ILLINOIS POLLUTION CONTROL BOARD
December 7, 1995

VILLAGE OF LAGRANGE, CITY OF COUNTRYSIDE, CHRISTINE RADOGNO, LAUREEN DUNNE SILVER, MICHAEL TURLEK, and DONALD YOUNKER,	)	
Petitioners,	)	PCB 96-41
v.	)	(Pollution Control Facility Siting Appeal)
MCCOOK COGENERATION STATION, L.L.C. and the BOARD OF TRUSTEES OF THE VILLAGE OF MCCOOK,	)	
Respondents.	)	

A. BRUCE WHITE AND BARBARA MAGEL, of KARAGANIS & WHITE, LTD. APPEARED ON BEHALF OF THE PETITIONERS;

DAVID ENGEL AND MARK D. CHUTKOW, of SIDLEY & AUSTIN, APPEARED ON BEHALF OF MCCOOK COGENERATION STATION, L.L.C.; and

VINCENT CAINKAR of LOUIS F. CAINKAR, LTD. APPEARED ON BEHALF OF THE VILLAGE OF MCCOOK.

OPINION AND ORDER OF THE BOARD (by E. Dunham):

This matter is before the Board on a petition for review, filed by petitioners on August 21, 1995. Petitioners, Village of LaGrange, City of Countryside, Christine Radogno, Laureen Dunne Silver, Michael Turlek, and Donald Younker, seek review, pursuant to Section 40.1 of the Environmental Protection Act (Act) (415 ILCS 5/40.1 (1994)), of the Board of Trustees of the Village of McCook (Village) July 17, 1995 decision granting siting approval to McCook Cogeneration Station L.L.C. (MCS) for a waste wood processing facility and a waste wood fired electrical cogeneration project.

Pursuant to Section 40.1 of the Act, the Board is to hold a public hearing "based exclusively on the record before the [Village] board". The Board held public hearings on the petition for review on October 10 and 11, 1995, in McCook, Illinois before Board hearing officer Deborah Frank. Members of the public attended these hearings and provided public comment on the record. In addition, the Board received 330 written public comments prior to the close of the record in this matter.[1]

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[1] The Board also received public comments after the November 1, 1995 deadline established by the hearing officer. (Tr. at 349.) These late-filed public comments were not considered by the Board.

Petitioners filed their post-hearing brief on October 25, 1995. Respondent[2], McCook Cogeneration Station, L.L.C. filed its response brief on November 1, 1995. Petitioners filed their reply brief on November 8, 1995.

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

The Board's scope of review encompasses three principal areas: (1) jurisdiction; (2) fundamental fairness of the village board's site approval procedures, and (3) statutory criteria for site location suitability. Pursuant to Section 40.1(a) of the Act, the Board is to rely "exclusively on the record before the [Village]" in reviewing the decision below. However, with respect to the issue of fundamental fairness, the Illinois Supreme Court has affirmed that the Board may look beyond the record to avoid an unjust or absurd result. (E & E Hauling v. PCB (2d Dist. 1983), 116 Ill. App. 3d 587, 594, 451 N.E. 2d 555, aff'd 107 Ill. 2d 33, 481 N.E. 2d 664 (1985).)

BACKGROUND

On February 2, 1995, notice was published in the *Daily Southtown Newspaper,* that MCS intended to file an application for local siting approval with the Village of McCook. (C36-C37,C73-C74.)[3] MCS submitted an application for local siting approval to

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[2] Further reference to respondent shall refer to McCook Cogeneration Station, L.L.C. While the Village of McCook was represented by counsel at the hearing before the Board, it has not filed a brief nor presented any arguments in this matter.

[3] "Cxxx" will be used to refer to the Village's record of the siting proceeding, and "Tr. x" will be used to denote the transcript of the hearings held by this Board on October 10 and 11, 1995.

the Village of McCook on February 21, 1995. (C1.) The application was comprised of fifteen pages of text and seven exhibits. (C1 - C37.) On May 10, 1995, MCS submitted an amended siting application to the Village. (C38 - C74.) The revisions in the amended application included a decrease in the amount of waste wood processed at the facility, an increase in the amount of acreage required for the facility and a new site layout diagram. (C1049 - C1050.)

The proposed facility consists of a waste wood processing facility and a cogeneration station. (C1057.) The proposed facility is to be located on a 22-acre site located in McCook, Illinois. (C1058.) A General Motors facility is located on the south and east sides of the proposed location. (C1058.) To the north and west of the site is an operating rock quarry. (C1058.) The area is zoned for heavy industrial operations. (C42.)

The facility is intended to serve the region's waste wood disposal needs, with a primary focus on the Chicago metropolitan area. (C40.) The incoming waste wood at the proposed wood processing facility will be separated and either recycled or combusted in the cogeneration project's boiler under controlled conditions. (C41.) The project will be designed to reduce an average of 1,040 tons per day of waste wood by 95% or more while producing electricity and steam. (C43.)

The cogeneration facility will provide electricity to Commonwealth Edison Company and steam to the General Motors-Electro-Motive Division (GM-EMD). (C43.) The GM-EMD facility will use the steam to meet its heating and operational needs in the manufacture of railroad locomotive engines and associated equipment. (C43.) This will allow GM-EMD to retire from service three existing coal fired steam boilers, the first of which was constructed in 1946. (C43.)

