ILLINOIS POLLUTION CONTROL BOARD
March 25, 1993

CITIZENS FOR A BETTER ENVIRONMENT, and ALICE ZEMAN, Petitioners, v. VILLAGE OF MCCOOK and WEST SUBURBAN RECYCLING AND ENERGY CENTER, INC., Respondents.	)	PCB 92-198 (Landfill Siting) (Consolidated with PCB 92- 201)

EDWARD NOVAK, Petitioner, v. BOARD OF TRUSTEES and MAYOR of the VILLAGE OF MCCOOK and WEST SUBURBAN RECYCLING & ENERGY CENTER, INC., Respondents.	)	PCB 92-201 (Landfill Siting) (Consolidated with PCB 92-198)

KEVIN GREENE APPEARED ON BEHALF OF CITIZENS FOR A BETTER ENVIRONMENT.

LAURA LEONARD, SIDLEY & AUSTUN, APPEARED ON BEHALF OF WEST SUBURBAN RECYCLING AND ENERGY CENTER.

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

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

This matter is before the Board on third-party appeals filed pursuant to Section 40.1(b) of the Environmental Protection Act (Act) (415 ILCS 5/40.1(b) (1992)[1]). Citizens For A Better

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[1] The Environmental Protection Act was previously codified at Ill. Rev. Stat. ch. 111 1/2, par. 1001 et seq. (1991).

Environment and Alice Zeman (CBE), a member of CBE, filed their appeal on December 3, 1992 and Edward Novak filed his appeal on December 4, 1992. On December 17, 1992, the Board consolidated both appeals because CBE, Alice Zeman, and Edward Novak (petitioners) all seek review of the decision of the Village of McCook (Village) granting site location suitability aproval to West Suburban Recycling and Energy Center, Inc. Hearings were held on February 4, 1993 and February 5, 1993 in Summit, Illinois, which were attended by members of the public.

BACKGROUND

On May 7, 1992, West Suburban Recycling and Energy Center (WSREC) filed an application for siting approval for consisting of an integrated municipal waste transfer, recycling, compost and waste processing regional pollution control facility to be located on 19 acres of land in the Village of McCook.[2] (R. 13, 16.) The "Recovery Center" will provide resource recovery by processing recyclable materials, composting biodegradable materials, and by processing mixed municipal solid waste to produce refuse derived fuel (RDF) for combustion at a separate facility to be located in the Village of Summit. (R. 16.) On August 5, 1992 an amended application was filed. (R. 206.) Hearings were held before the Village on August 17, 1992. On November 2, 1992, the Village entered its written decision finding that WSREC met all applicable criteria set forth in Section 39.2 of the Act (415 ILCS 5/39.2) and granting siting approval. (R. 2-12.)

On appeal before the Board, Novak alleges that the proceedings before the Village were fundamentally unfair and asks that the matter be remanded for a new hearing and new decision. CBE alleges that the Village's findings that the facility is necessary to accommodate the waste needs of the intended service area (415 ILCS 5/ 39.2(a)(1) (1992)) and that the facility is consistent with the solid waste management plan (415 ILCS 5/39.2(a)(8) (1992))are against the manifest weight of the evidence.

STATUTORY FRAMEWORK

At the local level, the siting process is governed by Section 39.2 of the Act. (415 ILCS 5/39.2 (1992).) Section

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[2] Because the facility is to be located on property that straddles the boundary of two villages, an application for siting approval for a waste-to-energy facility was filed with the Village of Summit. However, the Village of Summit's decision is not before the Board in the instant case as that matter was reviewed in PCB 92-174, 92-177.

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. Only if the local body finds that all applicable criteria have been met by the applicant can siting approval be granted. The Village found that WSREC met its burden on all the criteria. CBE challenges the County's findings on criteria #1 and #8.

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 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., PCB 90-94 (August 30, 1990), aff'd File v. D & L Landfill, Inc. (5th Dist. 1991), 219 Ill.App.3d 897, 579 N.E.2d 1228.)

