ILLINOIS POLLUTION CONTROL BOARD
January 9, 1986

CONCERNED NEIGHBORS FOR A BETTER ENVIRONMENT & WILLIAM SCAVARDA,	)	
Petitioners,	)	
v.	)	PCB 85-124
COUNTY OF ROCK ISLAND and BROWNING-FERRIS INDUSTRIES of IOWA, INC.,	)	
Respondents.	)	

MR. JAMES YOHO APPEARED ON BEHALF OF THE PETITIONERS.

MR. DENNIS M. FAUST APPEARED ON BEHALF OF THE COUNTY OF ROCK ISLAND.

MR. FRANKLIN S. WALLACE AND MR. FRED C. PRILLAMAN APPEARED ON BEHALF OF BROWNING-FERRIS INDUSTRIES.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter comes before the Board upon the August 20, 1985 appeal by Concerned Neighbors for a Better Environment and William Scavarda from a July 16, 1985 decision of the Rock Island County Board ("County Board"). On that date the County Board approved an application filed by Browning-Ferris Industries of Iowa, Inc. ("BFI") for approval of the site location suitability for a new regional pollution control facility to be located in an unincorporated area of Rock Island County. For the reasons discussed below, the Board finds that the County Board hearing was conducted in a fundamentally fair manner and that the decision of the County Board is supported under a manifest weight standard of review of the evidence presented at hearing below. Therefore, the Board affirms the approval granted by the County Board to BFI's application for the siting of a new regional pollution control facility.

Since there are a number of Petitioners and Respondents involved in this matter, they will be clearly identified at the outset. Concerned Neighbors for a Better Environment is an Illinois non-profit corporation founded by Rock Island County citizens who are concerned about waste disposal practices. William Scavarda is a resident near BFI's facility. Both Petitioners participated in the proceeding before the County Board. The Respondents in this matter are BFI and the County of Rock Island; Section 40.1(b) of the Act requires that in an

appeal from a local governing body's approval of an application for the siting of a new regional pollution control facility, the local governing body and the applicant be named as co-respondents.

Hearing on BFI's May 20, 1985 application was held before the County Board on June 18, 1985, and that body rendered its decision approving the application on July 16, 1985. Petitioners appealed this decision to the Board on August 20, 1985. On August 21, 1985 the Board accepted the case and authorized it for hearing, and ordered the County Board to prepare and file the record on appeal. BFI filed a motion on September 3, 1985, requesting that the Board require Petitioners to file a statement specifying the deficiencies in the proceedings held below. The Board granted this motion by Order dated September 20, 1985. The Rock Island County Clerk filed the record on September 30, 1985.

Petitioners filed a supplemental petition on October 17, 1985 in response to the Board's Order. BFI moved to strike the supplemental petition on October 21, 1985, and Petitioners responded to this motion on October 23, 1985. By Interim Order of October 24, 1985, the Board denied the motion to strike but required Petitioners to file at hearing a written specification elaborating on the allegations made in their October 17 supplemental petition. This document was submitted by Petitioners at the October 29, 1985 hearing. BFI filed a post-hearing brief on November 8, 1985. No other briefs were filed. On December 9, 1985 BFI waived the time for decision in this matter until January 17, 1986.

Cases such as this one which involve appeals from local governmental decisions on the siting of new regional pollution control facilities (referred to as "S.B. 172" cases) involve two main issues: Whether the procedures used by the local governing body in reaching its decision were "fundamentally fair", and whether the local governing body's decisions on the six statutory criteria of §39.2 of the Act are supportable under the manifest weight of the evidence standard of review. These issues will be addressed in that order.

