ILLINOIS POLLUTION CONTROL BOARD
February 21, 2008

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

ORDER OF THE BOARD (by T.E. Johnson):

On December 6, 2007, the Board affirmed the decision of the City of Madison (City) to approve the landfill siting application of Waste Management of Illinois, Inc. (Waste Management). The City granted siting for an expansion of Waste Management's Milam Recycling and Disposal Facility. The expansion, called "North Milam," is to be located in the City of Madison, Madison County. American Bottom Conservancy and Sierra Club (petitioners) had sought Board review of the City's decision to grant siting. In a motion filed on January 18, 2008, petitioners ask the Board to reconsider the December 6, 2007 decision affirming the City. Waste Management and the City filed responses opposing petitioner's motion on February 1 and 4, 2008, respectively.

For the reasons below, the Board denies petitioners' motion to reconsider. In this order, the Board first provides background on the proceeding. Then the Board discusses the pleadings before ruling on the motion.

BACKGROUND ON THE BOARD PROCEEDING

Petitioners appealed to the Board on March 13, 2007. On March 15, 2007, the Board accepted the petition for hearing. Petitioners challenged the City's grant of siting on the grounds that the City conducted the siting proceeding in a manner that was fundamentally unfair, and that the City's determination was contrary to the manifest weight of the evidence with respect to two siting criteria of Section 39.2(a) of the Environmental Protection Act (Act): siting criterion (i) ("the facility is necessary to accommodate the waste needs of the area it is intended to serve"); and siting criterion (iii) ("the facility is located so as to minimize incompatibility with the character of the surrounding area"). *See* 415 ILCS 5/39.2(a)(i), (iii) (2006).

The Board held a hearing on August 23, 2007. Petitioners filed their opening brief on September 17, 2007, and their reply brief on October 15, 2007. Waste Management and the City filed their respective response briefs on October 9, 2007. In its final decision of December 6, 2007, the Board found that petitioners failed to prove that the City's siting procedures were

fundamentally unfair, or that the City's determinations regarding the two contested siting criteria were against the manifest weight of the evidence. The Board therefore affirmed the City's decision to grant siting approval to Waste Management for North Milam.

MOTION AND RESPONSES

In their motion to reconsider (Mot.), petitioners claim that there are "new facts that have occurred after the conclusion of the hearing." Mot. at 1. Petitioners first note that criterion (iv) of Section 39.2(a) requires that a "sanitary landfill or waste disposal site be located outside the boundary of the 100-year floodplain or the site is flood-proofed" and that criterion (ii) requires that the "facility be so designed, located and proposed to be operated that the public health, safety and welfare will be protected." *Id*. at 2; *see also* 415 ILCS 5/39.2(a)(ii), (iv) (2006). According to petitioners, three pieces of new evidence show that North Milam does not meet the requirements of these two siting criteria. Mot. at 2-3.

First, petitioners state that on October 5, 2007, the United States Department of Homeland Security–Federal Emergency Management Agency (FEMA) transmitted to several communities a "Deaccreditation Notification Letter." The letter, assert petitioners, reports that the levees shown on the effective Flood Insurance Rate Maps for communities in Madison, St. Clair, and Monroe Counties do not meet federal requirements and therefore will not be shown as providing protection from the base flood. Mot. at 2, Exh. 2, Exh. 4, App. B. Second, according to petitioners, a September 29, 2007 briefing document from the "East West Gateway Council of Governments" notes that FEMA is required to determine whether flood hazard areas meet standards for adequate protection from catastrophic floods. The briefing document includes "maps and tables to illustrate the general scope of the areas affected by the deaccredited flood control facilities." Mot. at 3, Exh. 3. Third, petitioners continue, a November 2007 "Revised Draft of an East West Gateway Council of Governments' status report" notes that:

> without an immediate response, the decertification of levees will result in large areas being designated as special flood hazard areas when preliminary maps are released in early 2008, and that this is the same designation that would be used if there were no levees at all in place and the area was completely unprotected from flooding. The report notes (p. 36) that none of the levee districts has made sufficient progress to avoid decertification and flood zone designation in the final flood insurance maps to be issued in May 2009. Mot. at 3, Exh. 4.

Petitioners argue that these three documents demonstrate that because North Milam would be located in an area that would not be "flood-proofed," North Milam does not satisfy criterion (iv). Mot. at 3. In turn, maintain petitioners, North Milam does not satisfy the criterion (ii) requirement of protecting public health, safety, and welfare because a "levee breach allowing floodwaters to reach the proposed landfill could affect communities in the Metro East American Bottom floodplain." *Id.*

Waste Management's response (WM Resp.) to petitioners' motion for reconsideration makes three arguments. First, Waste Management states that on appeal, petitioners "argued that the City's decision was against the manifest weight of the evidence only with respect to criteria

(i) and (iii), not criteria (ii) and (iv), and therefore, any argument concerning criteria (ii) and (iv) has been waived." WM Resp. at 3, 4-5. Second, according to Waste Management, information about the potential deaccreditation of levees in the future "is not newly discovered information because it was available at the time of the hearing (in fact, Petitioners submitted similar information as public comment)." *Id*. at 3, 6-7, citing North River Insurance Co. v. Grinnell Mutual Reinsurance Co., 369 Ill. App. 3d 563, 572-73, 860 N.E.2d 460, 468-69 (1st Dist. 2006) ("[t]rial courts should not allow litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling.").

