

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

STOP THE MEGA-DUMP,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-103
	)	(Third-Party Pollution Control Facility
COUNTY BOARD OF DEKALB COUNTY	)	Siting Appeal)
ILLINOIS and WASTE MANAGEMENT OF	)	
ILLINOIS, INC.,	)	
	)	
Respondents	)	

**NOTICE OF FILING**

TO: See Attached Service List

PLEASE TAKE NOTICE that on January 3, 2011, we filed with the Illinois Pollution Control Board, the attached **Waste Management of Illinois, Inc.'s Brief in Support of the Decision of the DeKalb County Board Approving Site Location for the DeKalb County Landfill Expansion** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

By:   
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**WASTE MANAGEMENT OF ILLINOIS, INC.'S BRIEF IN SUPPORT OF THE  
DECISION OF THE DEKALB COUNTY BOARD APPROVING SITE LOCATION FOR  
THE DEKALB COUNTY LANDFILL EXPANSION**

Respondent, Waste Management of Illinois, Inc. ("WMII"), by its attorneys, Pedersen & Houpt, P.C., submits this brief in support of the DeKalb County Board's ("County Board") Resolution #R2010-31 Approving The Request of Waste Management of Illinois, Inc. For Site Location of the DeKalb County Landfill Expansion ("Site Location Approval"). In support thereof, WMII states as follows:

**I. INTRODUCTION**

This third-party appeal arises out of the November 30, 2009, site location application ("Application") filed by WMII with the County Board requesting site location approval for the expansion of the existing DeKalb County Landfill ("Expansion"), pursuant to Section 39.2 of the Illinois Environmental Protection Act ("Act"). The County Board approved the Application on May 10, 2010, after six days of public hearing held on March 1, 2, 3, 4, 5 and 11, 2010, during which

eight expert witnesses testified in support of the Application on all nine Section 39.2(a) criteria. No other expert witness testified or presented evidence establishing that any of the criteria were not satisfied.

On appeal, Petitioner, Stop the Mega-Dump ("STMD") asserts that DeKalb County does not need a "mega-dump" to accept waste from a 17-county service area. Specifically, STMD contends that the County Board's findings on criteria (i), (ii), (iii), (v) and (vi) were against the manifest weight of the evidence. The record, however, demonstrates that WMII established all of the statutory criteria by clear and convincing evidence, and no expert testimony or evidence was offered to controvert this proof. Accordingly, the County Board's decision granting site location approval is supported by the manifest weight of the evidence and should be affirmed.

STMD also contends that the local siting proceedings were fundamentally unfair because (a) the DeKalb County Pollution Control Facility Siting Ordinance ("Ordinance") and Articles of Rules and Procedures ("Rules and Procedures") improperly limited public participation; (b) the County Board improperly limited public access to the Application and refused to provide copies of an electronic version of the Application; (c) certain County Board members prejudged the Application; (d) alleged ex parte contacts involving a pre-filing landfill tour and pre-filing review of the Application improperly tainted the County Board; and (e) the County Board improperly earmarked anticipated host fees before making a decision on the Application.

STMD's fundamental fairness arguments must fail because (a) no one was denied the opportunity to participate at the public hearing; (b) no one was denied access to the Application, and copies of an electronic version of the Application were given to STMD and any person who asked

for it; (c) all the County Board members who voted to approve made their decision on the evidence in the record and only after all the evidence was in; (d) pre-filing landfill tours and application review are not improper ex parte contacts; and (e) the County Board did not earmark or commit anticipated host fees prior to making its decision.

Because the record fully supports the County Board's findings that criteria (i), (ii), (iii), (v) and (vi) of Section 39.2(a) were satisfied, and also shows that the proceedings were fundamentally fair in all respects, the County Board's decision to grant site location approval of the Application should be affirmed.

## **II. FACTUAL BACKGROUND**

### **A. Application**

The existing DeKalb County Landfill, located northeast of the intersection of Somonauk and Gurler Roads in unincorporated DeKalb County, Illinois, includes an 88-acre waste disposal area on a 245-acre property. The Application requests local siting approval for the Expansion that consists of (a) the exhumation of the 24-acre old fill area and disposal of the exhumed waste in a composite-lined cell, (b) development of a 61-acre waste disposal area above and adjoining the existing 88-acre waste footprint and (c) development of a 179-acre waste disposal area east of Union Ditch No. 1, all on a 594-acre property. (WMII Post-Hearing Memorandum and Proposed Findings of Fact and Conclusions of Law, April 1, 2010, p. 1.) The Expansion is anticipated to receive approximately 1800 tons per day of solid waste from the service area, and will receive no more than 500,000 tons

per year. (Pet. Ex. 1, Vol. 1, at Criterion 2, p. 6-3.)<sup>1</sup> The capacity of the Expansion is 23.2 million tons, and is expected to provide disposal capacity for approximately 46 years. (Pet. Ex. 1, Vol. 1, at Criterion 2, p. 6-3.)

