ILLINOIS POLLUTION CONTROL BOARD
November 15, 1989

McLEAN COUNTY DISPOSAL COMPANY, INC.	)	
Petitioner,	)	
v.	)	PCB 89-108 (Landfill Siting Review)
THE COUNTY OF McLEAN,	)	
Respondent.	)	

THOMAS J. IMMEL (IMMEL, ZELLE, OGREN, McCLAIN, GERMERAAD & COSTELLO), APPEARED ON BEHALF OF McLEAN COUNTY DISPOSAL COMPANY, INC.; and

ERIC T. RUUD, ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF McLEAN COUNTY.

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

This matter is before the Board on a July 7, 1989 petition for review. Petitioner, McLean County Disposal Company, Inc.(MCD), seeks review of the June 20, 1989 decision of the McLean County Board (County Board) denying site approval of MCD's proposed regional pollution control facility. On July 13, the Board noted that the petition had been received, but pointed out that MCD had not paid the statutorily-required $75 filing fee. The July 13 order specifically stated that the 120-day deadline for the Board's decision would not start to run until the fee was paid. On July 27, the Board issued an order noting that the filing fee was received on July 20, 1989, and that therefore the decision period began to run on July 20.

PROCEDURAL HISTORY

This is the third time that the Board has reviewed the County Board's decisions on MCD's application for site approval. On August 18, 1987, the County Board denied MCD's application for siting approval of a non-hazardous waste landfill, to be located adjacent to the unincorporated hamlet of Randolph, Illinois. MCD then filed a petition for Board review of the County Board's decision. On January 21, 1988, in docket PCB 87-133, the Board held that McLean County had defaulted on the 180-day deadline for decision, and therefore stated that siting approval was granted by operation of law. On December 28, 1988, the Illinois Appellate Court, Fourth District, reversed the Board's holding on the 180-day deadline issue, finding that MCD had waived the issue by participating in the county proceedings after the statutory time

for public hearings had passed. Citizens Against the Randolph Landfill (C.A.R.L.) v. County of McLean, 178 Ill.App.3d 686, 533 N.E.2d 401, 127 Ill.Dec. 529 (4th Dist. 1988). The appellate court remanded the case to this Board for further proceedings.

On May 25, 1989 the Board found that audiotapes, rather than written transcripts, which were available to the County Board members to review before voting on the application, were inherently unacceptable as the sole means by which a County Board member may acquaint himself or herself with the record. Therefore, the Board remanded the case to the County Board for reconsideration. On June 20, 1989, the County Board again voted to deny MCD's application for siting approval. MCD petitioned this Board for review, and the proceeding was docketed under PCB 89-108. A public hearing was held on August 28, 1989. Both MCD and the County have elected to stand on the arguments presented in their briefs filed in PCB 87-133.

BOARD DECISION DEADLINE

At the August 28 hearing on this petition for review, MCD raised two issues relating to the proper calculation of the Board's 120-day decision deadline. Section 40.1(a) of the Environmental Protection Act (Act) states that "[i]f there is no final action by the Board within 120 days, petitioner may deem the site location approved." Ill.Rev.Stat. 1987, ch. 111 1/2, par. 1040.1(a). As stated above, the petition was filed on July 7, but the required $75 filing fee was not paid until July 20. Thus, as the Board noted in its July 13 and July 27 orders, the 120-day decision timeclock began to run on July 20.

MCD first argues that the 120-day time for decision began to run on March 1, 1989, when the appellate court issued its mandate remanding PCB 87-133 to the Board. MCD contends that the Board had no authority to remand the matter to the County Board (the action which was taken on May 25), and that the 120-day period for decision ended on August 2, 1989. Thus, MCD asserts that local siting has been approved as a matter of law.

The Board has consistently taken the position that the 120-day decision deadline established in Section 40.1(a) applies only to petitions for review of local siting decisions when they are originally filed with the Board. The 120-day deadline does not apply to remands from the appellate court when, as here, the Board took "final action" on the original petition for review within its 120-day period. Even if the 120-day deadline did apply to cases when remanded by the appellate court, the Board met that deadline here when it remanded the case on May 25. The Board is directed by Section 40.1 to consider the fundamental fairness of the procedures used by the County Board in reaching its decision. Based upon its consideration of fundamental fairness issues in this case, the Board concluded that the audiotapes available to the

County Board members did not satisfy the requirement that each County Board member have the opportunity to review the record before voting. McLean County Disposal Company, Inc. v. The County of McLean, PCB 87-133, May 25, 1989; Ash v. Iroquois County Board, PCB 87-29, July 16, 1989. The Board has held that the remedy for a lack of fundamental fairness is a remand to the County Board to give them an opportunity to cure the problem. City of Rockford v. Winnebago County Board, PCB 87-92, November 19, 1987. The Board stresses that it does not believe that the 120-day decision period applies to remands from the appellate court. The Board wishes only to point out that its action (the May 25 remand) on the case was indeed taken within 120 days from the issuance of the appellate court's mandate.

