

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN BOTTOM CONSERVANCY, and)
)
SIERRA CLUB,)
)
Co-Petitioners,)
)
v.) PCB 07-84
) (Third-Party Pollution Control
) Facility Siting Appeal)
CITY OF MADISON, ILLINOIS, and)
)
WASTE MANAGEMENT OF ILLINOIS, INC.,)
)
Respondents.)

PETITIONERS' BRIEF

Introduction

This matter arises out of an application to site a landfill in the City of Madison, Illinois, filed by Waste Management of Illinois, Inc. (“Waste Management”). On February 6, 2007, the City of Madison (“the City”) approved the application. American Bottom Conservancy and Sierra Club (“petitioners”) have petitioned the Illinois Pollution Control Board for review of the City’s decision on the ground that the application fails to satisfy the siting criteria set forth in 415 ILCS 5/39.2, and on the ground that the proceedings conducted by the City of Madison were not fundamentally fair.¹

Statement of Facts

Proceedings before the City of Madison

On September 22, 2006, Waste Management filed with the City its application to site the North Milam landfill. C 0014. The application, together with other

¹ Pages to the record made before the City are cited in this brief, for example, as “C 0001.” Pages to the transcript of the hearing before this Board are cited in this brief, for example, as “Tr. 1.”

documents filed with the City, describe the natural and cultural resources that would be impacted by the proposed landfill. These include Horseshoe Lake State Park, Horseshoe Lake, American Indian Mounds, Cahokia Mounds World Heritage Site, and wetlands.

Horseshoe Lake State Park

Horseshoe Lake State Park is a 2,968 acre Illinois State Park located within a short distance to the North and to the East of the proposed landfill. C 0456 (Ex. ABC 8), 0458, 0459, 0460. If constructed the landfill would be bounded by railroad tracks on its Northern Boundary. C 0458. A Fish and Wildlife area at the southern end of Horseshoe Lake State Park abuts these railroad tracks. C 0462.

Within Horseshoe Lake State Park there are group picnic shelters, playgrounds, boat ramps, a fishing pier, campsites, hiking trails, and public water fowl hunting blinds. C 0460. A four-mile hiking trail, known as the "Walkers Island Bird Walk," is located on Horseshoe Lake Island. C 1539.

For thousands of years the area that is now Horseshoe Lake State Park had been inhabited by various Native American Indian groups. C 1538. The most impressive period of settlement was between 800-1600 A.D. when Cahokia Mounds was built. Id. An earthen platform mound still exists inside the park boundaries today. Id.

Horseshoe Lake

Much of Horseshoe Lake State Park consists of Horseshoe Lake. C 0456.

Horseshoe Lake is situated on a low flood plain which follows the Mississippi River down to the Kentucky border. C 1538. Horseshoe Lake is a natural Oxbow Lake, formed by a channel cut by the Mississippi River during heavy spring floods. C 1538.

Horseshoe Lake is used for fishing and hunting. C 1538. For fishing, the Lake contains channel catfish, bass, crappie, and bluegill. Id. Boat fishing is permitted except during the water fowl season. Id. For hunting, numerous public blinds are located along the Lake. Id.

American Indian Mounds

During its investigation, Waste Management encountered Native American sites (sites 1316, 1375, and 1385) on the proposed landfill site. These pre-Columbian sites are associated with Cahokia Mounds. C 1593, 2069.

At site 1316, in December, 2005, archeologists uncovered what were later determined to be ancient human remains. C 2087, 2095. Pottery shards were found around the skull. C 2084. Twenty-six archaeological features and four architectural features were exposed, mapped, photographed and covered. C 1592.

At site 1375, a Native American Mound was surrounded by a fenced 75 foot buffer. C 1592. Seventy-four archaeological features and three architectural features were found and excavated. C 1593.

Concerning the Mounds Ruben Aguirre, a member of the Tongva Nation, addressed the City of Madison during the public hearing:

if you do this landfill, you are – you are digging into our ancestors, you are desecrating our ancestors, especially these burials. It's like me going to a cemetery and dig up your relatives, your families, your relatives and take them out to do a landfill so the City can make money out of this....

This affect [sic] us indigenous people, our native people all over the world

C 1459.