The Application contains the Host Community Agreement ("Agreement") between WMII and DeKalb County signed April 17, 2009. The Agreement will apply to the Expansion in the event of final and non-appealable local siting approval. (Pet. Ex. 1, Vol. 2, at Agreement, pp. 1-2.)

In the Agreement, WMII guarantees disposal capacity at the Expansion for nonhazardous solid waste generated in DeKalb County for at least 25 years.<sup>2</sup> (Pet. Ex. 1, Vol. 2, at Agreement, p. 5.) WMII agrees to a property value guarantee plan and domestic water well monitoring plan for properties located within ½ mile of the waste footprint of the Expansion and included those plans in the Agreement.<sup>3</sup> (Pet. Ex. 1, Vol. 2, at Agreement, pp. 9-10.) WMII will indemnify DeKalb County for any liability relating to the operation and closure of the Expansion. In addition to a commercial general liability insurance policy in the amount of \$10 million, WMII will maintain

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<sup>1</sup>Exhibits submitted by WMII at the County Board public hearing will be identified as Petitioner's Exhibit \_\_\_\_\_. (Pet. Ex. \_\_\_.) Transcripts of the public hearing before the County Board will be referenced by date and page (3/\_\_/10 Tr. at \_\_\_.) References to the record of the County Board proceedings will be (C\_\_\_\_\_.) Transcripts of the hearing before the Illinois Pollution Control Board ("IPCB" or "Board") will be referenced as (IPCB Tr. at \_\_\_\_\_.) Deposition transcripts submitted to the IPCB will be referenced by surname of deponent and page (Surname Tr. at \_\_\_\_\_.) The Host Community Agreement, found in the Application, will be referenced as (Agreement, p.\_\_\_\_\_.) Public comment filed with the IPCB will be referenced as (PC#\_\_\_\_\_.)

<sup>2</sup>One of the conditions in the Site Location Approval extended this guarantee "for a period that equals the life of the landfill." (Resolution #R2010-31, p. 2.)

<sup>3</sup>One of the conditions in the Site Location Approval extended the Property Value Guarantee Plan to properties "located at least 1 mile from the landfill expansion footprint..." (Resolution #R2010-31, pp. 9-10.)

pollution liability insurance in the amount of \$20 million for the entire period of Expansion operation and 30 years after closure. (Pet. Ex. 1, Vol. 2, at Agreement, pp. 10-11, 15, 19-21.) WMII agrees to actively promote key responsibilities of environmental stewardship, including the provisions for a methane gas recovery facility, citizen forum procedures and a household hazardous waste collection program. (Pet. Ex. 1, Vol. 2, at Agreement, p. 17.)

**B. Availability of Application**

On November 7, 2009, WMII published its "Notice of Application to County Board of DeKalb County, Illinois Requesting Approval of Site Location for an Expansion of the DeKalb County Landfill" ("Notice of Application") in the Daily Chronicle. The Notice of Application provided, in pertinent part:

The Application will be submitted to the Board on November 30, 2009. After the Application has been filed, it will be available for public inspection in the Office of the County Clerk, 110 East Sycamore Street, Sycamore, Illinois 60178, and copies of the Application may be obtained from that Office upon payment of the actual cost of reproduction.

Shortly after the Notice of Application was served, the Daily Chronicle published a news article entitled "Application For Landfill Expansion To Be Filed In Days." The article, appearing on November 20, 2009, stated that WMII intended to file the Application on November 30, 2009, and indicated that, once filed, the Application "will be available to the public at the DeKalb County Clerk's Office, several municipalities including Cortland and DeKalb, and at area libraries." (IPCB Tr. at 189; PC #45.)

On November 30, 2009, WMII filed the Application with the County Board. (Pet. Ex. 1.) The Application was available for public review and copying at the County Clerk's Office. (Notice of Application, Pet. Ex.1, Vol. 2.) In addition, the Application was maintained and available for review at the Office of the County Board, the City of DeKalb, the Town of Cortland, and the DeKalb, Sycamore and Cortland public libraries. (Bockman Tr. at 36, 43; IPCB Tr. at 36, 40; Ordinance, Sec. 50-54(c)(1), (d).)

On February 10, 2010, WMII published the Notice of Public Hearing in the Daily Chronicle. The Notice of Public Hearing provided that the public hearing on the Application would commence on March 1, 2010, at Kishwaukee College, 21193 Malta Road, Malta, IL 60150 in the Jenkins Auditorium. (Pet. Ex. 2, Exhibit. A.)