It should be noted that BFI's application requests approval to expand the height and depth of its existing facility beyond the originally permitted vertical contours, thus increasing disposal capacity. The difference in thickness of the landfilling between the site as it currently exists and the proposed plan is a maximum of twenty feet, most of which appears to be accomodated by an increase in the final surface elevation of the fill (County Board hearing, R. at 71-72). BFI's application seeks siting approval of a "new" regional pollution control facility, notwithstanding the fact that BFI already operates a facility on the same site. This occurs because the Board has construed §3(x) of the Illinois Environmental Protection Act ("Act"), which defines a new regional pollution control facility, as applying to increases the waste disposal

capacity of a site in any direction beyond the dimensions contemplated by the current permit. See M.I.G. Investments, Inc. v. Illinois Environmental Protection Agency, PCB 85-60, August 15, 1985.

Fundamental Fairness

Petitioners allege that the hearing held below was fundamentally unfair due to testimony given by two of Respondents' witnesses which referred to prior Agency approval of the site (County Board hearing, R. at 11, 12, 39, 43, 93-95, 101-102, 106-107). Petitioners contend that this reference was made "as and for proof that the proposed facility complies with Criteria 2 and 5", and consequently "as reason for approval by the County Board" (document entitled Specification of Rulings of Hearing Officer Challenged by Petitioners, at 1 and 2; filed with the Board November 4, 1985).

However, "fundamental fairness" as described in §40.1 refers to the procedures used by the County Board in reaching its decision, not to the evidence or lack thereof presented before it.

"Fundamental fairness" as used in §40.1 of the Act creates a statutory due process standard, which has been construed as requiring application of adjudicative due process in S.B. 172 proceedings. E & E Hauling v. Pollution Control Board, 116 Ill. App. 3d 586, 608, 451 N.E. 2d 555 (2d Dist. 1983). The Board finds that the procedures used below provided adjudicative due process, and that Petitioners' allegations are of insufficient weight to warrant a finding that the County Board proceeding lacked fundamental fairness.

Petitioners do correctly point out that a local governing body is required to make an independent assessment of the merits of a new regional pollution control facility by applying the six statutory criteria found in §39.2 of the Act (document entitled Specification of Rulings of Hearing Officer Challenged by Petitioners, filed at October 29, 1985 hearing). The S.B. 172 process envisions a role for local governing bodies which is independent of, and is exercised antecedent to, the Agency's permitting duties. However, this should not be construed to mean that the local governing body can take no recognition of an Agency evaluation in a prior or ongoing permitting reveiw when such has preceded the local governing body's involvement, as is the case here. To find otherwise would be tantamount to limiting the local governing body's ability to weigh the full spectrum of evidence upon which it might base its considered judgement. It is only when the local governing body relies exclusively upon such an evaluation, and thereby abrogates its responsibility to exercise independent judgement, that it would be correct to find that the proceeding is flawed (see Criterion 2 discussion, infra).

The Statutory Criteria

Section 39.2(a) of the Act requires a local governmental entity to apply six criteria when making the determination to approve/disapprove a new regional pollution control facility. The six criteria are:

1. the facility is necessary to accommodate the waste needs of the area it is intended to serve;

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

3. the facility is located so as to minimize incompatibility with the character of the surrounding area and minimize the effect on the value of the surrounding property;

4. the facility is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation, or the site is flood-proofed to meet the standards and requirements of the Illinois Department of Transportation and is approved by that Department;

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; and

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

Section 40.1(b) of the Act (when read in conjunction with §40.1(a)) provides that the burden of proof in an appeal before the Pollution Control Board is on the petitioner. The County Board must decide based upon a preponderance of the evidence that the facility satisfies all six criteria. However, in order to overturn a local governing body's decision, a petitioner must prove to this Board that the local governing body's decisions on the six criteria were against the manifest weight of the evidence, E & E Hauling, 116 Ill. App. 3d at 608.

Criterion #1

BFI presented two witnesses at the County Board hearing who presented testimony on the necessity of the proposed facility. Mr. John Curry, a Regional Landfill Manager for BFI, testified that the existing facility on the site serves primarily the Illinois side of the Quad City area, and that the life expectancy of the present facility (without expansion) is five years at the present volume (County Board hearing, R. at 8). Mr. Curry also stated that if BFI should close its landfill, disposal costs to

area residents would increase because there would be fewer landfills operating in the area (County Board hearing, R. at 9).