The main components of the waste wood processing facility and the cogeneration facility will be waste wood delivery, processing and storage, a fluidized bed boiler, a steam turbine generator, air pollution control equipment, ash handling equipment, and auxiliary equipment, such as a cooling tower, fire protection equipment and an electrical switchyard. (C43.) The cogeneration facility will also include one or two new auxiliary natural gas fired steam boilers to provide for peak demand and backup steam to GM-EMD. (C43.) The natural gas fired boiler(s) will have the capacity to generate a maximum of 110,000 pounds per hour each of process steam for use by GM-EMD. (C43.)

The Village held public hearings on the amended application on May 24 and 25, 1995. The Village adopted rules and procedures for the public hearings. (C75-77, C83-84.) The first day of the public hearing was allocated for proponents of the project and the second day was reserved for opponents.

At the hearing before the Village Board, the applicant presented testimony from Edward Bartlett, Jr., John Lindeberg, Lawrence Joachim and Cynthia Conklin and introduced fifteen exhibits. Mr. Barrett provided testimony on the general operation of the proposed project and the traffic plan. (C1052-C1070.) Mr. Lindeberg provided testimony on traffic flow around the site and the operations at the facility. (C1080-C1093.) Mr. Joachim testified on the design of the facility and the equipment located at the facility. (C1099-C1113.) Ms. Conklin testified on the waste needs of the area. (C1122-1154.)

The rules developed by the Village for the hearing allowed for the cross-questioning of witnesses. Those wishing to ask cross-questions were instructed to submit the question in writing to the hearing officer. (C1046.) The hearing officer would determine if the question was relevant and then ask the question of the witness, rephrasing the question if necessary. (C1046.) Written public comments were accepted by the Village until June 24, 1995. (C777 - C1042.) The Village, by ordinance, granted siting approval to MCS on July 17, 1995. (C1445 - C1454.)

Numerous comments were made by members of the public on the record at the hearing before the Board's hearing officer, Deborah Frank, including comments by State Representative Eileen Lyons and a spokesman from Congressman William Lipinski's office.

The written public comments received came from as diverse sources as Congressmen, Village Boards, attorneys, business people, citizens and school children. The Villages of Burr Ridge, Forest View, LaGrange, LaGrange Park and Lyons officially opposed the siting approval. Congressman William Lipinski forwarded a letter to the USEPA requesting a review of pollution sources in the area.

Most of the comments from citizens were made by way of form letters, signed and mailed individually. All but two of the comments received contained issues addressed by the petitioner's briefs. One comment received in behalf of MCS explained the steam flow through the process, and one comment discussed the placement of the MCS notice in the *Daily Southtown*, a newspaper not distributed throughout the region surrounding McCook. This issue was merely a footnote in petitioner's brief, but was elevated in importance in the Board's opinion by the filing of the public comment. The Board notes that many of the public comments request the repeal of the Retail Rate Law, 220 ILCS 5/8 403.1 (et. seq.). The Board, as an agency of the executive branch of the state government, has no authority to affect repeal of a law enacted by the state legislature. Those commenters favoring repeal of the Retail Rate Law are advised to convey their concerns to their respective state legislators.

Petitioners assert that the Village lacked jurisdiction to act on the siting request, that the proceedings were fundamentally unfair and that the Village's decision on several of the criteria was against the manifest weight of the evidence.

JURISDICTION

Section 39.2(b) of the Act requires the applicant to publish notice "in a newspaper of general circulation published in the county in which the site is located" containing information on the proposed site and "the right of persons to comment on the request" for siting approval. Section 39.2(c) of the Act requires the applicant to file a copy of its request with the Village Board. The request shall contain the "substance of the applicants proposal" and "all documents, if any, submitted as of that date to the Agency pertaining to the proposed facility". (415 ILCS 5/39.2 (1994).)

The notice requirements of Section 39.2 of the Act are jurisdictional prerequisites to the County Board's power to hear a landfill siting proposal. (Concerned Citizens of Williamson County v. Bill Kibler Development Corp. (January 19, 1995), PCB 94-262.) Due to the jurisdictional nature of the notice requirements of Section 39.2 of the Act, whether or not actual prejudice was shown to have resulted from failure to meet the notice requirements, the county lacks jurisdiction to act on the siting request if the notice requirements are not met. (Id. at 807). The appellate court has stated that it is appropriate for any person to raise the issue of jurisdiction. (Concerned Citizens, Inc. v. M.I.G. Investments, Inc. (2nd Dist. 1986), 144 Ill.App.3d. 334, 98 Ill.Dec. 253, 494 N.E.2d 180.) The notice requirements of Section 39.2 are to be strictly construed as to timing, and even a one-day deviation in the notice requirement renders the county without jurisdiction. (Browning-Ferris Industries of Illinois, Inc. v. PCB (5th Dist. 1987), 162 Ill.App.3d 801, 516 N.E.2d 804.)