Cahokia Mounds World Heritage Site

The Cahokia Mounds World Heritage Site and National Historic Landmark boundaries are located within 2,140 feet of the proposed landfill. C 2069, 2074. Cahokia Mounds is recognized as a State Historic Site; a National Historic Landmark; and a United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Site. C 1544. It is the largest pre-Columbian settlement north of Mexico and was occupied primarily between 800-1400 A.D. C 1540. During this period it covered nearly 1,600 hectares and included 120 mounds. Id. The site's Monks Mound is the largest prehistoric earthwork in the Americas. Id. The Mississippians built at least 100 more additional mounds at other nearby sites, many of which have now been altered or destroyed. C 1545

Wetlands

The proposed landfill would impact 8.5 acres of farmed wetlands and 9.9 acres of forested wetlands. C 1929, 1973. The wetland referred to as Area 5 is a 13.9 acre complex of moderate to high quality, forested and scrub-shrub wetland. C 1933, 1939. Vegetative and wildlife habitat are moderate to high in this wetland. C 1939.

The Public Hearing

On December 21 and 22, 2006, the City held a public hearing on Waste Management's application. C 0973-1313, 1489-1535.

During the hearing, petitioners attempted to examine Waste Management's expert on compatibility about the Native American Mounds discovered at the site:

Q. Are you aware that there are at least two mounds and a burial site and countless artifacts at the site?

Mr. Moran: Objection, beyond the scope of his direct. It's also not relevant.

Hearing Officer: Sustained.

Q. If you knew that there were mounds on the site would you consider that compatible?

Mr. Moran: Objection, same basis.

Hearing Officer: Sustained.

C 1045-1046.

During the hearing, petitioners attempted to examine Waste Management about the wetlands on the site:

Q. Do you find it incompatible to destroy wetlands to build a landfill?

Mr. Moran: Objection, same reason.

Hearing Officer: Sustained.

C 1015. See also C 1016.

Concerning compatibility generally, Waste Management's consultant testified that he was engaged to look at the end use or conclusion of the facility. C 1025-1026, 1050-1051. It was not within the scope of his engagement to evaluate the landfill's compatibility with its surroundings from the time construction begins. *Id.* He also admitted that smell would be an appropriate criterion to assess, but it was not appropriate for him to do so because he was engaged to look at the end use of the facility. C 1025.

Argument

Siting approval is to be granted only if a proposed facility meets the criteria set out in section 39.2 of the Environmental Protection Act. 415 ILCS 5/39.2. A negative determination on any one of the criteria is sufficient to defeat an application for site approval. *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill.2d 103, 108, 866 N.E.2d 227, 231 (Ill. 2007). One of the criteria is whether

the proposed facility is located so as to minimize incompatibility with the character of the surrounding area. 415 ILCS 5/39.2 (a)(iii).

I. The proposed landfill fails to meet the siting criteria because it is not located so as to minimize incompatibility with the character of the surrounding area in that A. There is no substantive buffer between the proposed landfill and Horseshoe Lake State Park; B. American Indian Mounds are located on the proposed landfill site and ancient human remains have been found at the site; C. The site is within 2,140 feet of the Cahokia Mounds World Heritage Site and National Historic Landmark Boundary; D. The proposed landfill will take eighteen acres of wetlands; and E. No effort was made to determine whether the proposed landfill would be compatible with the surrounding area during the landfill's operation

A. There is no substantive buffer between the proposed landfill and Horseshoe Lake State Park

The proposed facility is incompatible with the surrounding area because there is no substantive buffer between the proposed landfill and Horseshoe Lake State Park. If constructed the landfill would be bounded by railroad tracks on its Northern Boundary. C 0458. A Fish and Wildlife area at the southern end of Horseshoe Lake State Park abuts these railroad tracks. C 0462.

Waste Management's consultant asserts that the tracks serve as "strong physical demarcations between the Open Space/Recreation/ Conservation uses and North Milam." C 0471. According to the consultant the railroad is the buffer for the Fish and Wildlife Area on the southern end of the Park. C 0462. The consultant concludes that due to physical and visual buffers, North Milam is not incompatible with the use of Horseshoe Lake State Park. C 0464, 0489.

There is no noticeable buffer unless a train happens to be passing by. Compare view 2 on page C 0479 (Ex. ABC 8, Figure 9 (with train)) with views 3 and 4 on page C 0474 (Ex. ABC 8, Figure 5 (without train)). When there is no train, park users

looking to the South would have an unobstructed view of the proposed landfill.² With or without a train, the railroad tracks provide no meaningful visual buffer for persons using Horseshoe Lake State Park.³ Nor do the train tracks prevent odors emanating from the landfill from migrating to the public use areas of Horseshoe Lake, immediately upwind of the proposed landfill.