Third, Waste Management argues that the information submitted by petitioners is not probative because it consists of "mere speculation about the possibility for future de-accreditation of certain levees located in Madison, St. Clair and Monroe Counties." WM Resp. at 3. Waste Management emphasizes that the draft report relied on by petitioners states only that deaccreditation *could* occur and, if it does, deaccreditation is currently predicted to happen *over a year from now*, in May 2009. *Id*. at 8. That same report, continues Waste Management, recommends steps to avoid deaccreditation, including applying to FEMA for "Restoration Zone" or "AR Zone" status:

> The AR Zone status is a transitional designation that recognizes that the area has been adequately protected from flooding in the past and is now in a transitional process to restore protection. The AR Zone designation confirms there is a plan to restore the levees and also provides significant relief in the insurance rates and requirements for new development. Further, it will signal that there is a plan in place that will fully restore adequate flood protection within ten years. *Id*., quoting Mot., Exh. 4 at 35.

Additionally, Waste Management concludes, petitioners' information "does not establish, even if deaccreditation should occur, that the Facility lies within the 100-year floodplain or has not been floodproofed." *Id*. at 3, 9.

In the City's response (City Resp.), the City adopts the response of Waste Management. City Resp. at 2. The City further states that it took action in December 2007 and January 2008 to prevent a deaccreditation by having any affected area mapped as a "Restoration Zone," as allowed by FEMA. *Id*. The City concludes that "it is clear the *possible* levee deaccreditation upon which [petitioners] rely is very remote given the actions on the part of the City to timely address the concerns of FEMA." *Id*. (emphasis in original).

DISCUSSION

A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902. A motion to reconsider may specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 3 (Feb. 19,

2004). "[R]econsideration is not warranted unless the newly discovered evidence is of such conclusive or decisive character as to make it probable that a different judgment would be reached." Patrick Media Group, Inc. v. City of Chicago, 255 Ill. App. 3d 1, 8, 626 N.E.2d 1066, 1071-72 (1st Dist. 1993).

Petitioners do not argue that there has been a change in the law or that the Board, in its December 6, 2007 decision, erred in applying the law or overlooked facts in the record. Instead, petitioners assert that there is "new evidence" proving that North Milam does not satisfy criteria (ii) and (iv) of Section 39.2(a) of the Act (415 ILCS 5/39.2(a)(ii), (iv) (2006)). The purported new evidence consists of various documents allegedly demonstrating that the area where North Milam is proposed to be located would not be "flood-proofed," resulting in a failure to protect public health, safety, and welfare. Mot. at 3. Waste Management asserts that petitioners have waived these arguments by not making them during the appeal, that petitioners' submissions now are not new evidence, and that the information on the mere possibility of certain levees being deaccredited in the future is speculative and therefore lacks probative value. WM Resp. at 4-9. The City adds that it has taken measures to address any possible deaccreditation. City Resp. at 2.

Petitioners raised a host of issues in their petition for review filed with the Board on March 13, 2007, including claims that North Milam would not be located either outside of the floodplain or so as to protect public health, safety, and welfare. Petition at 6-7. In their post-hearing brief filed on September 17, 2007, however, petitioners challenged only fundamental fairness and siting criteria (i) and (iii) (415 ILCS 5/39.2(a)(i), (iii) (2006)). Neither criterion (ii) nor criterion (iv) was even mentioned. The Board finds that "those issues raised by a petition but have not been argued by a petitioner are waived." Shaw v. Village of Dolton and Land & Lakes Co., PCB 97-68, slip op. at 12 (Jan. 23, 1997); *see also* Citizens United for a Responsible Environment v. Browning-Ferris Industries of Illinois, Inc. and Village of Davis Junction, PCB 96-238, slip op. at 3 (Sept. 19, 1996) (waiver found where assertions were made in the petition and restated in the brief but not supported by argument or facts). Petitioners have waived the right to challenge, in their motion to reconsider, North Milam's siting based on criteria (ii) and (iv).

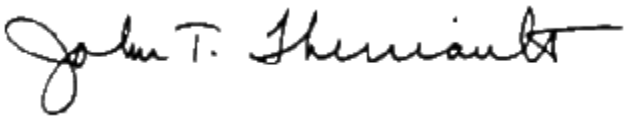
Further, for purposes of this order, it is irrelevant whether the information offered with the motion to reconsider constitutes new evidence unavailable at the time of hearing. Petitioners proffer the documents solely to contest the City's decision on siting criteria, the review of which by the Board is limited to the local siting authority's record. *See* 415 ILCS 5/40.1(b) (2006); Town & Country Utilities, Inc. v. PCB, 225 Ill. 2d 103, 117, 866 N.E.2d 227, 235 (2007). Accordingly, if the evidence is new as petitioners contend, it is necessarily outside of the City's record and therefore beyond the Board's review on appeal. Alternatively, if the evidence is not new as Waste Management and the City maintain, it cannot properly be the subject of reconsideration. *See* Citizens Against Regional Landfill, PCB 92-156, slip op. at 2, citing Korogluyan, 213 Ill. App. 3d at 627, 572 N.E.2d at 1158; *see also* 35 Ill. Adm. Code 101.902.

For all of these reasons, the Board denies petitioners' motion to reconsider.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 21, 2008, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board