ILLINOIS POLLUTION CONTROL BOARD
October 27, 1994

CONTINENTAL WASTE INDUSTRIES OF ILLINOIS, INC.,	)	
Petitioner,	)	PCB 94-138 (Siting Review)
v.	)	
CITY OF MT. VERNON, ILLINOIS,	)	
Respondent.	)	

FRED C. PRILLAMAN, MOHAN, ALEWELT, PRILLAMAN & ADAMI APPEARED ON BEHALF OF PETITIONER;

DAVID R. LEGGANS APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board on a petition for review filed on April 26, 1994, by Continental Waste Industries of Illinois, Inc. (C.W.I). C.W.I. requests review of the City of Mt. Vernon's (City) denial of local siting approval to regionalize the existing transfer facility.

A hearing in this matter was held on June 21, 1994, in Mt. Vernon, Illinois before hearing officer John Hudspeth. C.W.I. filed its brief on August 11, 1994. The City of Mt. Vernon filed its brief on September 8, 1994. C.W.I. filed its reply brief on September 22, 1994.

The Board's responsibility in this matter arises from Section 40.1 of the Environmental Protection Act (Act) (415 ILCS 5/40.1 (1992)). 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 approval provision for new regional 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 would make decisions on permit applications submitted if local siting approval is granted and upheld.

ISSUES

Petitioner seeks reversal of the City's decision on one or

more of the following grounds: 1) Section 39.2 of the Act violates the commerce clause of the United States Constitution; 2) Section 39.2 violates the supremacy clause of the United States Constitution; 3) the City of Mt. Vernon's decision is against the manifest weight of the evidence; and 4) petitioner was denied fundamental fairness. (Pet. Br. at 3.)[1]

PROCEDURAL HISTORY

On October 6, 1993, C.W.I. filed a request for siting approval for a regional pollution control facility with the City of Mt. Vernon. (C-3.) C.W.I. sought local siting approval for expansion of services at an existing waste transfer station located in the City of Mt. Vernon. (C-1.) The proposed expanded facility would be a regional waste transfer station accepting waste from throughout Jefferson County and surrounding areas. (C-1.) No waste would be disposed in Jefferson County. (C-1.) On January 10, 1994, a hearing on C.W.I's request was held before the City Council of Mt. Vernon. (C-19.) In March of 1994, the City Council of Mt. Vernon passed a resolution denying C.W.I's request for siting approval. (C-219 - C-225.)

JURISDICTION

The constitutional issues raised by C.W.I. would, if valid, serve to deprive the Board of jurisdiction. It is appropriate that those issues be discussed first. Though the Board is a creature of the statute that created it, and the statutory powers given the Board do not include the power to definitively decide constitutional issues, for reasons given below we believe that the authority cited by C.W.I. does not serve to deprive the Board of jurisdiction because we believe that no valid constitutional issues were raised.

Petitioner's first challenge to jurisdiction is premised upon the application of TENNSV, Inc. v. Gade, (Nos. 92-503 & 92-502 (S.D. Ill. Oct. 22, 1993). Petitioner argues that TENNSV supports its argument that the siting requirement contained in Section 39.2 of the Act is unconstitutional. The TENNSV court held Section 39.2, as well as Section 3.2 and 22.14(a), unconstitutional as applied to interstate municipal solid waste. In the context of this case, petitioner's reliance upon TENNSV is misplaced because it is readily distinguished based upon facts and the issue before us.

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[1] Petitioner's Brief filed on September 8, 1994 will be referenced as Pet. Br. at ____. Reply Brief of Petitioner filed on September 22, 1994 referenced as Reply at ___. References to the record filed by Mt. Vernon will be referenced to the page number (C-1 through C-239). The transcript from the Board's June 21, 1994 hearing will be referenced as Tr. at _____.