Additionally, the Board must review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. (415 ILCS 5/40.1 (1992); E & E Hauling, 451 N.E.2d at 562.) While no jurisdictional issues are presented, Novak does raise a fundamental fairness issue.

DISCUSSION

First, the Board addresses the fundamental fairness issue raised by Novak. Novak contends that the proceedings were fundamentally unfair because, unlike the August 10, 1992 Village of Summit hearings on the waste-to-energy facility, the hearing on the instant application did not continue into the evening

hours when Novak and others attended thereby depriving them of the opportunity to participate.

The legal notices, published in the Chicago Tribune and the Desplaines Valley News, provide that hearing on WSREC's application would be held "on Monday, August 17, 1992, beginning at 10 a.m." (R. 286-91.) The record establishes that the Village of McCook hearing commenced at 10 a.m. on August 17, 1992. (Tr. 2/4/93 at 48; R. 6.) A lunch break was taken, the hearing reconvened and subsequently adjourned at approximately 4;45 p.m. (Tr. 2/4/93 at 48; R. 6.) A thirty-day comment period was set at the conclusion of the hearing. (R. 1118.)

The record also establishes that the Village of Summit hearing, held August 10, 1992, began at 10 a.m., continued until 4:30 p.m., reconvened at 7:00 p.m., and concluded at 2:30 a.m. on August 11, 1992. (Tr. 2/4/93 at 50.)

According to Novak, a resident of Summit for 37 years, he came to the hearing room at 7 p.m. on August 17, 1992 and waited until about 10:30 p.m. before leaving. After it became apparent that the hearing was over, Novak and other citizens filled out "presentation" and "cross question" cards which had been left in the room and delivered them to the Village. Novak testified that a newsletter published by the Village of Summit indicated that the hearing would be held at 7 p.m. (Tr. 2/4/93 at 20.) Novak also testified that he attended the Village of Summit's August 10, 1992 hearing from 7 p.m. until the hearing ended. (Tr. 2/4/93 at 21-22.)

Mike Turlek testified that he came to the August 17 McCook hearing at 7:45 p.m. and that there were approximately 40-50 people at the auditorium. (Tr. 26.) He testified that he was aware that the legal notice stated that the starting time of the hearing was 10 a.m. and that it gave no finishing time. (Tr. 2/4/93 at 24-25.) He also testified that he attended the August 10 Summit hearing and was "aware there would be a 7:00 p.m. start-up again." (Tr. 2/4/93 at 25.) Turlek also testified that the Suburban Life newspaper story indicated that the hearing would begin at 10 a.m. and that there would be another starting time at 7 p.m. (Tr. 2/4/93 at 25.) Turlek did submit a public comment. (Tr. 2/4/93 at 30-31.)

James Sylvester testified that he too came to the August 17 McCook hearing at 7 p.m. and read the newsletter indicating that the hearing would be held in both the morning and the evening. (Tr. 2/4/93 at 34-35.) He also filed a written comment. (Tr. 2/4/93 at 38.)

Catherine Kulaga testified that she attended the hearing held on August 17 and that she informed the hearing officer that there might be people attending in the evening. (Tr. 2/4/93 at

42-43.) She also testified that everyone in attendance at the August 17 hearing was given the opportunity to make a comment. (Tr. 2/4/93 at 45.)

Dilys Jones testified that he attended the August 17 McCook hearing and that the legal notice for that hearing only stated that the hearing would begin at 10 a.m. (Tr. 2/4/93 at 60.) He testified that people assumed that the August 17 hearing was going to be just like the August 10 Summit hearing. (Tr. 2/4/93 at 60-61.)

Joel Balestri testified that he did not see the legal notices (Tr. 2/4/93 at 83) and Greg Baine testified that he saw no legal notices for either hearing, but stated also that he does not read the newspaper (Tr. 2/4/93 at 93).