The other witness who testified for BFI in regard to criterion #1 was Mr. David Beck, Vice-President of Andrews Engineering and the consulting engineer employed by BFI to work on various engineering matters at the site. Mr. Beck testified that his calculations show that at the present rate of refuse received, the remaining life of the existing facility is approximately 5 years, while the proposed expansion would increase that number to 18 years (County Board hearing, R. at 67). Regarding the useful lives of other landfills serving the area, Mr. Beck said that his firm, under contract from the Agency, had surveyed area landfill operators in 1981. Mr. Beck noted, however, that the survey had not been updated since that time (County Board hearing, R. at 76). Mr. Beck stated that there are two other landfills presently operating in Rock Island County in addition to the BFI facility. These are the Watts Landfill, and the Bledsoe Landfill (County Board hearing, R. at 90). Mr. Beck estimated that the remaining life at the latter facility is less than ten years, while he was uncertain about the remaining life at the former (County Board hearing, R. at 90).

Mr. John Thompson, Executive Director of the Central States Education Center and Central States Resource Center, testified for Concerned Neighbors in regard to several of the statutory criteria, including criterion #1. Mr. Thompson testified that he updated the 1981 report prepared by Andrews Engineering (supra) by contacting area landfill operators by phone (County Board hearing, R. at 138). Mr. Thompson stated that according to his calculations the BFI facility has six years of useful life remaining, while the Watts and Bledsoe Landfills have twelve and fifteen years, respectively, of capacity left. Mr. Thompson's testimony regarding the remaining life at the Bledsoe Landfill was impeached on cross-examination, however, when it was revealed that in a 1984 hearing he had testified that the remaining useful life at that facility was nine years* (County Board hearing, R. at 155); Mr. Thompson's explanation of his prior testimony did not resolve the discrepancy.

Several Illinois appellate cases have interpreted the language of criterion #1 of §39.2. The Second District Appellate court has held that "the use of 'necessary' in the statute does not require applicants to show that a proposed facility is

*B.F.I. originally applied to the Rock Island County Board for approval of this facility in 1984, and received approval on October 16, 1984. It was at hearing conducted that evening that Mr. Thompson testified to the nine-year figure in relation to the Bledsoe facility. Because of an apparent defect in the notice served to a landowner adjoining the facility, however, BFI was forced to refile its application and begin the process again.

necessary in absolute terms, but only that the proposed facility is 'expedient' or 'reasonably convenient' vis-a-vis the area's waste needs." E & E Hauling, 116 Ill. App. 3d at 609, quoted in Waste Management of Illinois, Inc. v. The Pollution Control Board, 123 Ill. App. 3d 1075, 1084 (2d Dist. 1984]. The Third District, within which the facility resides, construed criterion #1 to require an applicant to show that the proposed facility is "reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and its waste disposal capabilities, along with any other relevant factors." Waste Management of Illinois, Inc. v. The Pollution Control Board, 122 Ill. App. 3d 639, 645 (3d Dist. 1984). The Second District later found that "expedient" connoted an element of urgency, and that "reasonable convenience" also requires a petitioner to show more than convenience. Waste Management, 123 Ill. App. 3d at 1084.

Applying the definition of either court, the Board is convinced the record supports the County Board's decision that the proposed facility is "expedient" or "reasonably required by the waste needs of the area intended to be served". A local governing body does not have to wait until the amount of landfill space available to it is critically low before approving an application for a new facility, and undoubtedly a prudent governing body would not do so. Insuring a sufficient quantity of landfill space is particularly critical today, since the advent of the S.B. 172 process and the need to consider all factors related to waste disposal and treatment have lengthened considerably the time required to site a new landfill facility. The County Board received conflicting testimony on the remaining life of the operating landfills in Rock Island County, and ostensibly reached their determination by assigning a higher weight to some of the testimony.

