (Bd. Tr. at 28), petitioners were given the opportunity to view the transcript at City Hall beginning on April 7th, petitioners submitted significant public comments (R. at C01949-2078), and petitioners were notified they could contact the court reporting service directly to obtain a copy of the transcript (Bd. Tr. at 17).

Therefore in consideration of petitioners claim regarding the alleged unavailability of the transcript, the Board finds the City's proceeding was conducted with no prejudice rising to the level of fundamental unfairness. This conclusion is based on the availability of the local hearing transcript at the City Hall and consideration of the quoted cost of the transcript, on recognition that petitioners were provided and utilized extensive public interaction with the City's siting process, and that the City's conduct with respect to the transcript did not impair petitioners' ability to prepare and submit post-hearing comments sufficiently to warrant a finding of fundamental unfairness.

Conduct of the City Hearing

Next the Board addresses petitioners' claim that the conduct of the March 14th and 15th meeting was fundamentally unfair. Petitioners assert that they were led to believe that persons giving oral comments at the hearing would not necessarily be sworn or subject to cross-examination. It is uncontested that the hearing process did allow for written public comments, which were not subject either to being sworn or to cross-examination. The City itself indicates that it did not believe that all oral commenters would be sworn and subject to cross-examination. (City Br. at p. 14.)

Nevertheless, the hearing officer ruled during the conduct of the hearing that any statement for the public record would be sworn and subject to cross-examination. (Tr. at 206-7.) As the basis for his decision, the hearing officer observed that "(a)ny

time you make--give testimony or make a statement in a public hearing, you're subject to cross-examination. That is the ultimate test of authenticity and credibility of the Anglo-American judicial system. And I think that we must permit cross-examination." (Tr. at 207.) The hearing officer further ruled that all testimony and statements were to be made under oath. (Tr. at 208.)

Petitioners contend that this action of the hearing officer impacted the content and amount of comments made by the public and was thereby fundamentally unfair. (Pet. Br. at 9.)

The City provided for several "levels" of participation in the hearing process. This intent is apparent on the form distributed to interested persons prior to the hearing, on which they were allowed to "preregister" for various types of participation. Five types of participation were listed: 1) comment on the record but not under oath or subject to cross-examination; 2) testify under oath and subject to cross-examination; 3) present evidence; 4) question other witnesses; or 5) give an opening and summary statement. The petitioners in the instant action registered as follows: Jean Bowers chose #1 (R. at C00737), Kathy Andria chose #4 (R. at C00795), and Jim Bensman chose all five options (R. at C00859).

In determining whether the City's siting process was fundamentally unfair we must address whether the action of the hearing officer limiting oral presentation to sworn testimony and allowing cross-examination of all sworn testimony constituted fundamental unfairness.

In a review of similar local siting decisions, a similar issue was raised in Daly v. Village of Robbins (July 1, 1993), PCB 93-52, PCB 93-54. In Daly, petitioners claimed that the hearing officer's "arbitrary jettisoning of cross-questions" violated their right of public participation and made the hearing fundamentally unfair. The Board held that public participation was not thwarted so as to make the hearing fundamentally unfair where the hearing officer informed participants that duplicative or irrelevant questions would not be asked, wrote the reason for not asking the question on the form, and where any questions not asked were more fully explained in supplemental information supplied to the village.

The hearing officer's action in this matter likewise does not rise to the level of rendering the City's siting process fundamentally unfair. The Board cannot see how it could be fundamentally fair to allow cross-examination of some participants, including applicants, but somehow fundamentally unfair to allow cross-examination of other participants, including objectors, as here. Otherwise, if the participants were allowed to testify on the record at hearing without being

under oath and subject to cross-examination, the Board would have been required to give their testimony lesser weight. (See City of Geneva v. Waste Management of Illinois, Inc. and County Board, County of Kane (July 21, 1994), PCB 94-58; Industrial Fuels and Resources v. City Council of the City of Harvey (September 27, 1990), PCB 90-53.)