In TENNSV, the court was deciding whether a rail shipment of municipal solid waste (MSW) into Illinois from New York was required to undergo the Section 39.2 siting approval process for the MSW to be unloaded from the train for shipment to a landfill in Illinois. Citing Fort Gratiot Landfill (1992), ___ U.S. ____, 112 S.Ct. 2019, 119 L.Ed.2d 139, the Second District found that the defendants in TENNSV had not offered any proof that MSW generated outside the boundaries of any local general purpose unit of government poses any different health risks to the public than MSW generated locally. In Fort Gratiot Landfill, the Supreme Court held that a Michigan landfill siting law violated the commerce clause of the U.S. Constitution because it required counties within the State of Michigan to affirmatively permit the receipt of interstate shipments of waste.

In this case, C.W.I. sought local siting approval from the City of Mount Vernon to be allowed to expand the service area of an existing waste transfer facility which was originally only accepting waste from within the City and therefore not subject to the siting approval process of the Act. The approval sought involved the expansion of the service area, and did not entail any changes in the operation of the facility. The effect of the expansion of the service area would be to increase the amount of waste received and handled at the existing facility. The expansion of the service area was requested "to take waste from throughout Jefferson County and surrounding counties, as its primary service area." (C-1.) At no time during the hearings before the City or the Board did the petitioner refer to an interstate service area. For the first and only time, petitioner raises this issue in its reply brief, arguing that the requested area did not specifically exclude interstate waste, and thus it "may" accept interstate waste if siting approval is given. (Reply at 3.)

Clearly, the facts are different than those in TENNSV and Fort Gratiot Landfill. Here we are dealing with intrastate transfers of waste. Contrary to petitioner's argument, the record contains no evidence that the waste to be handled at this transfer station will come from beyond Illinois' boundaries. Therefore, there is no factual basis to support this constitutional challenge. At issue here is the increased amount of waste to be handled at this particular transfer station, not its source of origin. Therefore, the Board finds that TENNSV does not deprive the Board of jurisdiction in this case.

Petitioner's second challenge involves the application of the supremacy clause. The supremacy clause of the U.S. Constitution provides that the laws of the United States shall be the supreme law of the land. (U.S. Const., art. VI.) The Resource Conservation and Recovery Act (RCRA) requires states to submit a solid waste plan to the U.S. EPA for approval. (42 U.S.C. §6947) Illinois submitted a plan which was approved by

the U.S. EPA. (See 47 Fed. Reg. 9004 (March 3, 1982).) The Illinois plan identifies the Agency as the lead agency, the entire State of Illinois as the planning region, the Agency as the planner and local governments as the implementors. (Plan at 24.)

Petitioner contends that the provisions of Section 39.2 of the Act are inconsistent with the Solid Waste Plan submitted by Illinois and therefore violates the supremacy clause. Petitioner contends that "[i]n contrast to the regionalized planning approach mandated by the Plan, Section 39.2 allows local bodies, * * * who have not been designated as the planning entity for a region, to unilaterally grant or deny siting approval for regional pollution control facilities on essentially an ad hoc basis." (Pet. Br. at 10.)

The Board finds no inconsistency with the role of local governmental bodies in reviewing a siting application and the solid waste plan approved by the U.S. EPA. Section 39.2 provides certain criteria that the local governmental body must consider in reviewing the siting application. The decision of the local governmental body can be appealed to the Board and the Board's decision may be appealed to the Appellate Court. The Agency, in issuing permits for the facility plays an integral role in the siting review process. Finding no inconsistency, the Board believes that there is no violation of the supremacy clause of the U.S. Constitution.

FUNDAMENTAL FAIRNESS

Section 40.1 of the Act authorizes the Board to review the proceedings before the local decisionmaker to assure fundamental fairness. In E & E Hauling, (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, 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, 451 N.E.2d at 564; see also Fairview Area Citizens Taskforce (FACT) v. Pollution Control Board (3d Dist. 1990), 198 Ill.App.3d 541, 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.)