Novak's contention that the proceedings below were fundamentally unfair is based upon the fact that the hearing had been concluded by the time he arrived to participate. Novak believed that the August 17 McCook hearing would still be in progress because: (1) the August 10 Summit hearing proceeded into the evening hours; and (2) some local newspaper articles and a newsletter indicated that the hearing would proceed into the evening hours.

The "Village of Summit Newsletter" relied upon by Novak actually refutes his position. (PCB Pet. Exh 1.)[3] This newsletter states that the August 10 Summit hearing would begin at 10 a.m., continue until 4:30 p.m., reconvene at 7 p.m., and continue until all comments were made. Conversely, this newsletter states that the August 17 McCook hearing "will begin at 10 a.m." However, some of the newspaper articles introduced by Novak indicated that the August 17 hearing would also continue into the evening as had the August 10 hearing. (PCB Pet. Exh. 4, 5, 8.) A Northwest Cook County Environmental Action Coalition (NCCEAC) newsletter also indicates that the August 17 McCook hearing would follow the pattern of the August 10 Summit hearing. (PCB Pet. Exh. 2.)

While newspaper articles and NCCEAC Newsletters indicated that the August 17 McCook hearing would be held in the evening, the legal notices, which are the only notices required to be given by the Act (415 ILCS 5/39.2(d) (1992)), accurately stated that the hearing would begin at 10 a.m. (R. 286-91.) The Board cannot make the fairness of the proceedings before the Village dependent upon the accuracy of local newspaper articles or newsletters. If the Board were to find that a local newspaper story or newsletter published by a local citizens group could

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[3] "PCB Pet. Exh ___ " indicates exhibits introduced by petitioner at the Board hearing on February 5, 1993.

affect the fundamental fairness of a hearing by incorrectly predicting the timing of the hearing, the fairness of the proceeding could be "sabotaged". Rather, the Board finds that the fairness of the hearing, in terms of accurately giving notice of the time and place of the hearing, is governed by the legal notice required to be published by the Act. (415 ILCS 5/40.1 (1992).)

In the instant case, the legal notice stated that the hearing would begin at 10 a.m. and the hearing did indeed begin at that time. Therefore, the Board finds no unfairness resulting from the fact that the August 17 McCook hearing concluded at 4:45 p.m. before Novak and others attended. Moreover, the Board finds that fundamental fairness does not require that the August 17 McCook hearing follow the identical schedule of the August 10 Summit hearing. The Board concludes that the proceedings before the Village were fundamentally fair.

The Board now addresses CBE's challenge to the Village's findings on criteria #1 and #8. Criterion #8 provides that the applicant must establish that "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) (1992).)

While CBE contends that the Village's decision that WSREC met the "solid waste management criterion" is against the manifest weight of the evidence, WSREC contends that this criterion is inapplicable because there is no adopted plan. The Village's November 2, 1992 written finding states that the facility is to be located "in Cook County which has not yet adopted a solid waste management plan." (R. 10.) A letter dated July 1, 1992 from the Cook County Department of Environmental Control states that the County had not yet adopted a solid waste management plan. (C 864.) The "Solid Waste Needs Assessment for the Cook County Planning Area" (Cook County report), prepared by the Northeastern Illinois Planning Commission, states that the Cook County solid waste planning area comprises the entire area of the County outside the City of Chicago, that the Cook County Board is responsible for adopting a solid waste plan for that area, and that the County has been divided into five sub-areas for planning purposes. (R. 487.) The group responsible for planning for the area where WSREC's proposed facility would be located is the West Cook County Solid Waste Agency (WCCSWA). (R. 487, 492.) The record also contains a "West Cook County Solid Waste Management Plan (WCCSWMP)." (R. 660.) A letter dated August 27, 1992 from the Chairman of the WCCSWA indicates that the plan would be adopted by the WCCSWA's Board of Directors on or about September 17, 1992. (R. 1174.) However, the Cook County report establishes that while the Cook County Board

intends to make use of the plans developed by the groups in the sub-areas, the ultimate responsibility for adopting a solid waste plan for the entire suburban portion of Cook County rests with the Cook County Board. (R 492.)