Second, MCD maintains that the 120-day period for decision of this case properly began to run on July 17, not on July 20, as stated by the Board in its July 27 order. MCD notes that its filing fee was mailed to the Board on July 17, and contends that under the Board's procedural rules, "mailed is filed". Since the filing fee was mailed on July 17, MCD asserts that the 120-day period began on July 17, not on July 20, when it was received by the Board.

MCD's arguments are based on an erroneous reading of the procedural rules. 35 Ill.Adm.Code 101.102(d) states "[t]he time of filing of documents will be the date on which they are date-stamped by the Clerk, unless date-stamped after any due date. If received after any due date, the time of mailing shall be deemed the time of filing." This rule is based upon Supreme Court Rule 373. See Procedural Rules Revision 35 Ill.Adm.Code 101, 106 (Subpart G), and 107, R88-5(A), June 8, 1989, at p.5. The Board's July 13 order gave MCD 21 days (until August 4) to file the filing fee. MCD's filing fee was mailed on July 17 and received on the 20th, clearly long before the due date. Therefore, under Section 101.102(d), the time of filing is "the date on which they are date-stamped by the Clerk"--July 20. The decision deadline began to run on July 20, not on the 17th.[1]

STATUTORY CRITERIA

At the local level, the site location suitability approval process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider up to nine criteria. Local siting approval may be granted only if the County Board or unit of local government finds that all criteria have been met. The County Board found that MCD had failed to meet three of the criteria, relating to public health, safety, and welfare,

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[1] The Board again notes that it stated in its July 27 order that the decision time period began on July 20. MCD made no objection at that time to that order.

minimization of incompatibility with the surrounding area, and minimization of impact on existing traffic flows. County Record, Document #630 (hereinafter Doc. #__). When reviewing the County Board's decision, this Board must determine whether the County Board's decision was contrary to the manifest weight of the evidence, and whether the procedures used at the local level were fundamentally fair. E&E Hauling, Inc. v. Pollution Control Board, 116 Ill.App.3d 586, 451 N.E.2d 555 (2d Dist. 1983), aff'd in part 107 Ill.2d 33, 481 N.E.2d 664 (1985). All issues of fundamental fairness have been disposed of in PCB 87-133. Therefore, the only issue remaining before the Board is whether the County Board's decision that Criteria 2, 3, and 6 were not met is against the manifest weight of the evidence.

Criterion 2

The second criterion to be considered by the County Board is whether the proposed facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected. The County found that the proposed site's entrance was not sufficiently designed to protect the public health, safety, and welfare. The County Board also found that the design, location, and proposed operation of the facility did not give adequate protection to the water wells currently relied on by Country Oaks subdivision. (Doc. #630.)

MCD argues that the County Board's finding that criterion 2 was not met is contrary to the manifest weight of the evidence presented by MCD. MCD points to the testimony of its two technical witnesses on the subjects of site geology and protection of groundwater, and states that these witnesses concluded that the proposed facility protected the groundwater and met criterion 2. MCD also maintains that Beverly Herzog, a consultant hired by the County Board (and paid by the county with part of MCD's filing fee), concluded as part of a staff report that the site was geologically and hydrogeologically suitable for the facility, and that the facility was designed and located so as to protect the public health and safety. Additionally, MCD attacks the testimony of a technical witness presented by citizen objectors. MCD contends that in the face of this body of scientific evidence it is impossible to sustain the County Board's finding, because the manifest weight of the evidence is to the contrary.

In response, the County argues that the evidence showed that the site did not give adequate protection for the water wells currently relied upon by Country Oaks subdivision, and that this finding was not contrary to the manifest weight of the evidence. The County contends that some of the testimony of MCD's witnesses was incomplete and inconsistent, and that some information was missing (i.e. no emergency closure plan was submitted, the exact number and placement of monitoring wells is unknown, and information on water elevations in the bore holes was omitted).

The County also points to testimony by Dr. Robert Morse, who testified on behalf of citizen objectors, and who stated that the geology of the site made a clay lining unsatisfactory. Finally, the County maintains that Ms. Herzog did not find that the site wholly met the statutory criteria, but recommended that if approval was granted by the County Board, a leachate collection system and an offsite monitoring well or wells should be required as conditions to local site approval. The County points out that Ms. Herzog was part of an eight member staff group who prepared a report for the County Board, and argues that the County was in no way obligated to follow the suggestions and recommendations of its staff.