The Board accordingly finds no fundamental unfairness in the manner in which the testimony was sought and examined by the City.

Next the Board addresses petitioners claim that the conduct of the hearing violated due process. Although citizens before a local decision-maker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. (Southwest Energy Corp. v. IPCB, Concerned Citizens for a Better Environment, and the City of Havana, (4th Dist. 1995), No. 1-94-0759, citing Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 1019, 544 N.E.2d 1176, 1193.) Due process is a flexible concept and requires such procedural protections as the particular situation demands. (Scott v. Department of Commerce & Community Affairs (1981), 84 Ill.2d 42, 51, 48 Ill.Dec. 560, 416 N.E.2d 1082.)

Appellate Courts have determined that due process of law requires that all parties have an opportunity to cross-examine witnesses and to offer evidence in rebuttal. (Eugene Daly v. Pollution Control Board, Village of Robbins, and the Robbins Resource Recovery Co., (1st Dist., No. 1-93-2671), citing Abrahamson v. Illinois Department of Professional Regulation (1992), 153 Ill. 2d 76, 606 N.E.2d 1111; North Shore Sanitary Dist. v. PCB, 2 Ill.App.3d 797,801, 277 N.E. 754,757, citing Garces v. Department of Reg.& Education, 118 Ill.App.2d 206, 254 N.E.2d 622 (1969).) Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. (Waste Management of Illinois Inc. v. IPCB (2d Dist. 1989), 175 Ill.App.3d 1023, 530 N.E.2d 682.) It has also recently been observed that the local siting process does provide opportunity for parties to place non-cross-examined comment on the record as written public comment. (Southwest Energy Corp. v. IPCB citing 415 ILCS 5/39.2(c).)

In the case at issue the hearing officer required cross-examination of all testimony. We find the hearing officer's action to be consistent with the long established belief of courts that the safeguards and encouragement of truth provided for by requiring a witness to be sworn and subject to cross-examination far outweigh any undue influence on their testimony. (See City of Geneva v. Waste Management of Illinois, Inc., and County Board, County of Kane (July 21, 1994), PCB 94-58, citing

Industrial Fuels and Resources v. City Council of the City of Harvey (September 27, 1990), PCB 90-53.)

Indeed, due process requires balancing interests, including weighing the minimal intrusion that exists when participants are subject to cross-examination against the goal of a reliable, truthful siting process. Accordingly the Board finds no due process violation.

The City's Findings of Fact

Petitioners' third claim that the City's procedures were fundamentally unfair is directed at the sufficiency of the City's Findings of Fact. Petitioners first assert the City failed to consider timely filed public comments as required pursuant to Section 39.2(c) and consequently prejudiced petitioners. (Pet. Br. at 10.) Petitioners maintain that the City's Findings of Fact (issued on May 15th) were almost identical to the City's prior Summary Statement (issued on April 3rd or 4th) and therefore the City could not have considered any comments submitted in the intervening thirty days (between public hearings held on March 14th and 15th, and deadline for public comments, April 14th). (Pet. Br. at 10.)

Simply because the City adopted the conclusions of the special siting counsel instead of the petitioners does not allow for the conclusion that petitioners' comments were not considered. Where there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. (File v. D&L Landfill, Inc. (5th Dist. 1991), 219 Ill.App.3d 897, 579 N.E.2d 1228; Fairview Area Citizens Taskforce v. Pollution Control Board (3d Dist. 1990), 198 Ill.App.3d 541, 555 N.E.2d 1178, 1184; Tate v. Pollution Control Board (4th Dist. 1989), 188 Ill.App.3d 994, 544 N.E.2d 1176, 1195; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1989), 187 Ill.App.3d 79, 543 N.E.2d 505, 507.) Simply because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for the Board to reverse their findings. File v. D&L Landfill, Inc. (August 30, 1990), PCB 90-94, aff'd File v. D&L Landfill, Inc., (5th Dist. 1991), 219 Ill.App.3d 897, 579 N.E.2d 1228).