The Notice of Application and the Notice of Public Hearing both provided that the Application would be available for public inspection in the Office of the County Clerk and copies of the Application could be obtained from that Office upon request and payment of the actual cost of reproduction. (Notice of Application, Pet. Ex. 1, Vol. 2; Notice of Public Hearing, Pet. Ex. 2, Exhibit A.) Each person who came to the County Clerk's Office inquiring about the Application was given complete access to review and inspect it. The two persons who asked for a copy of an electronic version of the Application were provided it, including Mr. Mac McIntyre, the founder of STMD. (IPCB Tr. at 65-66, 72.) Mr. McIntyre testified at the IPCB hearing that he shared his copy of the electronic version of the Application with members of STMD. (IPCB Tr. at 65-66, 72.)

**C. Opportunity to Participate at Public Hearing**

The Notice of Public Hearing stated that parties wishing to testify or cross-examine witnesses at the public hearing must register with the County Clerk at least seven days before the

public hearing begins, or by the close of business on February 22, 2010<sup>4</sup>. The Notice of Public Hearing also explained that members of the public wishing to speak during the public comment time of the public hearing are not subject to the pre-registration requirement, but that the hearing officer may set rules and designate specific times for oral public comment during the hearing. (Pet. Ex. 2, Exhibit A.)

A Daily Chronicle news article dated February 26, 2010, entitled "Landfill Hearing Officer Will Be Accommodating," stated that the public hearing would provide members of the public the opportunity to present their positions and, in some instances, to participate in the public hearing by asking questions of witnesses. (PC #54.) The article further stated that officials and the hearing officer would "do all they can" to accommodate those members of the public who wanted to present evidence or cross-examine witnesses during the hearing, even those who had not registered by the February 22 deadline. (PC #54.) Sixteen people registered with the County Clerk's Office to participate at the public hearing, four of whom registered after the February 22 deadline but were still permitted to participate. (C0006823-6824.)

The public hearing commenced on March 1, 2010, in the Jenkins Auditorium. John McCarthy, the appointed Hearing Officer, presided over the public hearing. In the Hearing Officer's opening remarks, he explained that there were three ways to participate in the local siting process: 1) as a participant who registered with the County Clerk, 2) by giving public comment during the public hearing, and 3) by submitting written public comment within 30 days after the date of the last public hearing. He stated that he would try to accommodate the schedules of those who desired to make public comment, and emphasized that the County Board must consider public comment in

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<sup>4</sup>This registration requirement is found in Article III, Section 6(A) of the Rules and Procedures.

making its decision. (3/1/10 Tr. at 9, 36, 49-50.) The Hearing Officer was also liberal in allowing members of the public to become participants even though they did not sign up by the February 22 deadline, including those who stated their interest in being a participant on the first day of the public hearing. (3/1/10 Tr. at 19, 35-36, 49-50, 53-54, 57; IPCB Tr. at 45-46.) In addition, the Hearing Officer allowed any person in attendance at the public hearing to question any witness, irrespective of whether the person was registered as a participant. (3/1/10 Tr. at 52.)

Mr. Mac McIntyre and Ms. Danica Lovings, two members of STMD, testified that they were not aware of anyone who was prevented from participating in the public hearing based on where they lived, or anyone who was prevented from presenting information or evidence. (IPCB Tr. at 77.) In fact, Ms. Lovings admitted that she was allowed to register as a participant at the public hearing even though she missed the registration deadline by calling the County Clerk's Office on Friday, February 26. Ms. Lovings affirmed that she had been given the opportunity to question witnesses and provide whatever public comment she wished. She further acknowledged that the Hearing Officer was very accommodating of people who wanted to speak at the public hearing. (IPCB Tr. at 45-46.) All eight of WMII's witnesses were cross-examined by STMD, persons who attended the public hearing, or both.

**D. Statements By County Board Members Julia Fauci and Riley Oncken**

STMD's Petition for Review claims that the County Board was biased in favor of WMII and prejudged the Application. As support for its claim, STMD offered testimony describing statements allegedly made by County Board members Julia Fauci and Riley Oncken. At the IPCB hearing, STMD presented the testimony of two of its members, Paulette Danielle Sherman and Dan Kenney, regarding these statements.

Dan Kenney, STMD's Chairperson, testified that sometime in August 2009, he saw Julia Fauci at a networking event and when he asked her something about the landfill being expanded, she told him "it was pretty much a done deal" and that "we've negotiated some things for ourselves." (IPCB Tr. at 48-50.) This encounter between Mr. Kenney and Ms. Fauci occurred after the Agreement was signed on April 17, 2009. Ms. Fauci saw Mr. Kenney in March 2010 at the public hearing, and told him that he had misquoted her and taken her statements out of context. (IPCB Tr. at 53-61.)