B. American Indian Mounds are located on the proposed landfill site and ancient human remains have been found at the site

During its investigation, Waste Management encountered Native American sites (sites 1316, 1375, and 1385) on the proposed landfill site. Numerous archeological and architectural features have been uncovered at these sites. C 1592, 1593. Ancient human remains, together with pottery shards, were discovered at one of the sites. C 2087, 2095. These pre-Columbian sites are associated with Cahokia Mounds. C 1593, 2069.

The contemporary American Indian community opposes the siting of the landfill. (C 1589, 2069):

you are digging into our ancestors, you are desecrating our ancestors, especially these burials. . . . This affect [sic] us indigenous people, our native people all over the world . . .

Testimony of member of the Tongva Nation, C 1459.

² If there is a passing train, the park users will have to glance upward to view the landfill.

³ Several years ago, the Cahokia Canal, together with the vegetation along the canal, provided a somewhat substantive buffer between the landfill and the recreational uses to the North. North Milam has crossed that buffer. See Ex. ABC 9 (submitted under an offer of proof).

C. The site is within 2,140 feet of the Cahokia Mounds World Heritage Site and National Historic Landmark Boundary

Cahokia Mounds is recognized as a State Historic Site; a National Historic Landmark; and a United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Site. C 1544. It comes as no surprise, therefore, that the Cahokia Archaeological Society opposes the proposed landfill because of the landfill's potential impact on Cahokia Mounds. C 2074.

Further, the Powell Archaeological Research Center opposes the siting of the landfill because of the importance of Cahokia Mounds as an American Indian Cultural Site, a past ritual center for ancient Americans, a sacred site to contemporary Indians, and a valuable source of tourism for the state of Illinois. C 2069. The Center believes that objectionable smells, sights and sounds associated with the proposed landfill would detract from the overall experience of visitors to the Cahokia Mounds Heritage Site. C 2069.

Nor is it a surprise that the contemporary American Indian community opposes the siting of the landfill. C 1459, 1589, 2069.

D. The proposed landfill will take eighteen acres of wetlands

The proposed landfill will take 8.5 acres of farmed wetlands and 9.9 acres of forested wetlands. C 1929, 1973. Some of these wetlands are moderate to high quality, forested and scrub-shrub wetland. C 1933, 1939. The quality of the vegetative and wildlife habitat is moderate to high in these wetlands. C 1939.

E. No effort was made to determine whether the proposed landfill would be compatible with the surrounding area during the landfill's operation.

The North Milam Landfill is proposed to operate (initially) for seventeen

years.⁴ Waste Management made no effort to determine whether the proposed landfill would be compatible with its surroundings during its operation. C 1025-1026, 1051. Instead, its consultant attempted to evaluate only whether the landfill, after it ceased operating, would be compatible with the surrounding uses, ignoring the seventeen years (or longer) when the landfill would be in operation. Id. For this reason, Waste Management did not assess smell. C 1025. Nor did Waste Management evaluate the noise impacts that would come from the landfill. C 1039. Nor did Waste Management evaluate the visual impacts during the landfill's operation. C 1051.

Summary

For the reasons set forth above, the proposed landfill is not located so as to minimize incompatibility with the character of the surrounding area.

II. The proposed landfill fails to meet the siting criteria because it is not necessary to accommodate the waste need of the area it is intended to serve

A second siting criterion Waste Management must satisfy is whether the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve. 415 ILCS 5/39.2(a)(i). To satisfy this factor, an applicant must demonstrate an urgent need for the new facility as well as the reasonable convenience of establishing a new landfill. *File v. D&L Landfill, Inc.*, 579 N.E.2d 1228, 1235, 219 Ill. App. 3d 897, 906 (Ill. App. 5th Dist. 1991).

According to a 2005 landfill capacity report, the proposed landfill falls within Region Six. C 1445. Region Six landfill capacity increased by almost 33.9 million gate cubic yards (29 percent) from the previous year. C 1445. Further, landfill

⁴The existing Milam landfill, on the southern side of Cahokia Canal, has expanded at different times since first being permitted, the latest expansion being the subject of a previous siting appeal by petitioners. PCB 01-159.

operators in the Region reported 17 years of capacity remaining for waste disposal. C 1445. Because Metro East landfill capacity increased 29% from the previous year, and seventeen years of landfill capacity remains, there is no urgent need for North Milam. *Cf. Waste Management of Illinois, Inc. v. Pollution Control Board*, 530 N.E.2d 683, 691, 175 Ill. App. 3d 1023, 1033 (Ill. App. 2nd Dist 1988) (no need for proposed landfill where nine years of capacity remains).