The Board finds the instant case distinguishable from Worthen v. Village of Roxanna (October 10, 1991), PCB 91-106 where the Board also dealt with the issue of whether criterion #8 applies. In Worthen, the Board was unable to determine whether the county had an adopted solid waste management plan. (PCB 91-106 at 9.) However, because the county made a specific finding of fact that the drafts of the solid waste management plans would be considered as if such a plan was in full force and effect, the Board reviewed the consistency of the plan pursuant to criterion #8. Here, there is one document, the letter from the Chairman of the WCCSWA, indicating that the WCCSWA's plan may be adopted by the WCCSWA's Board of Director's in the future. Additionally, although testimony was elicited as to whether the proposed facility is consistent with the WCCSWMP (Tr. 8/17/92 at 1117), such testimony does not establish the existence of an adopted solid waste management plan requiring an inquiry pursuant to criterion #8. However, not only does this evidence fail to conclusively establish that the WCCSWA has adopted a plan, other evidence indicates that it is the Cook County Board that must adopt such a plan. Lastly, unlike Worthen, here the Village specifically found that no solid waste management plan had been adopted. Based upon a review of the record, the Board finds that Cook County did not have an "adopted" solid waste management plan at the time the Village rendered its decision on WSREC's application.

In the absence of an adopted plan, an applicant cannot be required to establish that the proposed facility is consistent with that plan in order to obtain siting approval. Therefore, the Board concludes that the Village's finding that criterion #8 is inapplicable is proper and rejects CBE's contention that the Village's finding on this criterion is against the manifest weight of the evidence.

Criterion #1 requires that the applicant establish that the "facility is necessary to accommodate the waste needs of the area it is intended to serve." (415 ILCS 5/39.2(a)(1) (1992).) In construing this statutory provision, the appellate court has held that an applicant for siting approval need not show absolute necessity in order to satisfy criterion #1. (Clutts v. Beasley (5th Dist. 1989), 541 N.E.2d 844, 846 ; A.R.F. Landfill v. PCB (2d Dist. 1988), 528 N.E.2d 390, 396 ; WMI v. PCB (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. PCB, 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. PCB (2d Dist. 1988), 530 N.E.2d 682, 689 ; A.R.F. Landfill v. PCB, 528 N.E.2d at 396; WMI v. PCB (2d Dist. 1984), 463 N.E.2d 969, 976 .) The First District recently 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. IPCB (1st Dist.1992), 227 Ill. App. 3d 533, 592 N.E.2d 148, 156.)

In support of its finding that WSREC's facility is needed, the Village stated the following: the facility would "encourage and promote alternate means of managing solid waste in conjunction with the state policy established in the Illinois Solid Waste Management Act"; that there is a need for the facility in the greater Chicago area located in proximity to the source of the municipal waste being generated; the testimony of John L. Kirby, president of WSREC, the Fifth Annual Report of Available Disposal Capacity for Solid Waste in Illinois, the West Cook County Solid Waste Needs Assessment, the West Cook County Solid Waste Management Plan, and the Solid Waste Needs Assessment for the Cook County Planning Area establish that there is a need for a facility which will accommodate an increase in the recycling and composting of municipal waste. (R. 7.)

WSREC notes that while CBE recognizes that the issue before the Board is whether the applicant established a "need", CBE has couched virtually all of its arguments in terms of an alleged inconsistency between the facility and the waste management plan prepared by the WCCSWA. The Board agrees that much of CBE's argument on the "need criterion" is based upon its contention that the proposed facility is inconsistent with a solid waste management plan that has not yet been adopted. As noted above, WSREC need not establish that the facility is consistent with an unadopted waste management plan. However, the Village could properly rely on waste generation data in an unadopted solid waste management plan which contains data on waste generation in reaching its determination on criterion #1. (See e.g., R. 660-763 Pet. Exh. 7.)