Petitioners assert that the Village of McCook lacked jurisdiction because the notice and filing requirements of Section 39.2 were not satisfied by the applicant. Petitioners argue that the notice did not contain the information required by Section 39.2(b). (Pet. Br. at 7.) Petitioners assert that the notice was deficient because it did not separate the two proposed facilities and did not sufficiently describe the proposed activities at the facilities to place interested parties on notice. (Pet. Br. at 7.) Petitioners also argue that the applicant when filing its application did not include materials submitted to the Agency as required by 39.2(c). (Pet. Br. at 8.)

Newspaper Notice

Petitioners claim that by publishing a single notice to cover the two facilities (waste wood processing facility and electric cogeneration project) the public was unable to ascertain where one facility left off and the other began or to determine the activities proposed for each facility. (Pet. Br. at 10.) Petitioners assert that the notice did not inform the public that the proposed facility was an incinerator. (Pet. Br. at 11.) Petitioners assert that "cogeneration" was used to describe the proposed facility to intentionally mislead the public. (Pet. Br. at 11.)

Petitioners also assert that the notice did not notify the public that the facility would include a 300 foot smokestack. (Pet. Br. at 11.) Petitioners observe that the notice did not mention that the facility would generate sufficient steam to serve all the needs of the GM-EMD facility. (Pet. Br. at 12.) Petitioners contend that this is a central focus of the request, the applicant's presentation and the Village's decision and should have been included in the notice. (Pet. Br. at 12.) The petitioners also assert that the notice did not mention any of the specific units proposed for either facility and therefore the public was not on notice of the particular aspects of the project that would prompt public involvement. (Pet. Br. at 12.) In addition, petitioners observe that the notice did not mention that the facility would generate more than 50 tons of waste ash daily. (Pet. Br. at 12.) Petitioners contend that it was unreasonable for the applicant to tout the putative benefits of the project in the notice and ignore the drawbacks. (Pet. Br. at 12.)

Several members of the public, at the Board's hearing and in public comments, reported that they were not aware of the proposed project or the hearings before the Village Board and therefore did not participate at the Village Board hearing. Public comments have also asserted that the *Daily Southtown Newspaper* in which the notice was published, is not circulated in the area surrounding the proposed facility. (Pet. Br. at 13.)

Respondent states that the requirements of Section 39.2(b) were met by the notice published by MCS. They assert that the legal and narrative description of the property, name and address of the applicant, probable life of the proposed facilities, date of intended filing with the Village and description of the public participation process in hearings and the comment period were adequate. Respondents describes the notice as more detailed than necessary for including the request for approval of two facilities; one as a waste wood processing facility and one as a wood fired electric cogeneration project.

Respondent submitted a memorandum from the *Daily Southtown* indicating that McCook and Summit are within the circulation area of the *Daily Southtown*, (Resp. Br. Exhibit D) as well as several newspaper articles on the proposed site published prior to hearing in the *Suburban Life Citizen*; *West Cook Press, Countryside Edition* and the *Des Plaines Valley News*.

In Madison County Conservation Alliance v. Madison County (April 11, 1991) PCB 90-239, the Board found the language in the notice was sufficient where the applicant published a single notice describing a 210 acre regional pollution control facility as follows:

> "The proposed facility is a comprehensive waste management center including the following units: material recovery-facility, fuel pelletizing and waste baling, landscape waste composting, bale storage and future waste to energy facility."
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> (*Id.* at 4.)

Thus the Board did not require that the applicant describe in great detail the respective size and location of each element of the comprehensive waste management facility. In the present case, respondent filed a single application for a waste wood processing facility and an electric cogeneration project. The Board finds that the information provided by the applicant meets the statutory requirements of Section 39.2 and is sufficient to provide the Village Board with jurisdiction for siting approval.

Petitioners further argue that the failure to describe the cogeneration facility as an incinerator constitutes a failure to clearly inform the public of the nature of the proposed facility, thereby depriving the Village Board of jurisdiction. Citing again to Madison County, the Board stated:

> "However, use of the words "bale storage" and "storage area" for the more commonly used term "landfill" could result in some public misunderstanding. Generally, less commonly used expressions should be avoided in public notices. Notwithstanding, the Board concludes that the notice was not so confusing or misleading that jurisdiction should be denied on this basis."
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> (*Id. at 5.)*

The notice in Madison County also referred to a "future waste to energy facility", by which the applicants in that case meant to describe an incinerator that burned municipal waste to generate electricity, much as the McCook applicants intend to burn waste wood to generate electricity. While the admonition against use of technical jargon in describing proposed facilities is

repeatable here, the Board is not convinced that the notice was confusing or misleading to the public so as to deny jurisdiction to the Village Board.

Petitioners also claim that the notice was deficient for failing to make the public aware that there would be a 300 foot stack, that steam generated would be used by GM-EMD, what specific units of the proposed facilities would be regulated under environmental laws and regulations, and that the facility would generate 50 tons of ash per day. To quote the court in Tate v. IPCB, 188 Ill. App. 3d 994, 544 N.E. 2d 1176 (4th Dist. 1989):

> "The purpose of the notice is obviously to notify interested persons of the intent to seek approval to develop a new site or to expand an existing facility. The notice is sufficient if it is in compliance with the statute and it places potentially interested persons on inquiry about the details of the activity. The notice itself need not be so technically detailed as to raise unnecessary concerns among local residents and the general public. Clearly, the statute does not require the notice to be so technical that only an engineer would understand it."