Summary

The application fails to meet two of the siting criteria. The application should be denied for this reason.

III. The City's siting proceedings were not conducted in a fundamentally fair manner because A. Waste Management failed to present evidence during the public hearing of the Native American Mounds discovered at the site and petitioners were precluded from examining Waste Management's witnesses about these Native American Mounds; B. Waste Management failed to present evidence during the public hearing about wetlands at the site and petitioners were precluded from examining Waste Management's witnesses about these wetlands; and C. There is no written decision of the City specifying the reasons for its decision

A non applicant who participates in a local pollution control facility siting hearing has a statutory right to fundamental fairness in the proceedings before the local siting authority. 415 ILCS 5/40.1 (a); *Land and Lakes Company v. Illinois Pollution Control Board*, 319 Ill. App.3d 41, 47, 743 N.E.2d 188, 193 (Ill. App. 3rd Dist. 2000). The right to fundamental fairness incorporates minimal standards of procedural due process, including the opportunity to be heard and the right to cross-examine adverse witnesses. *Land and Lakes Company v. Illinois Pollution Control Board*, 319 Ill. App.3d at 48, 743 N.E.2d at 193; *Daly v. Pollution Control Board*, 264 Ill. App. 3d 968, 970, 637 N.E.2d 1153, 1155 (Ill. App. 1 Dist. 1994).

A. Waste Management failed to present evidence during the public hearing of the Native American Mounds and ancient remains discovered at the site and petitioners were precluded from examining Waste Management's witnesses about these Native American Mounds

The proceedings before the City of Madison were not fundamentally fair because Waste Management presented no evidence of the on-site Native American Mounds during the public hearing and, at the hearing, petitioners were precluded from inquiring into these Native American Mounds.

At the public hearing, petitioners attempted to examine Waste Management about the Native American Mounds discovered at the site:

Q. Are you aware that there are at least two mounds and a burial site and countless artifacts at the site?

Mr. Moran: Objection, beyond the scope of his direct. It's also not relevant.

Hearing Officer: Sustained.

Q. If you knew that there were mounds on the site would you consider that compatible?

Mr. Moran: Objection, same basis.

Hearing Officer: Sustained.

C 1045-1046.⁵

Rather than submit any testimony, data, or information about these Native American Mounds at the public hearing, or allow its compatibility witness to be questioned about these Mounds during the hearing, Waste Management submitted its

⁵ In advance of the public hearing, an archaeologist had prepared Ms. Andria to examine Waste Management's witnesses about the Native American Mounds. Tr. 22-30; Ex. ABC 11, submitted under an offer of proof.

data toward the end of the public comment period. C 1591-1928.⁶ Because Waste Management failed to present any evidence of these mounds during the public hearing, and petitioners were precluded from questioning Waste Management's witnesses about these Mounds during the public hearing, the proceedings before the City were not fundamentally fair. *Cf. Land and Lakes Company v. Illinois Pollution Control Board*, 319 Ill.App.3d 41, 51 743 N.E.2d 188, 196 (Ill. App. 3d Dist. 2000) (material submitted on last day of public comment period was harmless where Waste Management's witness relied on the material in testimony before County Board).

B. Waste Management failed to present evidence during the public hearing about wetlands at the site and petitioners were precluded from examining Waste Management's witnesses about these wetlands

The proceedings before the City of Madison were not fundamentally fair because Waste Management presented no evidence during the hearing of the wetlands on the site and petitioners were precluded from inquiring about these wetlands.

During the hearing, petitioners attempted to examine Waste Management about the wetlands at the site:

Q. Do you find it incompatible to destroy wetlands to build a landfill?

Mr. Moran: Objection, same reason.

Hearing Officer: Sustained.

C 1015. See also C 1016.

Rather than allow its witness to be examined during the hearing, Waste Management submitted its data about the wetlands toward the end of the public comment period. C 1929-2068. As with the Native American Mounds, because Waste Management failed to present any evidence of these wetlands during the public

⁶ According to the City's Mayor, the City of Madison relied on the data submitted by Waste Management toward the end of the comment period. C 2246-2247.

hearing, and petitioners were precluded from questioning Waste Management's witnesses about the wetlands during the public hearing, the proceedings before the City were not fundamentally fair. *Land and Lakes*, p. 10, *supra*.