In addition to arguing about consistency with the WCCSWMP, CBE argues that the Village's finding of "need" is against the manifest weight of the evidence because the WCCSWMP developed for the area intended to be served by the WSREC does not include two of the WSREC's major components: the solid waste composting facility and RDF-production facility. WSREC contends that the Village's decision is not against the manifest weight of the evidence simply because the WCCSWMP does not specifically identify the composting and RDF-production components of the proposed WSREC facility as a necessary part of the plan. WSREC maintains that the Village's finding of "need" is supported by the WCCSWMP as well as other evidence and testimony introduced by

WSREC.

The Board cannot say that the Village's finding on the "need criterion" is against the manifest weight of the evidence simply because WSREC's facility is not identified as being a necessary part of a draft solid waste management plan. Again, the question of "need" is not dependant on consistency with an solid waste management plan; rather that inquiry is properly made under criterion #8 when applicable. While the Village's written decision makes reference to the WCCSWMP in establishing a "need", it is possible that the Village was taking into account that such a plan was not yet in place and, therefore, provided no solution to the waste needs of the intended service area. The Board finds that the relevant inquiry is whether there is sufficient evidence in the record to support the Village's finding of need, not whether the WCCSWMP or any other draft waste management plan specifically incorporates WSREC's.

John L. Kirby, president of WSREC, testified that the facility is needed to accommodate the waste needs of the intended service area. ((TR. 8/17/92 at 37.) Kirby testified that in assessing need, WSREC used data available from the Illinois Environmental Protection Agency's "Available Disposal Capacity for Solid Waste in Illinois, Fifth Annual Report", "Illinois Solid Waste Needs Assessment" dated June 1988, and the June 1991 "Solid Waste Needs Assessment for Cook County Planning Area." (Tr. 8/17/92 at 40.) These reports provide information on the number of active landfills in Illinois, new facilities planned for the area but which have yet to receive permits, and the amount of waste being generated in Cook County. (Tr. 8/17/92 at 38-41; R. 377-762 Pet. Exh. 4, 5, 6, 7.) Jack Matton, manager for ABB Recovery Systems, also testified that there is a "need" for transfer capacity and recycling. (Tr. 8/17/92 at 1117.)

The Board finds that the Village's finding that WSREC established a "need" for the facility based on testimony and the reports introduced by WSREC is not against the manifest weight of the evidence. CBE does not point to any testimony refuting the testimony of Kirby and Matton that the facility is necessary to accommodate the waste needs of the intended service area. Rather, CBE relies upon the facilities alleged inconsistency with the unadapted WCCSWMP and its interpretation of the data in that plan in support of its contention that the Village's finding on criterion #8 is against the manifest weight of the evidence. In the absence of such contradictory evidence, it is difficult to conclude that the Village's decision is against the manifest weight of the evidence. (Industrial Fuels & Resources/Illinois, Inc. v. IPCB (1st Dist.1992), 227 Ill. App. 3d 533, 592 N.E.2d 148.) Based upon the Board's review of the record, a finding that WSREC failed to establish a "need" is not clearly evident, plain, or indisputable.

For the foregoing reasons, the Board concludes that the Village's proceedings were fundamentally fair, affirms the Village's finding that criterion #8 is inapplicable and finds that the Village's determination that WSREC established that the facility is necessary pursuant to criterion #1 is not against the manifest weight of the evidence.

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

ORDER

The Board hereby affirms the Village of McCook's November 2, 1992 decision granting WSREC siting approval.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 1992)) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Casteneda v. Illinois Human Rights Commission (1989), 132 Ill. 2d 304, 547 N.E.2d 437; Strube v. Illinois Pollution Control Board, No. 3-92-0468, slip op. at 4-5 (March 15, 1993).)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 25th day of March, 1993 by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board