Merely because the City did not substantially change its May 15 Findings of Fact from what was submitted by the City's attorney and special siting counsel on April 4th does not constitute evidence that the City failed to consider the comments made after hearing. There exists a clear distinction between whether the City considered the public comments and whether the City found those comments to be sufficiently meritorious to alter the proposed findings of fact.

Additionally, petitioners contend that because two council members were absent at the public hearing the evidence presented at public hearing could not have been considered. (Pet. Br. at 10.) However case law is well settled that council members need not attend all hearings. The appellate courts have affirmed the Board in finding it acceptable for the decisionmaker to rely on transcripts of the public hearing in rendering its decision. (City of Rockford v. County of Winnebago, (2d Dist. 1989), 542 N.E.2d 423; Waste Management of Illinois v. Pollution Control Board (2d Dist. 1984) 123 Ill.App.3d 1075, 79 Ill.Dec. 415, 463 N.E.2d 969 ("As long as the entire record was available for review by the full county board all members heard the case irrespective of their attendance.").) We therefore find that the failure of two council members to attend the hearing did not render these proceedings fundamentally unfair.

Lastly, petitioners contend that the Hearing Committee's recommendation and the City's Resolution No. 1266 did not specify the reasons for those decisions in accordance with Section 39.2(a) of the Act, thereby violating Section 39.2(e). (Pet. Br. at 11.) Petitioners allege the City was required to issue a specific finding for each criterion and the general language of its finding that "all applicable requirements of Section 39.2 and the Siting Ordinance have been met" was insufficient. (Pet. Br. at 11.)

Although petitioners recognize the City was not required to give a detailed explanation, they assert the City's decision was not specific enough to satisfy the Act because it did not give any reasons. Petitioners also argue that the City's Findings of Fact were not findings of fact, but rather a summary of the testimony given at hearing. (Pet. Br. at 12.)

The City was only required to indicate which of the Section 39.2 criteria have or have not been met; the City is under no obligation to give a detailed explanation of its decision. (E&E Hauling, Inc. v. PCB, (2d Dist. 1983), 451 N.E.2d 555, 116 Ill.App.3d 586.) In sum, we find no violation of fundamental fairness in reviewing the City's Findings of Fact.

Based upon the record in this case, appellate court decisions, and review of Section 39.2 of the Act, the Board finds the City's siting process was not fundamentally unfair.

STATUTORY CRITERIA

It is specified in the Act that "local siting approval shall be granted only if the proposed facility meets" nine specific criteria. (415 ILCS 5/39.2(a) (1994).) These criteria are found at Section 39.2(a) of the Act, and are directed towards specific siting issues including need, safety, compatibility, etc.

As regards the instant matter, the City found that the applicant, Wood River Partners, established by the preponderance of evidence standard that all nine criteria had been met. Here petitioners challenge the City's findings with respect to five of the nine criteria.

When reviewing a local decision regarding the nine criteria, the standard the Board must apply is the manifest weight of the evidence standard. (McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26, 29; Fairview Area Citizens Taskforce v. IPCB, (3d Dist. 1990), 144 Ill.Dec. 659, 555 N.E.2d 1184; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1987), 160 Ill.App.3d 434, 513 N.E.2d 592. A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. (Harris v. Day (4th Dist. 1983), 115 Ill.App.3d 762, 451 N.E.2d 262, 265.)

Petitioners claim that the City's findings with respect to criteria #1, #2, #3[9], #7, and #8 (415 ILCS 39.2(a)(1), (2), (3), (7), and (8) (1994)) were against the manifest weight of the evidence. The Board will review the record of the City's decision with respect to each of these contested criteria.

Criterion #1

> 1. the facility is necessary to accommodate the waste needs of the area it is intended to serve;
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> (415 ILCS 5/39.2(a)(1) (1994).)

Petitioners claim Wood River Partners failed to present a prima facie case for criterion #1 because it made only general statements to satisfy the need criteria without sufficient details, did not deal with the entire "service area", failed to prove there was an urgent need for the facility, and failed to sufficiently demonstrate the need for the entire service area of Madison, St. Clair, and Monroe Counties, and the surrounding areas. (Pet. at 7, Pet. Br. at 12-19.)