The Board finds that the notice as published provided sufficient information of the proposed facility for purposes of jurisdiction.

Another issue of jurisdiction regards the publication by respondent of their notice to file the application in the *Daily Southtown Newspaper*. The jurisdictional requirement of Section 39.2(b) are that notice "...shall be published in a newspaper of general circulation in the county in which the site is located." The *Daily Southtown Newspaper* is a newspaper of general circulation within the County of Cook, where respondent seeks to construct their facilities. The jurisdictional requirements of the Act are met. Whether it is fundamentally fair to publish notice in a newspaper whose circulation may not include the surrounding communities is discussed below.

The Board finds that the published legal notice in the *Daily Southtown Newspaper* was adequate to confer jurisdiction on the Board of Trustees of the Village of McCook.

Content of Application

The petitioners claim that the applicant did not fulfill the filing requirements of Section 39.2(c) because documents that the applicant submitted to the Agency were not included in the application. (Pet. Br. at 13.) In particular, petitioners refer to documents on air emissions that were provided to the Agency by

the applicant. (Pet. Br. at 15.) Petitioners contend that these documents were submitted to the Agency prior to the filing of the original siting application by the applicant in February 1995. (Pet. Br. at 15.) The petitioners claim that the failure to include this documentation in the application was unfair, and deprived the Village of jurisdiction to review the siting application due to MCS's reliance on the material at hearing and the questions raised at hearing concerning emissions. (Pet. Br. at 17.)

Respondent argues that the air emission testing protocol referred to by petitioners was not "submitted" to the Agency within the legal meaning of that term, or, in the alternative, that the requirement for inclusion of documents filed with the Agency is procedural, not jurisdictional. Respondent argues that to submit a document is "To commit to the discretion of another." (Resp. Br. at 13).

Once the protocol was in the hands of the Agency, it was certainly within the discretion of the Agency to review, comment, or to reject the document. The Board finds that the protocol document was surely "submitted" to the Agency prior to the filing of the application by the applicant. However, the question before the Board is whether the failure to include the documents submitted to the Agency with the application for siting deprived the Village Board of jurisdiction to review the siting application.

Section 39.2(c) requires that "An applicant shall file a copy of its request...and (2) all documents, if any, submitted as of that date to the Agency pertaining to the proposed facility." The air sampling protocol for the testing of the existing stack on the boilers at General Motors EMD was submitted to the Agency by the respondent so that the testing data derived could be used by respondent at hearing to demonstrate an estimated reduction in actual emissions if the proposed project was approved. The sampling protocol, however, was for the existing stacks at GM-EMD, not for a similar burner as planned if siting approval is obtained for the site. The data derived from the sampling (not the sampling protocol) was used at hearing. The sampling protocol merely states the types of equipment to be used, the analyses that will be run, and the methodologies to be used by the lab. It is merely the "cookbook" by which the data is derived. The nexus between the existing stack sampling protocol and the proposed facility is insufficient for the Board to hold that the failure to provide this document to the Village deprived the Village Board of jurisdiction to decide the siting matter.

FUNDAMENTAL FAIRNESS

Section 40.1 of the Act requires the Board to review the proceedings before the local decisionmaker to assure fundamental

fairness. In E & E Hauling (2d Dist. 1983), 451 N.E.2d 555, the appellate court found that although citizens before a local decisionmaker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. (E & E Hauling (2d Dist. 1983), 451 N.E.2d at 564; see also Fairview Area Citizens Task Force (FACT) v. Pollution Control Board (3d Dist. 1990), 144 Ill. Dec. 659, 555 N.E.2d 1178.) Due process requires that parties have an opportunity to cross-examine witnesses, but that requirement is not without limits. 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. Pollution Control Board (2d Dist. 1988), 175 Ill.App.3d 1023, 530 N.E.2d 682, 693.) The manner in which the hearing is conducted, the opportunity to be heard, the existence of ex parte contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. (Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163.) Siting procedures are not entitled to the same procedural protections as more conventional adjudicatory proceedings. (Southwest Energy v. PCB (4th Dist. 1995), 655 N.E. 2d 304.)

Petitioners contend that the proceedings were fundamentally unfair for the following reasons:

1. notice was published in a newspaper not generally circulated in the suburbs surrounding McCook;

2. the siting application lacked the necessary information to inform the public and allow meaningful participation at the public hearing;

3. the siting application misrepresented the scope of the project in a manner that was misleading and fundamentally unfair;

4. the applicant was not correctly identified in the application;

5. the Village rushed to a final decision;

6. the petitioners were deprived of a reasonable opportunity to cross examine witnesses;

7. the Village had entered into a memorandum of intent for issuance of economic development bonds and were negotiating a host community agreement with the applicant.

The petitioner also asserts that the cumulative effect of its challenges to fundamental fairness result in the proceedings being fundamentally unfair.

In addition to the petitioners' claim that the local siting hearing was fundamentally unfair, many of the public comments received by the Board claim that the hearings were unfair because the hearings were held during the day when many people were not able to attend.