The Board does not find the County Board's conclusion in regard to criterion #1 to be against the manifest weight of the evidence. The Board notes that in reaching this determination, it did not give favorable consideration to Mr. Curry's statement that disposal costs in the Rock Island area would increase if BFI closed its facility (County Board hearing, R. at 9). This contention was not supported by any substantive evidence in the record, and generalized statements concerning increased costs are insufficient to establish the need for expansion of an existing landfill. Waste Management, 122 Ill. App. 3d at 643; Waste Management, 123 Ill. App. 3d at 1087.

Criterion #2

In addition to his testimony relating to the first criterion, Mr. John Curry gave testimony pertaining to criterion #2. Mr. Curry expressed his opinion that the proposed modification of the existing facility would result in a design superior to that of the original landfill, and that the redesign would benefit and protect the public health, safety and welfare (County Board hearing, R. at 12). Mr. Curry also stated he

believed the soil liner underlying the landfill consisted of silty clay material having a permeability of 10^{-8} cm/sec (County Board hearing, R. at 40).

Mr. David Beck also provided testimony on criterion #2. He noted that the features of the modified facility would include higher berms (minimum of ten feet above grade), a gas venting system, gas probes, monitoring wells, creek sampling points, five feet of final cover, and that the facility will be monitored by BFI for five years post closure (County Board hearing, R. at 34, 36, 70). Mr. Beck also offered his opinion that the design of the original facility is adequate to protect the public health, safety and welfare, and that the proposed modification will provide state of the art protection for the environment (County Board hearing, R. at 72, 77).

During the direct examination of Mr. Beck, BFI introduced as an exhibit the original permit application submitted to the Agency in 1981 by the developers of the facility (County Board hearing, R. at 80), who sold the site to BFI in 1983. Mr. Beck testified that this application contained "all geological data" relevant to the site (County Board hearing, R. at 80). Mr. Beck conceded that for the purposes of its present application before the County Board, BFI did not reiterate all of the information contained in the original application (County Board hearing, R. at 80).

Mr. John Thompson, witness for Concerned Neighbors, discussed this aspect of Mr. Beck's testimony at length during his own testimony. Mr. Thompson stated that among the hearings on proposed landfills with which he is familiar, it has been standard practice to bring in a hydrogeologist to explain the available information (County Board hearing, R. at 143-144). In Mr. Thompson's opinion, the record was lacking in information detailing the monitoring and geology of the site; consequently, he believed the evidence would not warrant a finding that criterion #2 had been satisfied (County Board hearing, R. at 143).

The Board finds that there was a sufficient amount of evidence presented below to support the County Board's finding that the proposed facility meets the requirements of criterion #2. Given the substantial amount of evidence respecting criterion #2 on the record, it cannot be concluded that the County Board relied on the Agency's prior granting of operational and developmental permits to this facility as the sole or even primary basis on which to approve the application for modification. Much of this evidence took the form of testimony, but additionally the County Board was presented with a substantial amount of information concerning the physical character of the site in the form of the information contained in the 1981 application. This latter material became a part of the record when it was admitted as an exhibit, and the County Board was free to accord the document the weight it desired. Moreover, effective July 1, 1985, applicants in S.B. 172 proceedings are

required to file all documents submitted to the Agency as part of their petition to the local governing body. Thus, it is appropriate that the County Board review the Agency's prior involvement. In view of the above, the Board does not find that the County Board's approval of the application as to criterion #2 was against the manifest weight of the evidence.

Criterion #3

Mr. Gordon Landrum, District Manager for BFI, testified that the expansion of the facility as proposed would be compatible with the surrounding area. In support of this contention, Mr. Landrum noted that "some new construction" (a new home) has taken place approximately 300 yards from the site (County Board hearing, R. at 52). Moreover, Mr. Landrum indicated that because he believes the proposed modification of the site would improve the facility overall, he is of the opinion that property values in the area would increase after the modification takes place (County Board hearing, R. at 52-53).

Mr. David Beck testified that because the landfill is located in a hilly, wooded area, it is compatible with the surrounding area because it is not easy to see from the road and in fact is not immediately adjacent to the highway (County Board hearing, R. at 76-77). Mr. Beck also stated that he believes the facility is compatible with the surrounding area because the landfill is one of the cleanest, best managed and best operated he has ever seen (County Board hearing, R. at 77).