Petitioner contends that it sought the input and approval of the City in selecting an acceptable site for a regional transfer station. (Tr. at 11.) After several months of reviewing sites and working with the city manager it was determined that no location was more acceptable than where the existing transfer station was located. (Tr. at 13 and 15.) During this same time period, petitioner also pursued the siting of a transfer station on the outskirts of Mt. Vernon and submitted a siting request to Jefferson County. (Tr. at 16.) The City objected to the siting of the transfer station on the outskirts of the City. (Tr. at 18.) At the request of Jefferson County, hearing was delayed in that siting procedure to allow the City to act on a petition for the existing facility to operate as a regional transfer station. (Tr. at 18.)

C.W.I asserts that it was denied fundamental fairness because: 1) the City assisted in finding a better site, but could not; 2) the City opposed the siting of C.W.I.'s regional pollution control facility on the outskirts of the City; 3) the resolution of the City shows that the City ignored the expert testimony and other testimony in favor of siting; and 4) the City ignored the "implicit finding" of the Agency in relation to the health, safety and environmental factors that C.W.I. believes accrued to it via the Agency permitting process.

The City of Mt. Vernon states that the issue of fundamental fairness was not raised at the hearing before the City Council, and is therefore waived. While waiver of some fundamental fairness issues may be possible, the siting review process mandates that the Board assess the fundamental fairness of the proceeding below. The City also argues that, on the merits, the proceedings before the City Council were fundamentally fair. The City also points out that the proceedings before the City Council are presumed at law to be fundamentally fair, and therefore, the burden of proving fundamental unfairness is on the petitioner.

The landfill siting process as defined in Section 39.2 of the Act places city and county boards in the position of adjudicating the siting petitions of prospective regional pollution control facilities on the merits. Many local administrators find the transition from their normal legislative function to an adjudicatory function very difficult. In this case, the City, in attempting to assist the petitioner in finding a suitable location for a regional transfer station, was attempting to fill the normal role of a concerned city council. Later, the Council objected to the siting of a new regional facility on the outskirts of the City, in a proceeding which is not before the Board, presumably in the role as advocates for the constituents in the City. Later still, the City Council sat in

an adjudicatory hearing and conducted itself very well in that function, granting all parties present time to state their respective cases for and against the siting request.

C.W.I. states that the City Council was unfair for first trying to help C.W.I. because C.W.I. received an adverse adjudicatory result. C.W.I. has pointed to no portion of the hearing transcript to indicate where bias was shown by the City Council in the conduct of the hearing, and the Board finds that no such bias can be shown on the record.

The Board finds that the City Council's resolution shows appropriate attention was given to all of the witnesses before the City Council, and that the resolution in and of itself does not support a finding of fundamental unfairness. The fact that the resolution of the City Council may be contrary to testimony presented by expert witnesses does not result in the resolution being unfair.

The grant of permits by the Agency for a local pollution control facility is based on a review of similar factors as considered by the local governmental body in reviewing the siting application. However, the mere existence of a permit does not prohibit a finding by the local governmental body that the facility may threaten the public, health, safety and welfare. The Board finds that the findings of the Agency and the local governmental body are two independent decisions. In addition, the Board notes that the permit issued by the Agency was not entered into the record.

STATUTORY 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 nine criteria when reviewing an application for siting approval. These statutory criteria are the only issues which may 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 City of Mount Vernon denied siting approval because, in its belief, petitioner failed to prove its case with respect to five of the criteria. The City found that criteria 1, 2, 3, 5 and 6 were not met.

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. 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.) However, where an applicant made a prima facie showing as to each criterion and no contradicting or impeaching evidence was offered to rebut that showing, a local government's finding that several criteria had not been satisfied was against the manifest weight of the evidence. (Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board (1st Dist. 1992), 227 Ill.App.3d 533, 592 N.E.2d 148.)

As noted above, the Board is not permitted to substitute its judgment for that of the local decisionmaker. The Board is only able to reverse the City's finding if the City's holding is against the manifest weight of the evidence.

Criterion 1 - The facility is necessary to accommodate the waste needs of the area it is intended to serve.