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[9] Although petitioners expressly plead criterion #5 (Pet. at 8, Pet. Br. at 29), petitioners quote from criterion #3 (Pet. at 8, Pet. Br. at 29). Wood River Partners addressed this argument as alleging a failure to satisfy criterion #3 in their post-hearing brief. (WRP at 32-35.) The City also addressed criterion #3 in their post-hearing brief. (City at 38-41.) Consequently the Board will construe petitioners appeal as addressing criterion #3.

Among other things petitioners point out there are two landfills in Madison County, one with 44 years of capacity and the other with 11 years of capacity, as evidence of the lack of need for an incinerator. (Pet. Br. at 15.) MCCA submitted a copy of the "Available Disposal Capacity for Solid Waste in Illinois" 7th Annual Report, prepared by the Illinois Environmental Protection Agency's Bureau of Land, as a summary of information showing the remaining capacity for area landfills and demonstrating there is no need for the Wood River incinerator. (R. at C01124-45.) Petitioners claim that only their witness, Richard Worthen, was qualified as an expert on the waste needs of Madison County (Pet. Br. at 20), and that he testified that there is no need for the facility proposed by Wood River Partners. (R. at C01942-8.) Petitioners also claim that waste generated in Missouri was erroneously calculated into Wood River Partner's need projections because Missouri is not part of the service area. (Pet. Br. at 19.) Further, petitioners allege the City failed to discuss the Illinois' Solid Waste Planning and Recycling Law (P.A. 85-1189). (Pet. Br. at 17.)

According to the applicant, the proposed service area consists of a primary service area, a tri-county region consisting of Madison, Monroe, and St. Clair Counties, and a secondary service area comprised of surrounding Illinois counties within approximately 100 miles of the facility. (R. at C02095.) Fuel for the facility received from the tri-county region would receive priority and if necessary, additional fuel would come from the secondary service area. (R. at C02095.)

Wood River Partners presented studies to the City, which it contends satisfied the need criteria. These include studies performed by a consulting firm, TSS Consultants, Inc., regarding the landfills in the Madison County area (R. at C00028) and the solid waste data for Madison, Monroe, and St. Claire Counties (R. at C00143-5). In addition to data regarding wood waste, Wood River Partners submitted information regarding the other fuel sources which are currently being stock piled due to costly disposal rates: railroad ties and tires. (R. at C00015, C00029.)

Wood River Partners also presented the testimony of their own expert witness, Mr. Shield of Polsky Energy, who testified to the facility's need. (Tr. at 187.) Mr. James Shields testified that the proposed facility is necessary to accommodate the waste needs of the area intended to be served, and that it would divert waste wood from area landfills, generate electricity, and extend the remaining life of the area's landfills. (R. at C01888.)

For purpose of providing an independent review of the application, the City retained the engineering and architecture firm of Foth & Van Dyke (R. at C01888). Mr. Rod Bloese, Senior Project Hydrogeologist at Foth & Van Dyke, testified that he was

initially concerned that the information regarding need required updating to reflect more current information about the landfill capacity in the area. (R. at C01888.) In response, the applicant added to the record Applicant's Exhibits 5 and 6, "Available Disposal Capacity for Solid Waste in Illinois" and "Appendix B: Solid Waste Disposal Capacity and Generation by County", respectively.