The Second District Illinois Appellate court has interpreted criterion #3, and has held that in an area where a landfill presently exists, an applicant in an S.B. 172 proceeding should not be able to establish the compatibility of a proposed facility based upon the presence of the preexisting facility. Waste Management, 123 Ill. App. 3d at 1088. A close reading of that case indicates that the Second Circuit rejected the notion that a proposed facility is always more compatible with an area where a landfill already exists than with an area where there is presently no landfill.

However, in a recent decision the Third District found that the prior use of a site is relevant to the question of compatibility. The court noted that criterion #3 recognizes that the siting of a facility may result in some reduction in value to surrounding properties; what the applicant must show is that the proposed location minimizes this reduction. The court went on to state that:

> Where, as here, the proposed site is in a pre-existing industrial zone near to the city's own waste water treatment plant and next door to a rubber boot factory that uses hazardous materials, we cannot escape the conclusion that the manifest weight of the evidence supports a finding that incompatibility with the character of the surrounding area is minimized by the selection of the site described in

> Watts' application. Speculation of a possible reduction of value to the Servus Rubber factory by locating the facility on the site of a former paint factory and a former battery factory is insufficient to overcome the manifest weight of evidence that the effect on value of the surrounding property is minimized by the zoining (sic) classification and prior uses of the selected site.

Cathryn Braet v. Illinois Pollution Control Board, No. 3-84-0193 (Consolidated with NO. 3-84-0221), slip op. at 32 (3d Dist. August 23, 1985).

The Board notes the apparent conflict between the decisions of the Second and Third Districts regarding criterion #3, and finds that after applying either view it cannot say that the County Board's approval of the application as to criterion #3 was against the manifest weight of the evidence.

The evidence presented by BFI concerning this criterion was not largely based on the fact that a preexisting facility operates there. Furthermore, this evidence was largely uncontested by Concerned Neighbors (except for cross-examination of BFI's witnesses), who presented no witnesses who offered any testimony on criterion #3.

Criterion #4

There was ample uncontested evidence before the County Board that the disposal area at the site is outside of the 100-year floodplain, and moreover that the disposal area is or will be floodproofed by berms extending 15 feet above the 100-year flood elevation. This evidence consists of testimony and cross-examination of Mr. Beck (County Board hearing, R. at 72-74, 97-104) and the Agency's prior permitting of the site, in which it is explicit that disposal not take place within the 100-year floodplain.

At issue is whether such evidence is sufficient for the County Board to reach the conclusion that criterion #4 has been satisfied. Criterion #4 would seem to clearly specify a central role for the Illinois Department of Transportation ("IDOT"), namely that it is IDOT's responsibility to determine the boundary of the 100-year flood or, in the alternative, that IDOT approves floodproofing of the site. Counsel for Concerned Neighbor's correctly pointed out during cross-examination of Mr. David Beck, however, that up to the time of the County Board hearing in this matter the Illinois Department of Transportation ("IDOT") never indicated that the proposed facility is located outside the boundary of the 100-year flood plain as determined by IDOT for that area; nor had IDOT indicated up to that time that the site is flood-proofed to meet the standards and requirements established by IDOT (County Board hearing, R. at 102-103).

However, in prior S.B. 172 cases IDOT has consistently deferred to determinations made by the Agency for proof of compliance with the requirements of criterion #4. This pattern was exemplified in a letter from a representative of IDOT, admitted as an exhibit in an earlier S.B. 172 case. A portion of it reads as follows:

> "I also advised you during our meeting that the Department of Transportation has no specific standards regarding flood-proofing of regional pollution control facilities. It is my understanding that the Illinois Environmental Protection Agency (Agency) does. Therefore, if a proposed facility meets all of the requirements of the Illinois Environmental Protection Agency regarding flood-proofing, it is deemed to comply with the requirements of Chapter 111½, Section 39.1 (sic) insofar as the Department of Transportation is concerned."