Based upon a review of the county record, and after consideration of the arguments presented by MCD and the County, the Board finds that the County Board's decision that criterion 2 was not satisfied was not against the manifest weight of the evidence. The witnesses presented by MCD and the citizen objectors gave sometimes conflicting testimony, and the County Board may have properly decided to give persuasive weight to the testimony presented by the objectors' witness. Additionally, the fact that Ms. Herzog recommended that the facility met criterion 2, with the imposition of conditions, in no way binds that County Board to accept that recommendation. MCD seems to imply that because Ms. Herzog heard all the testimony on this issue and cross-examined the witnesses, and was retained by the County Board as a technical advisor, her recommendation is entitled to some greater weight. The Board rejects this implication. Simply because a County Board chooses to retain an expert to advise them on the issues presented in no way gives that expert's recommendation greater weight than the other information presented, and certainly does not bind the County Board to accept that recommendation. As this Board has noted repeatedly, the standard of review of a local government's siting decision is whether the County Board's decision is against the manifest weight of the evidence. If the Board finds that the County Board could have reasonably reached its conclusion, that conclusion must be affirmed. See Steinberg v. Petra, 139 Ill.App.3d 503, 487 N.E.2d 1064, 94 Ill.Dec. 187 (1st Dist. 1985); Willowbrook Motel v. Pollution Control Board, 135 Ill.App.3d 343, 481 N.E.2d 1032 (1st Dist. 1985); Fairview Area Citizens Taskforce v. Village of Fairview, PCB 89-33, June 22, 1989. The Board finds that the County Board's decision was not against the manifest weight of the evidence.[2]

Criterion 3

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[2] The Board notes that the county board cited traffic safety as one of its reasons for finding that criterion 2 had not been met, and the both MCD and the county address this issue in briefs. The Board will address the traffic issues in conjunction with its consideration of criterion 6.

The third criterion to be considered by the County Board is whether the proposed 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 County Board stated that its decision was based on the proximity of the site to currently undeveloped residentially zoned property and the Country Oaks subdivision and the fact that MCD did not present any study of the impact of proposed facilities on existing residential areas. (Doc. #630.)

MCD argues that the County Board's conclusion that the facility might have an adverse impact on surrounding property values is clearly against the manifest weight of the evidence. MCD contends that it offered an overwhelming body of evidence to the contrary that the County Board failed to deal with. MCD points to the testimony of Donald B. Johnson, its witness on the issue. Mr. Johnson conducted a study of property values in a subdivision adjacent to an existing landfill in McLean County, and also examined the sale of properties adjacent to three landfills in the Chicago area. Mr. Johnson concluded that the properties readily sold and resold, that property values increased in time in a pattern consistent with properties not adjacent to landfills, and that the existence of a landfill actually had no impact after the facility began operation and controversy had subsided. MCD also presented testimony from the owner of the proposed facility, Roy Whittinghill, who testified in detail about the manner in which the site would be screened from public view, so that Country Oaks subdivision would not hear or see the facility. MCD characterizes the criticism that Mr. Johnson's analysis did not include a study of the impact of other proposed facilities on adjacent properties as "amazing", and questions how such a study could be performed in the time period in which a given facility is "proposed". Finally, MCD attacks the testimony of Herbert Voights, the witness presented by the citizen objectors, as "useless".

The County responds to MCD's arguments by contending that the record contains sufficient evidence to support the County Board's decision that criterion 3 was not met. The County maintains that Mr. Johnson's analysis in effect compared apples and oranges, because he compared the proposed site with subdivisions which had been developed after the landfill was operating in the area. The County also contends that Mr. Johnson did not consider any impact on agriculturally zoned property, or the unsubdivided residentially zoned property contiguous to the site. The County points to the testimony of Mr. Voights, who concluded that the proposed facility would lower the value of the existing subdivision and the area zoned for residential use by ten to twenty-five percent.