An applicant for siting approval need not show absolute necessity. (Clutts v. Beasley (5th Dist. 1989), 541 N.E.2d 844, 846; A.R.F. Landfill v. Pollution Control Board (2d Dist. 1988), 528 N.E.2d 390, 396; WMI v. Pollution Control Board (3d Dist. 1984), 461 N.E.2d 542, 546.) The Third District has construed "necessary" as connoting a "degree of requirement or essentiality." (WMI v. Pollution Control Board, 461 N.E.2d at 546.) The Second District has adopted this construction of "necessary," with the additional requirement that the applicant demonstrate both an urgent need for and the reasonable convenience of, the new facility. (Waste Management v. Pollution Control Board, (2d Dist. 1988), 530 N.E.2d 682, 689; A.R.F. Landfill v. Pollution Control Board, 528 N.E.2d at 396; WMI v. Pollution Control Board, (2d Dist. 1984), 463 N.E.2d 969, 976.) The First District has stated that these differing terms merely evince the use of different phraseology rather than advancing substantively different definitions of need. (Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board, (1st Dist. 1992), 227 Ill.App.3d 533, 592 N.E.2d 148, 156.) Moreover, it is the applicant who defines the service area. (Worthen v. Village of Roxana, (5th Dist. 1993), 253 Ill.App.3d 378, 623 N.E.2d 1058, 1063.)

Under the manifest weight of the evidence standard, the Board is not allowed to reweigh the evidence before the local governing body. Where as here, the evidence is conflicting, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other.

We find that the City was justified in finding that there was a demonstrated need for the proposed facility. The City could have credited the testimony of its own expert from Foth & Van Dyke or Mr. James Shields of Polsky Energy, both of whom found a need for the facility, over the testimony of Richard Worthen, Chairman of the Madison County Board's Environment Committee. With regards to any landfill capacity remaining in landfills in the area, the City need not find there was an absolute need for the facility. Petitioners' contention notwithstanding, Wood River Partners did provide ample studies regarding the primary service area to the City which supported a need for the incinerator.

Similarly, petitioners argue that the City failed to correctly weigh the evidence they presented, and instead relied

on reports and witnesses petitioners considered unreliable. Although petitioners allege this is not a case of the City assigning credibility to some testimony over others (Pet. Br. at 13), we find that petitioners' challenge to the "competency" of the evidence is indeed a challenge only to credibility, and not to the truth of the testimony; the Board will not reweigh credibility alone.

Respondent's arguments based on the record contain sufficient rationale for the City's finding regarding criterion #1. Therefore the Board finds that the decision of the City on criterion #1 was not against the manifest weight of the evidence.

Criterion #2

> 2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
>
> (415 ILCS 5/39.2(c)(2) (1994).)

Petitioners contend that Wood River Partners failed to meet its burden with respect to criterion #2 specifically because it did not establish that the loss of wetlands would not raise flood levels and it was not demonstrated that there is enough wood to operate the incinerator safely. (Pet. at 7, Pet. Br. at 21.) Among other things, petitioners contest the definition of wetlands considered by the City (i.e., wetlands defined by the Army Corps of Engineers as opposed to the U.S. Fish & Wildlife Service). (Pet. Br. at 21-23.)

Petitioners advance the proposition that the facility cannot be operated safely because it needs to burn 70% wood to operate properly and there is no way for Polsky to obtain that much wood. (R. at C01973-6.) Both parties presented data regarding the availability of wood to the City. Mr. Shields of Polsky Energy also testified on behalf of Wood River Partners regarding the wood fuel mix. (Tr. at 149-150.)

The Board does not find sufficient evidence by the petitioners as to why the facility would not operate safely with the proposed, or even less-than-proposed, amount of wood fuel. The Board does not find the City's decision on the issue of the amount of wood fuel as it relates to criterion #2 and the safety of the facility is against the manifest weight of the evidence.

The Board notes that in MCCA's post-hearing brief, not in the original petition for review, MCCA claims that Wood River Partners has not performed air studies and therefore has not sufficiently demonstrated criterion #2. (MCCA at 2-3.) MCCA states that the area is non-attainment for ozone and that the