Publication of Notice

Petitioners and some public comments stated that publication of notice in the *Daily Southtown Newspaper* was fundamentally unfair because the Chicago edition of that newspaper states its boundaries of circulation to include the area south of Interstate Highway 55. The Village of McCook, the petitioners, and most of the public commenters are located north of Interstate 55.

Respondent includes notice from the *Daily Southtown Newspaper* stating that the Villages of McCook and Summit are within the circulation boundaries of the newspaper. Respondent also points to the notice of the siting hearings published by the Village in the *Des Plaines Valley News*. (Resp. Br. at 9.) Respondent also includes several newspaper articles published in local newspapers prior to the hearings by the Village with their brief.

The Board has already found that the notice published in the *Daily Southtown Newspaper* satisfied the statutory requirements to confer jurisdiction on the Village. When reviewing the notice for fundamental fairness, the question before the Board is whether the notice was sufficient to provide interested parties with notice of the proceedings. While the *Daily Southtown Newspaper* does have a limited general circulation, its circulation does include at least a portion of the area surrounding the proposed facility. There is nothing in the record to indicate that notice was published in the *Daily Southtown Newspaper* to limit the extent of notice provided. The Board finds that the publication notice of the filing of an application for siting by respondent in the *Daily Southtown Newspaper* was not fundamentally unfair where the statutory notice requirements are satisfied and the paper is circulated in the area of the facility.

In addition, the Board observes that while members of the public claimed to be unaware of the proceedings, notice of the Village's hearing and articles of the facility appeared in other publications. The hearings were separately noticed in a newspaper widely distributed in the areas affected and there were several newspaper articles in local newspapers calling the

attention of the public to the pending applications and hearings.

Content of Application

Petitioners assert that the applicant is required to make a *prima facie* demonstration of compliance with each of the nine criteria in its request for siting approval. (Pet. Br. at 19.) The petitioners contend that the failure by the applicant to include the necessary information regarding five of the criteria deprived petitioners of any meaningful opportunity for participation at hearing. (Pet. Br. at 25.) In particular, petitioners assert that the application failed to make a *prima facie* demonstration of compliance on criteria 1, 2, 3, 5 and 6. (Pet. Br. at 25.)

Respondent asserts that the application as filed contained information that demonstrated compliance with the criteria. (Resp. Br. at 27.) Respondent further states that a *prima facia* case on the criteria is not required by the Act or by Board or court precedent at the time of filing the siting application.

In Tate v. Macon County Board (188 Ill.App.3d 994, 544 N.E.2d 1176 (PCB 88-126)), the Board specifically stated that: "an abbreviated siting application (one without technical supporting documents) is acceptable where, as here, such materials were available prior to the close of the hearing process". (Tate at 94 PCB 79.) In Town of St. Charles v. Kane County Board and Elgin Sanitary District (PCB 83-228, 229, 230, 57 PCB 203 (March 21, 1984), vacated on other grounds sub. nom. Kane County Defenders v. PCB et al., 129 Ill. App. 3d 121, 472 N.E.2d 150 (3rd Dist. 1984)), the Board upheld a siting application which was only two pages in length when filed. In each of the above cited cases, additional data was filed either at hearing, or prior to hearing, which supported the initial application. (See also Concerned Citizens for a Better Environment v. City of Havana (May 19, 1994) PCB 94-44.)

The amended petition filed by MCS contained fifteen pages of text and included seven exhibits. (C38-C74.) MCS presented testimony at the siting hearing and additional documentation in support of the application. Therefore, the Board finds that the application as filed and later supplemented at the siting hearing did not render the proceeding fundamentally unfair.

Misrepresentation

Petitioners contend that the minimal information included in the application misled the Village, the petitioners and the public. (Pet. Br. at 28.) In particular, the petitioners observe that the siting application represents that the wood burning incinerator would provide the steam needed to meet GM's needs and the two ancillary gas fired boilers would be on standby to

provide backup steam and meet peak demand requirements. (Pet. Br. at 28.) The petitioners contend that this representation is false as the Heat Balance diagram (Ex. 12) shows that the incinerator will provide little if any steam. (Pet. Br. at 28.) Petitioners assert that the diagram and testimony of Glenn Wetnik establish that the claimed reduction in emissions is not being provided by the incinerator but rather by the natural gas fired boilers. (Pet. Br. at 32.)

Respondent counters with the affidavit of Lawrence S. Joachim. (Resp. Br. Attachment A.) He states that the Heat Balance diagram in question was prepared by SFT, Inc., under his general direction. (Id.) Mr. Joachim states that the drawing shows no steam available for GM because the extreme operating conditions include the possibility of the wood burner operating during summer shut-downs of the GM plant. (Id.) He states that the steam flow to GM will be on a demand basis, and the design of the electrical generating equipment has to allow for all steam generated to flow through the turbine loop to generate electricity. To do otherwise would result in shut down of the waste wood burner during GM shut-down periods, or the waste of steam that could be used to generate electricity. (Id.)