The City of Mount Vernon stated merely that: "Inadequate and insufficient evidence was presented so that it cannot be determined whether the facility is necessary to accommodate the waste needs of the area it is intended to serve." (C-220.)

C.W.I. states that 135,000 cu. yds. per year of MSW are generated in Jefferson County. Consolidation of wastes could reduce the number of vehicles traveling to out-of-county landfills by 75 to 80 per cent. (C-4.) Petitioner also states that it can handle approximately 10,000 additional cubic yards of waste (C-47), and will increase traffic by only 2 to 3 vehicles per day (C-40). No record of economic benefit or detriment was presented beside the conclusory "It is extremely inefficient and expensive to transport wastes in the smaller collection vehicles rather than the larger transfer vehicles." (C-4.)

C.W.I. contends that the information presented on the need criterion was not contested. (Pet. Br. at 18.) In fact, the City Council at hearing disputed the waste volume numbers that formed the basis for C.W.I.'s need arguments at length. (C-44 to C-55.)

C.W.I. presented letters from three municipalities that tend to support the need for the regional transfer facility, but the largest city, Centralia, merely indicates that it would consider the option of using the waste transfer station if it were available. (C-212.) The Village of Ina stated that it "would like the opportunity of disposing of trash collected from residences of Ina, the Village of Ina and surrounding residences at the transfer station of Mt. Vernon, Illinois." (C-211.) The letter from the Village of Belle Rive speaks of a "long discussion with Mr. Frank Volini on 4 Nov. 1993 about landfills in the Southern Illinois Area" and then the "undue problems and unnecessary added costs to many small villages in the area ... " (C-210.)

The record does not offer an argument against these letters representing a purported need. However, the Board cannot state that it is against the manifest weight of the evidence to conclude that letters of interest in using the proposed transfer station are insufficient evidence to satisfy the need criterion especially where the amount of waste to be recieved at the proposed transfer station is disputed.

Since the record contains sufficient rationale for the respondent's statement regarding insufficient information regarding criterion 1, the Board finds that the decision of the City on criterion 1 was not against the manifest weight of the evidence.

Criterion 2 - The facility is so designed, located and proposed to be operated that the public, health, safety and welfare will be protected.

The City Council of Mt. Vernon found that the proposed transfer station did not satisfy criterion 2 for the following reasons: 1)insufficient and inadequate evidence was presented as to the capacity of the proposed facility so that it cannot be determined whether the facility is capable of accommodating additional waste; 2) there is flooding in the area immediately adjacent to the site which flooding contributes to the runoff and off-site deposit of rain water contaminated with garbage and waste spillage; 3) increase of the present rodent and pest problem in the immediate area; 4) increase of the present fly problem in the immediate area; 5) increase in the present odor problem in the area; 6) design and procedure for the disposition of liquid waste and/or water from the transfer station adversely affects the public health, safety and welfare; and 6) liquid spills from trucks entering and leaving the area. (C-221 and C-

222.)

The Board finds that there is sufficient evidence in the record to support the City Council's finding on criterion 2. Residents who testified before the City Council complained of flies in the area of the transfer station. (C-65 and C-73.) The residents also complained of rats (C-106) and odors in the area (C-69 and C-75). Residents also reported that the area around the transfer station has a drainage problem that results in flooding of the area. (C-77 and C-80.)

Criterion 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.

The City Council stated that the proposed facility was compatible with the industrial operations in the area but was not compatible with the surrounding residential area. (C-222.) The City Council also found that the facility was not located to minimize the effect on property values in the area. (C-223.)

The sole evidence placed in the record by C.W.I. to satisfy this criterion is the testimony that the transfer station has been operating at this site for about a decade, and that expansion of the service area should not affect local property values.

The appellate courts have found in File v. D & L Landfill, Inc., (5th Dist. 1991), 219 Ill.App.3d 897 and Waste Management of Illinois, Inc. v. Pollution Control Board, (2nd Dist, 1984), 123 Ill.App.3d 1075 that pre-existence of a landfill does not entirely satisfy the incompatibility criterion for an expansion. Though C.W.I argues that the transfer station will not change its physical boundaries as a landfill would, the Board notes that significant increases in usage and addition of a second loading dock for outgoing trailers do constitute expansion of the currently permitted facility.