additional NOx and VOCs will be harmful to the air quality of the surrounding area, as well as endangering safety. Wood River Partners' application and expert testimony detailed the multitude of permits, including air, solid waste and stormwater permits, which must be obtained from the Agency before construction and operation of the facility may begin. Wood River Partners expert testimony regarding pollution control devices included the following: "state-of-the-art boiler called a fluidized bed boiler, which has lower emission levels than a conventional, stoker-fired boiler" (R. at C01903), baghouse to control particulate matter, an advanced heat distribution system to control emission of nitrogen oxides, the use of a catalytic nitrogen oxide reduction system, a continuous monitoring system, as well as many other pollution and safety devices. (R. at C01903-8.) Petitioners submitted only general air pollution and incineration data to the City. (R. at C01980.) Reviewing the evidence presented to the City demonstrating the facility will be operated to be protective of public health, safety and welfare, and the lack of facility specific evidence to the contrary, the Board finds the City's decision regarding criterion #2 was not against the manifest weight of the evidence. In addition, the City required 21 conditions be placed on Wood River Partners to satisfy criterion #2.

Next, Wood River Partners maintains that petitioners' allegations regarding wetlands and the availability of waste wood fuel are irrelevant to criterion #2, and alleged without supporting evidence. (WRP Br. at 23.)

The Board agrees that the issue of flood levels is more appropriately alleged under criterion #4. Criterion #4 addresses the location of the facility with regard to the 100-year flood plain. However considering that petitioners do not allege criterion #4 was not satisfied, but again raise the issue of flooding under criterion #5, the Board will address this issue here. Criterion #4 reads:

> 4. The facility is located outside the boundary of the 100 year flood plain or the site is flood-proofed
>
> (415 ILCS 5/39.2(c)(4) (1994).)

Wood River Partners stated that no portion of the site is within the 100-year flood plain[10]. (R. at C00053, R. at C02108.) It explained that because the site was entirely within the boundaries of EnviroTECH Industrial Park, which is being

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[10] The City reviewed information regarding flooding in the discussion of criterion #4 of the application. (R. at C00053.)

developed by the City, "all issues related to the location relative to a 100-year flood plain are being addressed by the City of Wood River as developer of the industrial park." (R. at C02108.) The three acres of wetlands contained on the site are also being independently addressed by the City. (R. at C02105.)

The Board finds the issue of wetland flooding was adequately addressed on the record so as not to find the City's finding regarding flooding under criterion #4 was against the manifest weight of the evidence. First, the Board cannot find that the City used the wrong type of wetlands evidence in reaching its decision. The City could have relied upon documents received from the Federal Emergency Management Agency and the Illinois Department of Transportation showing the site is not within the 100-year flood plain. (R. at C00173-8.) Furthermore the City may have given considerable weight to its own Chief of the Wood River Fire Department, Guy Williams, who testified that the site did not flood in the great flood of 1993. (Tr. at 523-525.) Petitioners have failed to present any evidence to sufficiently refute Wood River Partners' data.

Given the weight of evidence presented to the City, the Board finds that the City's findings on criterion #2 are not against the manifest weight of the evidence. Again, it is not the Board's role to reweigh the evidence presented before the City in making their decisions.

Criterion #3

> 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
>
> (415 ILCS 5/39.2(c)(5) (1994).)

Petitioners claim the manifest weight of the evidence shows that Wood River Partners failed to demonstrate that "the facility is located so as to ... minimize the effect on the value of the surrounding land" because it did not demonstrate that the loss of wetlands would not raise flood levels. (Pet. at 8, Pet. Br. at 29.) The Board has addressed this issue above.

MCCA's post-hearing brief contention that Wood River Partners has not demonstrated criterion #3 because it did not perform air studies (MCCA at 2-3) is addressed in criterion #2 above.

The facility will be located within an industrial park, bordered by an elevated highway and a brass company, with an ammonia manufacturer in the near area. (R. at C00051, Tr. at 112.) In addition, the City has conditioned siting approval upon

Wood River Partners making a reasonable effort to minimize destruction of trees, especially hardwoods, that currently exist at the site and leaving a tree buffer surrounding the Old Wood River to the extent practicable. (R. at C02136.) Wood River Partners must also comply with the City's guidelines for site development of the Envirotech Business Park as enacted by Ordinance of the City on June 5, 1995. (R. at C02136.) The Board finds ample evidence to support the City's finding that Wood River Partners satisfied criterion #3 and does not find the City's finding is against the manifest weight of the evidence.