Since Mr. Joachim was not available to testify at the hearing before the Board, and therefore not available for cross examination, the Board must determine what weight, if any, it will afford to the statements of Mr. Joachim. Whether treated as testimony or a public comment, Mr. Joachim correctly states that good engineering practice requires design of a facility must include the worst case conditions of heat and steam flow. In the design of a turbine/electrical generating system, that includes total steam flow through the turbine. Economic and energy considerations make the waste of steam or the curtailing of operations during planned shut downs at GM-EMD unreasonable as alternate designs in sizing the generating unit.

The Board finds that the explanation of Mr. Joachim is reasonable, and that the application of MCS was not fundamentally unfair or misleading in describing the uses of steam in the proposed facility.

Identity of Applicant

The notices and the siting application identified the sole "applicant" as MCS. (C41 & C74.) The siting request also stated that Waste Wood Recovery Facility (WWRF) will lease a portion of the property from the named applicant and will develop the waste wood processing facility. (C41.) WWRF is owned 50-50 by the applicant's parent company and by HUE, L.L.C., a subsidiary of HUE, Inc. *(Id.)* HUE Inc. is identified as the long-term operator of the facility. *(Id.)* Petitioners contend that by failing to include WWRF and HUE Inc. as coapplicants the public, petitioners

and the Village were precluded from considering the operating history of the real parties who will be developing and operating the waste wood recovery facility when challenging and considering criteria 2 and 5. (Pet. Br. at 32.) Respondent states that the sole true applicant was identified, and the petitioners and the Village were able, through the disclosure of the contractual arrangements with other parties, to make inquiry into the operational histories of the other identified entities. (Resp. Br. at 39.)

The Board finds that identification of the parties that will be operating portions of the facility under the applicant's control is sufficient to allow interested parties, including the local decisionmakers, to inquire into the operating histories of the respective entities. Failure to name all such parties as co-applicants does not render the application and approval process fundamentally unfair.

Village Rush to Final Decision

The petitioners contend that the matter was improperly pushed to decision as quickly as possible - more than 120 days earlier than the statutory deadline. (Pet. Br. at 34). Petitioners maintain that this rush to decision deprived the petitioners and the public of any meaningful opportunity to participate in the proceedings. (Pet. Br. at 34.)

Pursuant to Section 39.2(e) the filing of an amended petition extends the decision deadline by an additional 90 days. Thus, when the applicant filed its amended petition, the decision deadline was extended to November 18, 1995. Petitioners contend that neither the Village nor the applicant informed the public of the extended deadline and suggest that a concerted effort was made to conceal the fact that more time was available. (Pet. Br. at 35.) Petitioners contend that it would have benefited by the additional time in which to prepare responses to the evidence presented by the applicant at hearing. (Pet. at 39.)

Respondent notes that the extension of the decision deadline occurs by operation of law (Resp. Br. at 40), that petitioners did not request additional hearing dates (Resp. Br. at 43), and that, though the decision deadline is automatically extended by the filing of an amended application, the 30-day post hearing comment period is not. (Resp. Br. at 41.)

The Board has previously noted the wealth of case law establishing that before an inquiry can be made into the decisionmaker's mental processes when a contemporaneous formal finding exists, there must be a strong showing of bad faith or improper behavior. (Dimaggio v. Solid Waste Agency of Northern Illinois (January 11, 1990), PCB 89-138 at 5; City of Rockford v. Winnebago County (November 19, 1987), PCB 87-92 at 9 [citations

omitted].) In their adjudicative role, the decisionmakers are entitled to protection of their internal thought processes. (Dimaggio at 5.) Consequently, without adequate facts warranting an inference that fundamental unfairness may have occurred in the hearing process, the Board will not unnecessarily invade the proper realm of the Village trustees. (Dimaggio v. Solid Waste Agency of Northern Cook County (October 24, 1989), PCB 89-138 at 7-8.)

The Board notes that the record was properly closed in this case, that the case was ripe for decision, and that the statutory decision deadline is a requirement to decide a case by a date certain, not a statutory prohibition against deciding a case that is ripe for decision prior to that date certain.

The Board finds that the Village Board made a timely decision on the merits of the application for siting, as required by the Act. The timing of that decision was not fundamentally unfair.

Cross-Examination

Pursuant to the Rules established by the Village, all cross examination questions were to be submitted in writing to the hearing officer. (C83.) The hearing officer would determine if the question was relevant or duplicative before directing the question to the witness. (C86.)

Petitioners assert that the Village's rules on cross examination stifled meaningful or effective cross examination of the applicant's witnesses by the public. (Pet. Br. at 41.) Petitioners testified that they would have benefitted from being allowed to direct cross examination to witnesses especially concerning follow up or clarification questions. (Tr. 67-71, 216-217, 226-227.) Petitioners further assert that the limitations on cross examination deprived petitioners of a meaningful opportunity to participate in the hearing. (Pet. Br. at 45.)

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. (See also Michael Turlek et.al. v. Village of Summit (May 5, 1994), PCB 94-19 cons. PCB 94-21, PCB 94-22.)

In this case, the record indicates that numerous questions were submitted by members of the public and asked by the hearing officer at the Village Board hearing. In some cases, the hearing officer held questions for later witnesses that were better able to answer, and in some cases, the stated rule against verbal questioning by members of the public was bent - follow up questions asked verbally were allowed.