C. There is no written decision of the City specifying the reasons for the decision

The decision of the local siting authority must be in writing and must specify the reasons for the decision. 415 ILCS 5/39.2 (e); *Land and Lakes Company v. Illinois Pollution Control Board*, 319 Ill. App.3d 41, 45, 743 N.E.2d 188, 191 (Ill. App. 3d Dist. 2000). See also 415 ILCS 5/40.1 (a) (Board shall include in its consideration the written decision and reasons for the decision of the local body); *Accord Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill.2d 103, 109, 866 N.E.2d 227, 230 (Ill. 2007).⁷ *Cf. Clutts v. Beasley*, 185 Ill.App.3d 543, 544, 541 N.E.2d 844, 845 (Ill. App. 5th Dist. 1989) (County Board's written decision that recited criteria for approving landfills was adequate).

There is no written decision of the City of Madison here that specifies the reasons for the City's decision to approve the landfill. The only writing is the City of Madison City Council Meeting Minutes from February 6, 2007:

It was moved by Alderman Grzywacz, seconded by Alderperson Armour, to approve the Waste Management Siting Application dated September 22, 2006. Roll call vote as follows: Yeas: Armour, Bridick, Grzywacz, Riskovsky, Hampsey, Vrabec, Gardner, and Treadway.
Nays: None. Motion carried.

Even if the City's minutes were sufficient to be considered the "writing" required by the siting statute, the minutes fail to give any reason for the City's

⁷ Similarly, the City of Madison's ordinance provides that the decision "will be in writing and specify the reasons therefor . . ." C 0008A.

decision. For this reason also, the proceedings conducted by the City of Madison were not fundamentally fair.

Conclusion

The application fails to meet two of the siting criteria. The proceedings conducted by the City of Madison were not fundamentally fair. Waste Management's application for siting approval should be denied.

/s/ Bruce A. Morrison
Bruce A. Morrison (Il. Reg. No. 6279301)
Kathleen G. Henry
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, MO 63101-2208
Phone: (314) 231-4181
Fax: (314) 231-4184
Attorneys for petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of September, 2007, a complete copy of this instrument was served upon counsel for defendants by e-mail to the addresses below.

Donald J. Moran
Pedersen & Houpt
161 North Clark Street
Suite 3100
Chicago, IL 60601-3224
dmoran@pedersenhaupt.com

Penni S. Livingston
Livingston Law Firm
5701 Perrin Road
Fairview Heights, IL 62208
penni@livingstonlaw.biz

John T. Papa
Callis, Papa, Hale, Szewczyk & Danzinger, PC
1326 Niedringhaus Avenue
Granite City, IL 62040
jtp@callislaw.com

Carol Webb
Illinois Pollution Control Board
webbc@ipcb.state.il.us

/s/ Kathleen G. Henry

<http://whc.unesco.org/en/about/>

UNESCO World Heritage Sites

World Heritage

Heritage is our legacy from the past, what we live with today, and what we pass on to future generations. Our cultural and natural heritage are both irreplaceable sources of life and inspiration. Places as unique and diverse as the wilds of East Africa's Serengeti, the Pyramids of Egypt, the Great Barrier Reef in Australia and the Baroque cathedrals of Latin America make up our world's heritage.

What makes the concept of World Heritage exceptional is its universal application. **World Heritage sites belong to all the peoples of the world**, irrespective of the territory on which they are located.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) seeks to encourage the identification, protection and preservation of cultural and natural heritage around the world considered to be of outstanding value to humanity. This is embodied in an international treaty called the Convention concerning the Protection of the World Cultural and Natural Heritage, adopted by UNESCO in 1972.

UNESCO's World Heritage mission is to:

- * encourage countries to sign the World Heritage Convention and to ensure the protection of their natural and cultural heritage;**
- * encourage States Parties to the Convention to nominate sites within their national territory for inclusion on the World Heritage List;
- * encourage States Parties to establish management plans and set up reporting systems on the state of conservation of their World Heritage sites;
- * help States Parties safeguard World Heritage properties by providing technical assistance and professional training;
- * provide emergency assistance for World Heritage sites in immediate danger;
- * support States Parties' public awareness-building activities for World Heritage conservation;
- * encourage participation of the local population in the preservation of their cultural and natural heritage;**
- * encourage international cooperation in the conservation of our world's cultural and natural heritage.

un United Nations - Copyright © 1992-2007 UNESCO World Heritage Centre, All Rights Reserved |