After a review of the arguments presented by the parties, and based upon the evidence in the county record, the Board concludes that the County Board's decision that criterion 3 had not been met

is against the manifest weight of the evidence. Criterion 3 requires that the proposed facility be located "...so as to minimize the effect on the value of the surrounding property." Ill.Rev.Stat. 1987, ch. 111-1/2, par. 1039.2(a)(3)(emphasis added). The majority of the testimony presented by both MCD and the objectors focused on the issue of whether there would be an adverse impact on property values. That is not the proper inquiry on criterion 3: the question is whether the facility's location will minimize the effect on property values, not whether there will be any adverse effect. The County Board's decision was apparently based upon its findings that the facility would cause an adverse effect on property values, not upon a finding that the facility's location would not minimize that effect. The only evidence in the record which addresses the issue of minimization is the testimony of Mr. Whittinghill, the owner of MCD, who discussed MCD's plans for screening the facility from public view. (Tr. Vol. IX, pp. 41-49.) Because the County Board focused its decision upon the adverse effect rather than on any minimization of that effect, and because the only evidence in the record which addresses the proper inquiry for criterion 3 is in support of MCD's position, this Board finds that the County Board's decision that criterion 3 was not satisfied is against the manifest weight of the evidence.[3]

Criterion 6

The sixth criterion to be considered by the County Board is whether the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows. The County Board found that this criterion had not been met, and stated that its decision was based upon MCD's failure to design a proposed entrance to the site, and evidence presented by the objectors on considerations of the speed limit, possible deterioration of road 625N, and stopping distances.

MCD contends that the County Board's decision that criterion 6 had not been met was definitely contrary to the manifest weight of the evidence. MCD points to the traffic study performed by one of its witnesses, which concluded that road 625N (which would serve the proposed facility off state Route 51) presently supports larger vehicles than would be used at the facility and that traffic patterns to and from the landfill would not be significantly impacted by the proposed facility. MCD maintains that this testimony on traffic flows and the volume of traffic is uncontroverted. MCD also argues that the County Board's denial of siting approval because a final driveway design had not been completed is disingenuous, because that finding in effect reverses

[3] The Board notes that the issue of whether a given facility satisfies criterion 3 does not depend, in any way, on the socio-economic status of the surrounding property. See respondent's brief at p. 11; petitioner's reply brief at p. 17.

the usual procedure for county approval of any entrance to any type of facility. MCD points to testimony by Herbert Bekermeier, the county highway superintendent, who stated that the usual procedure would be to submit a sketch to the county highway department, and to complete the final design in consultation with the highway department. Additionally, MCD contends that the concerns of David Kistner, a member of the McLean County Sheriff's Department, about the line of sight necessary for adequate stopping distance were in essence remedied by Mr. Kistner's own testimony, when he admitted that the concerns could probably be rectified in the design of the driveway entrance. Finally, at the public hearing on this petition for review, MCD pointed to the Board's decision in Waste Management v. Village of Bensenville, PCB 89-28, August 10, 1989, as support for its contention that the County Board's decision was against the manifest weight of the evidence.

In response, the County argues that MCD did not meet its burden of proof on criterion 6. The County contends that analysis of Mr. Kistner's testimony shows that the "non-design" of the entrance to the proposed facility lacks safety considerations, and maintains that the prospective designs offered by MCD's witness are poor evidence that traffic patterns and traffic flow will be minimized. The County also points to Mr. Bekermeier's testimony that the road surface would require resurfacing to accommodate the large garbage trucks anticipated at the facility, and that the garbage trucks would be operated year around on the surface, while the grain trucks which currently use the road travel only on a seasonal basis. Additionally, the County states that MCD's argument that Mr. Bekermeier's testimony relates to wear and tear and not to traffic flow is short-sighted, because it is precisely the pattern and flow of traffic which creates the problem.

The Board finds, after a review of the record, that the County Board's decision is not against the manifest weight of the evidence. There was testimony presented on both sides of the issue, and the Board believes that the County Board could have reasonably concluded that the traffic patterns were not designed to minimize the impact on existing traffic flows. The Board reiterates that it reviews the County Board's decision: this Board does not make its own decision on whether criterion 6 was met. The Board notes that in Waste Management v. Village of Bensenville, cited by MCD, the Board reversed Bensenville's finding that criterion 6 was not satisfied. The Board stated that the applicant had demonstrated that it designed the facility to minimize impact on existing traffic flows, and found that Bensenville could not properly require the applicant to consider changing the existing traffic flows. The Board believes that the decision in the instant case is a close call, because the County does seem to imply that MCD should change the traffic flow, and not just minimize the impact on existing traffic. This implication is improper. However, the Board finds that the County could have reasonably decided that MCD did not show that criterion 6 was met, since

several of the county's Concerns were left unanswered by MCD's preliminary traffic pattern designs. The Board does not believe that it is improper for the County to expect an applicant to provide a completed traffic design. The fact that the design might later be modified in consultation with county highway officials does not relieve MCD from its responsibility to show that criterion 6 was met.

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

ORDER

The Board affirms the County Board's June 20, 1989 denial of MCD's application for siting approval of MCD's proposed regional pollution control facility.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, Ill.Rev.Stat. 1987, ch. 111-1/2, par. 1041, provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 15th day of November 1989, by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board