The procedures for cross-examination of witness at the hearing before the Village was similar to the procedures used in Daly and Turlek. The record in this case does not support a finding that the procedures for cross examination of witnesses at the Village Board hearing were fundamentally unfair.

Bond Issue and Host Community Agreement

The Village and MCS entered into a Memorandum of Intent that provided "[t]hat the Village will subject to a sale of the Bonds on terms satisfactory to MCS and the Village, authorize, issue, sell and deliver its economic revenue bonds in an amount not to exceed $90,000,000 (the Bonds) and apply the proceeds therefrom to the payment of the Project". (Pet. Exh. 4.) The Village also entered into a host community agreement with MCS for the siting of the proposed facilities. (Pet. Exh. 5.) Petitioners allege that failure to include these agreements in the siting record renders the decision of the Village Board fundamentally unfair because opponents of the siting could not inquire about the possibility of ex-parte contacts, or prejudgment of the project.

Respondent notes that there is no statutory requirement or Board rule that requires inclusion of such records in the siting record. Respondent further notes that no prejudice has been demonstrated by petitioners. (Resp. Br. at 50.)

The appellate courts have held that the existence of a preannexation agreement, with a potential economic benefit to a village, does not show predisposition of a local decisionmaker. (FACT, 555 N.E.2d 1178; Woodsmoke Resorts, Inc. v. City of Marseilles (3d Dist. 1988), 174 Ill.App.3d 906, 529 N.E.2d 274.)

In Gallatin National v. The Fulton County Board (June 15, 1992), PCB 91-256, 134 PCB 245, the Board found that the issuance of bonds was a permissible preliminary step and did not indicate predispoition or bias. The Board find that the facts in the present case are similar to the facts in Gallatin. As the existence of a bond agreement does not indicate predisposition or bias, the Board finds it unnecessary to require that documents relating to such agreements be included in the record.

Petitioners have failed to demonstrate that the failure of the respondent to include documents relating to the host community agreement or the bond issue have been prejudicial. The

Board does not find that the failure to include these documents rendered the hearing before the Village of McCook fundamentally unfair.

Daytime Hearings

Many public comments raise the issue that the hearings were held only during normal business hours thus limiting the availability of many members of the public from participating or attending.

The Board has previously held that hearings held during normal business hours meet the requirements of fundamental fairness as long as they are consistent with the published legal notice required under section 39.2(d) of the Act. (See Citizens for a Better Environment v. McCook (March 25, 1993), PCB 92-198, PCB 92-201.) We find nothing in this case which would have us depart from our prior rulings on this issue. Therefore, we find that hearings conducted during normal business hours comport with fundamental fairness. (See also Michael Turlek et.al. v. Village of Summit (May 5, 1994), PCB 94-19 cons. PCB 94-21, PCB 94-22.)

Cumulative Effect

In finding that none of the elements cited by petitioners as fundamentally unfair rise to the level of fundamental unfairness that would cause remand or reversal of the Village of McCook, the Board also finds that the cumulative effect of those elements was not so fundamentally unfair as to taint the proceedings before the Village Board.

CHALLENGED CRITERIA

At the local level, the siting process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. These statutory criteria are the only issues which can be considered when ruling on an application for siting approval. If the local body finds that all criteria are satisfied, siting approval must be granted.

When reviewing a local decision on the criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal, Inc. v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26, 29; Waste Management of Illinois, Inc. v. Pollution Control Board (2d Dist. 1987), 160 Ill.App.3d 434, 513 N.E.2d 592; E & E Hauling, Inc. v. Pollution Control Board (2d Dist. 1983), 116 Ill.App.3d 586, 451 N.E.2d 555, aff'd in part (1985) 107 Ill.2d 33, 481 N.E.2d 664.) 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.) The Board, on review, is not to reweigh the evidence. 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. (Fairview Area Citizens Taskforce (FACT) 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.) Merely because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the local government's 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. In this case, petitioners have raised challenges to the Village's decisions on criteria 1, 2 and 5.[4]

Criterion 1 - Need

Section 39.2(a) provides that a local decisionmaker must determine whether the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve.

The applicant is not required to show absolute necessity in order to satisfy criterion 1. (Fairview Area Citizens Taskforce v. PCB, 555 N.E.2d at 1185, citing Tate v. Macon County Board, 544 N.E.2d 1176; Clutts v. Beasley (5th Dist. 1989), 185 Ill. App. 3d 543, 541 N.E.2d 844, 846 ; A.R.F. Landfill, Inc. v. PCB (2d Dist. 1988), 174 Ill.App.3d 82, 528 N.E.2d 390, 396; Waste Management of Illinois v. PCB (3d Dist. 1984), 122 Ill.App.3d 639, 461 N.E.2d 542, 546.) The Third District has construed "necessary" as connoting a "degree of requirement or essentiality" and not just "reasonably convenient". (Waste Management of Illinois v. PCB, 461 N.E.2d at 546.) The Second District 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 of Illinois v. PCB (2d Dist. 1988), 530 N.E.2d 682, 689; A.R.F. Landfill, Inc. v. PCB, 528 N.E.2d at 396; Waste Management of Illinois v. PCB (2d Dist. 1984), 463 N.E.2d 969, 976.)