The Board concludes that the City's finding that criterion 3 was not met is not against the manifest weight of the evidence. Petitioner relies on the pre-existence of the transfer station to prove that the expansion is compatible. Pre-existence of a facility does not guarantee that an expanded facility will remain compatible. In addition, the testimony received from residents surrounding the facility challenges the assumption that the existing facility is compatible.

Criterion 5 - The plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents.

The resolution states that, "[t]he plan of operation for the

facility is designed to minimize the danger of the surrounding area from fire and other operational accidents, but the plan of operation for the facility is not designed to minimize the danger of the surrounding area from water runoff from the facility, from spills from trucks entering or leaving the facility, and from rain water and other liquids pumped onto the surface at the facility." (C-223.)

Petitioner contends that water runoff, spillage from trucks and pumping rainwater and liquids onto the ground around the facility are not the type of dangers with which criterion 5 is concerned. Petitioner bases its argument on the finding in E & E Hauling, Inc. v. PCB (2d Dist 1983), 116 Ill.App.3d 586, 614, aff'd, 107 Ill.2d 33 (1985) that the threat of leachate migration does not fit in to criterion 5 which is "concerned with the sudden calamities and disasters." Therefore, petitioner contends that because the City considered the wrong type of evidence in reaching its decision on criterion 5, it is against the manifest weight of the evidence.

The Board finds that the types of spills and accidents considered by the City in connection with criterion 5 are within the scope of the criterion. These types of spills represent potential areas for sudden calamities and disasters. The City's determination that the plan submitted by C.W.I. does not meet criterion 5 is not against the manifest weight of the evidence.

Criterion 6 - The traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows.

The resolution states that insufficient evidence was presented to decide this criterion. (C-223.) The resolution further recognized an existing traffic problem that would likely be exaggerated by the regionalization of the facility. (C-223.) The City determined that C.W.I's plan does not meet this criterion. (C-223.)

Petitioner contends that the resolution is contradictory in that it first states that there is insufficient evidence and then reaches a decision on this criterion. Petitioner further argues that it is not required to submit a traffic plan. Petitioner also argues that the statute only requires that the effects of traffic be "minimized" and does not require that there be no effect on existing traffic flow.

The present facility accepts garbage from about 12 vehicles a day. (C-44.) Respondent anticipates a 20% increase in vehicle traffic for a regional transfer station. (C-45.) At the hearing, a member of the City Council questioned the increase in vehicles as compared to the increase in the service area. (C-45.) A citizen also testified on previous traffic problems in the area but admitted that there has been an improvement. (C-73.)

Respondent contends that the increase in traffic is minimal and therefore the impact on traffic flow will be minimal. (C-6.)

Given the limited testimony on traffic flow in the area, the Board finds that the conclusion reached in the resolution is not unreasonable or against the manifest weight of the evidence. The Board finds that there is sufficient evidence to rebut petitioner's position that the impact on traffic flow will be minimal.

CONCLUSION

In summary the Board finds no basis for the constitutional arguments presented by petitioner that Section 39.2 violates provisions of the U.S. Constitution so as to deny the Board jurisdiction in this matter. The Board also finds that petitioner has failed to show that it was denied fundamental fairness in the landfill siting procedures before the City of Mt. Vernon. In addition, petitioner has not shown that the decision of the City of Mt. Vernon is against the manifest weight of the evidence.

This opinion constitutes the Board's findings of facts and conclusions of law in this matter.

ORDER

For the foregoing reasons, the Board affirms the denial of siting approval by the City of Mt. Vernon for regionalization of the transfer station in the City of Mt. Vernon operated by Continental Waste Industries Of Illinois, Inc.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1992)), 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.)

J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of October, 1994, by a vote of 6-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board