Criterion #7

> 7. if the facility will be treating, storing or disposing of hazardous waste, an emergency response plan exists for the facility which includes notification, containment and evacuation procedures to be used in case of an accidental release;
>
> (415 ILCS 5/39.2(c)(7) (1994).)

Petitioners claim that Wood River Partners failed to meet criterion #7 because the evidence shows that they will be treating and storing hazardous waste and did not develop an emergency response plan. (Pet. Br. at 29.) Specifically, if the facility plans to filter out any potential hazardous waste when discovered, it must store those hazardous wastes on site until shipment. (Id.)

Wood River Partners insists it will "not be treating, storing or disposing of hazardous waste". (R. at C00260; WRP Br. at 36.) Within Wood River Partner's application is the Wood Fuel Quality Assurance which covers on-site acceptance testing of urban wood fuel, fuel sampling/testing, and the project's right to refuse delivery, which would permit rejected processed waste to be "loaded back onto the trailer in which it was delivered". (R. at C00245.) Additionally, Wood River Partners is on record that they would require all suppliers to sign affidavits that none of the material coming to the facility is hazardous material or hazardous waste. (Tr. at 121.)

Although Wood River Partners claimed they will not be receiving hazardous waste, the City went so far as to guard against that unlikely event. The City conditioned approval on Wood River Partners making all reasonable effort not to accept any hazardous, extremely hazardous, or radioactive waste. (R. at C02138.) Although the City added that "(t)his condition is not intended to prohibit WRP from receiving and using hazardous material which are not waste", it did provide that any generator

of hazardous waste sent to the facility be determined and prevented from continuing to send such material. (Id.)

Given the City's conditional safeguards, together with Wood River Partners' sworn statement it would not be accepting hazardous waste, the Board does not find the City's finding that Wood River Partners satisfied criterion #5 against the manifest weight of the evidence.

Criterion #8

> 8. if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan;
>
> (415 ILCS 5/39.2(a)(8) (1994).)

Lastly, petitioners contend the City erred in finding Wood River Partners met criterion #8 because it was not demonstrated that the incinerator was consistent with the Madison County Waste Management Plan. (Pet. Br. at 30-36.) Specifically petitioners contest the credibility and reliability of Wood River Partner's expert relative to their own expert. (Id.)

Petitioners' presented a statement from the Madison County Board's Environmental Committee Chair Richard Worthen which concluded that the facility is not consistent with the plan. (R. at C01942-8.) Wood River Partners, on the other hand, presented a letter from the Administrator of the Madison County Building, Zoning and Environmental Department, Mr. Joseph Parente, which stated that "it is my conclusion that the development of the facility, and the use of wood from the Madison County waste stream, would be in conformity with our Solid Waste Plan". (R. at C00262.) According to Mr. Parente, the Madison County Solid Waste Plan identifies waste-to-energy as a future alternative to accommodate their waste disposal needs. (Id.)

As the Board has observed, where there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. (See criterion #1 discussion above.) The City was presented with the Madison County Solid Waste Plan to use in their evaluation of the conflicting testimony of the experts. Based on the application, hearing testimony and record, the Board finds the City's determination regarding criterion #8 is not against the manifest weight of the evidence.

CONCLUSION

The Board has carefully considered each of the arguments raised by petitioners in reviewing the City's decision to grant siting approval to Wood River Partners, and has not found the siting proceeding before the City was fundamentally unfair, nor that the City's findings regarding criteria #1, #2, #3, #7, or #8 are against the manifest weight of the evidence. Therefore, the Board must affirm the City of Wood River's siting approval rendered on May 15, 1995.

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

ORDER

For the reasons specified in the above opinion, the Board affirms the City of Wood River's May 15, 1995 decision granting site location suitability approval for a new pollution control facility to Wood River Partners, L.L.C.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246. "Motions for Reconsideration".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 5th day of October, 1995, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board