Petitioners assert that the Village's finding on criterion 1 is against the manifest weight of the evidence for two reasons.

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[4] The petition for review also challenges criterion 3 but petitioners elected not to proceed with this argument. (Pet. Br. at 60.)

First, the petitioners contend that the decision on criterion 1 was against the manifest weight of the evidence because the Village failed to consider evidence in the record of the landfill and incinerator capacity currently available and being developed in the area. (Pet. Br. at 60.) Second, petitioners argue that the Village's decision on criterion 1 was against the manifest weight of the evidence because the applicant did not demonstrate need for a wood processing facility in the area. (Pet. Br. at 60.)

Petitioners contend that the record clearly establishes that the current existing capacity is sufficient to meet the waste needs of the area. (Pet. Br. at 61.) Petitioners reference the testimony of MCS's expert witness, Ms. Conklin and the government reports submitted at the Village hearing to show that the record demonstrates that there are 9-11 years of landfill capacity left in the area. (Pet. Br. at 61.) In addition, petitioners contend that the Village failed to consider evidence in the record on other facilities in the process of being developed in the area. (Pet. Br. at 2.)

Petitioners also assert that the applicant only presented data on the need for wood processing facility for four counties and not all nine counties that comprise the service area. (Pet. Br. at 63.) The testimony presented by the applicant's expert witness provided data on waste wood generated in only four counties. (Pet. Br. at 63.)

In response, MCS asserts that the Village articulates numerous reasons in support of its decision on criterion 1 which are fully supported by the testimony. (Resp. Br. at 55.) MCS further asserts that petitioners have mischaracterized the testimony as stating that there is 9-11 years of landfill capacity left. (Resp. Br. at 57.) MCS contends that the testimony states that there were 7 years left in 1993 which would translate to two years left when the facility commences operation. (Resp. Br. at 57.) MCS contends that petitioners have presented no evidence to show that the Village failed to consider facilities under development. (Resp. Br. at 58.) MCS also states that the study performed by its expert witness used data of waste wood production from four counties and the expert's opinion that the other counties in the service area would significantly increase the amount of waste wood available. (Resp. Br. at 60.)

The Board finds that petitioners have not proven that the Village's decision on criterion 1 was against the manifest weight of the evidence. There is sufficient evidence in the record to support the Village's finding. The applicant presented evidence on the expected landfill capacity and the generation of waste wood in the service area. There is no evidence to support the contention by petitioners that the Village did not consider all the evidence when deciding on criterion 1.

Criterion 2 - Public Health, Safety and Welfare and
Criterion 5 - Fire, Spills and Other Accidents

Section 39.2(a) provides that the local decisionmaker must determine whether the proposed facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected (criterion 2). Section 39.2(a) also requires the local decisionmaker to determine whether the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents (criterion 5).

Petitioners contend that the Village abrogated its statutory responsibility to review the application on criteria 2 and 5 because the Village deferred to the other governmental agencies on these issues. (Pet. Br. at 67.) Petitioners contend that the applicant did not include technical information in its application and specifically invited the Village to defer to the Agency on technical decisions. (Pet. Br. at 67.) In addition, petitioners observe that MCS's witness stated that emergency response plans and operational plans would be developed and submitted to the Agency but these plans were not detailed at hearing and were not reviewed by the Village. (Pet. Br. at 71.)

MCS contends that technical details were presented regarding criterion 2. (Resp. Br. at 61.) MCS further maintains that the petitioners have mischaracterized the Village's decision and that the Village was entitled to consider evidence regarding future regulatory review. (Resp. Br. at 63.) MCS contends that the petitioners ignore the reasons given by the Village in support of its decision. (Resp. Br. at 66.)

The Board finds that there is sufficient technical information in the record on which the Village could base its decision on criteria 2 and 5. Petitioners have failed to show that the Village's decision on criteria 2 and 5 is against the manifest weight of the evidence. The Village's decision recognizes that other agencies will be reviewing the facility relative to these criteria and then goes on to explain the evidence that supports its decision that the applicant has satisfied criteria 3 and 5. The Village Board did not merely defer to other agencies on these criteria but reviewed the evidence for these criteria.

The Board has previously held that the local governing Board may place some reliance on the Illinois Environmental Protection Agency's (Agency) permit review process where the applicant has presented a *prima facie* case on the criterion. (Gallatin National Co. v. Fulton County Board (June 15, 1992), PCB 91-256, 134 PCB 245; City of Geneva v. Waste Management of Illinois (July 21, 1994) PCB 94-58.) The Board finds that the Village did not inappropriately abrogate its decision authority by placing some

reliance on the Agency's permitting review process and review by other governmental agencies.

CONCLUSION

As stated above, the Board finds that the Village of McCook properly exercised jurisdiction in this case and that the proceedings before the Village of McCook were not fundamentally unfair. The Board further finds that none of the decisions made on the criteria of Section 39.2(a) of the Act were against the manifest weight of the evidence.

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

ORDER

The July 27, 1995 decision of the Village of McCook granting siting approval for pollution control facilities to McCook Cogeneration Station, L.L.C., is hereby affirmed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1994)), provides for appeal of final orders of the Board 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, Motion 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 7th day of December, 1995, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board