Board of Trustees of Casner Township v. County of Jefferson, PCB 84-175 (April 4, 1985) at 12-13. The Board in that case construed that language as sufficient to constitute IDOT approval pursuant to criterion #4.

The Board finds that it must again rely on an Agency determination in order to find the requirements of criterion #4 satisfied. Without doing so, the Board would have no recourse but to reverse the County Board's decision as to criterion #4 and remand the matter for further proceedings below. However, as IDOT has desired to rely on the Agency regarding criterion #4 matters, nothing would be gained by remanding this proceeding back to the County Board since the Agency demonstrated previously (through the earlier permit process) that the original site is not within the 100-year floodplain. It cannot be said that the proposed facility is within the floodplain either, both because there is testimony in the record that the lowest point of the new facility would only be a "foot or two" lower than the original facility, and because of the height of the berms, noted above. Thus, it is unlikely that under remand the County Board could find other than it already has, and a remand by this Board would constitute a useless act.

There is one other matter regarding criterion #4 which warrants discussion. At the Board hearing in this matter, BFI attempted to introduce into the record an affidavit of Mr. David R. Boyce, Chief Flood Plain Management Engineer for the Division of Water Resources, IDOT. BFI alleges that Mr. Boyce "makes all S.B. 172 determinations for IDOT" (November 8, 1985 brief of BFI, p. 19). The Hearing Officer at that proceeding ruled that the affidavit would not be admitted as it was not directed towards an issue that could properly be considered at that hearing (Board hearing, R. at 14). The statutory basis for the Hearing Officer's ruling is section 40.1(a) of the Act, which states that, in regard to a Board hearing in an S.B. 172 proceeding:

> "such hearing shall be based exclusively on the record before the county board...and...no new or additional evidence in support of or in opposition to any finding, order, determination or decision of the appropriate county board...shall be heard by the Board."

In its post-hearing brief, BFI moved the Board to overrule the Hearing Officer's decision and introduce the Boyce affidavit (November 8, 1985 post-hearing brief at 20). The Hearing Officer's ruling was proper, and is hereby affirmed.

Criterion #5

Mr. Gordon Landrum testified that BFI has undertaken various activities at its facility in the interest of minimizing the danger to the surrounding area from fire, spills, or other operational accidents. These activities have included: bi-monthly safety meetings of both the landfill staff and State Police located nearby; close cooperation with the local fire department, including on-site training from that department in putting out landfill fires; and CPR (cardiopulmonary resuscitation) training to every employee of the landfill (County Board hearing, R. at 53). Mr. Landrum also noted that since BFI began operating the site in 1983, there have been no accidents at the facility (County Board hearing, R. at 53). Except for questioning Mr. Landrum on cross-examination, Concerned Neighbors did not present any evidence of its own to dispute that presented by BFI. The Board accordingly does not find that the decision of the County Board as to criterion #5 was against the manifest weight of the evidence.

Criterion #6

Both Mr. Gordon Landrum and Mr. David Beck testified that trucks traveling to and from the facility have no alternative but to use Knoxville Road (County Board hearing, R. at 60 and 78, respectively). Concerned Neighbors presented no evidence which would contest this assertion. Mr. Landrum did note that approximately 40 to 55 loads are delivered to the site per day (County Board hearing, R. at 54), and that in his opinion Knoxville Road is not overused (County Board hearing, R. at 60). Mr. Beck noted that he believes the road is adequate to serve the landfill, and that the proposed modification will not increase the amount of traffic using the facility (County Board hearing, R. at 78). Since this evidence was uncontroverted below, the Board finds that the County Board's decision as to criterion #6 was not against the manifest weight of the evidence.

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

ORDER

The July 16, 1985 decision of the Rock Island County Board approving the request of Browning-Ferris Industries of Iowa, Inc. for approval of the siting of a new regional pollution control facility is hereby affirmed.

IT IS SO ORDERED.

Bill Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 9th day of January, 1986, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board