Ms. Sherman also testified at the IPCB hearing on behalf of STMD. Ms. Sherman testified that she is a friend of Clay Campbell, a member of STMD who participated at the public hearing on STMD's behalf, and that she worked on Mr. Campbell's campaign for DeKalb County state's attorney. (IPCB Tr. at 22.) Ms. Sherman said that on the first day of the public hearing, she was approached by Mr. Oncken whom she claims said "I don't know why all these people are here. We've already made up our minds." (IPCB Tr. at 16-17, 18-22.) She also said that Mr. Oncken did not say who he meant by "we" or what he meant by "made up our minds." (IPCB Tr. at 28, 30.)

Mr. Oncken testified that he never made a comment to Ms. Sherman or anyone else that the Expansion was a done deal or that he or any other County Board member had made up their minds. (IPCB Tr. at 197-198.) Mr. Oncken testified that he made his decision shortly before the vote on the Application and did not consider evidence outside of the record. (IPCB Tr. at 198.) He testified further that despite his personal opinions, WMII had met its burden of demonstrating compliance with the nine statutory criteria. (IPCB Tr. at 204-205.)

**E. Evidence Presented at Public Hearing Regarding Criteria (i), (ii), (iii), (v) and (vi)**

WMII presented eight expert witnesses at the public hearing who testified in support of the Application. No other expert witness testified or presented evidence establishing that any of the criteria were not satisfied.

1. Criterion (i)

Sheryl Smith prepared the written report on criterion (i) and testified at the public hearing regarding the need for the Expansion. (Pet. Ex. 1, Vol. 1, at Criterion 1; 3/2/10 Tr. at 201-285.) Ms. Smith is a solid waste consultant and was qualified as an expert on the need criterion. (3/2/10 Tr. at 201-206.) Ms. Smith testified about the methodology she used to determine need, the service area, the types of waste accepted and waste generation rates. (3/2/10 Tr. at 207-210.) The service area for the Expansion consists of the following 17 counties in northeast Illinois: DeKalb, Boone, Bureau, Cook, DuPage, Grundy, Kane, Kankakee, Kendall, Lake, LaSalle, Lee, McHenry, Ogle, Putnam, Will and Winnebago. (Pet. Ex. 1, Vol. 1, at Criterion 1, p. 2-1; 3/2/10 Tr. at 208.) Ms. Smith stated that the available capacity of the service area (206.6 million tons) compared to the amount of waste generated over the operating life of the Expansion requiring disposal (490.4 million tons) results in a capacity shortfall of 283.8 million tons, and that the capacity of the Expansion is 23.2 million tons, less than one-tenth of the shortfall identified in the service area. (3/2/10 Tr. at 212.) Ms. Smith gave her opinion that, based on the disposal capacity shortfall, there is insufficient capacity available to meet the waste needs of the service area and the Expansion is necessary to meet the waste needs of the area it intends to serve. (Pet. Ex. 1, Vol. 1, at Criterion 1, p. 7-1; 3/2/10 Tr. at 212-213.)

2. Criterion (ii)

WMII presented four witnesses who testified regarding the design, operation and location of the Expansion, namely Andy Nickodem, Tom Price, Dale Hoekstra and Joan Underwood.

(a) *Design*

Andy Nickodem, a licensed professional engineer in Illinois, Wisconsin, Indiana and Kansas, who specializes in the design of solid waste landfills, testified concerning the design of the Expansion. (3/1/10 Tr. at 99-102.)

Mr. Nickodem testified that the primary objective in the design of a landfill is the containment and control of waste. For the Expansion, he proposed the following engineered systems to meet that objective:

1. A composite liner system to contain waste and control the migration of leachate. It consists, in ascending order, of a three-foot thick compacted low permeability ( $1 \times 10^{-7}$  cm/sec) soil layer, a 60-mil double-sided textured HDPE ("high density polyethylene") geomembrane and a geotextile cushion. In addition, a geocomposite liner ("GCL") will be placed under each central leachate collection pipe and each sump. (Pet. Ex. 1, Vol. 1, at Criterion 2, p. 6-1; 3/1/10 Tr. at 139-144; 3/2/10 Tr. at 128.) A construction quality assurance program will require testing of soil materials to ensure that the permeability ( $1 \times 10^{-7}$  cm/sec) specified for the compacted low permeability soil layer is achieved. (3/1/10 Tr. at 148.)
2. A leachate management system to collect leachate and keep it off the liner. One foot of highly permeable granular drainage material will be placed on top of the composite liner system so that leachate can flow to the leachate collection pipes. The leachate management system will ensure that there will be no accumulation of leachate over the composite liner. (3/1/10 Tr. at 156-157.) Without an accumulation of leachate on the composite liner system, there is no leachate that could leak from the landfill. (3/1/10 Tr. at 156-158.)
3. A final cover system to minimize the infiltration of rainwater and leachate formation. (3/1/10 Tr. at 159-160.) The final cover system will consist of a one-foot soil grading layer overlain with a 40-mil double-sided textured LLDPE geomembrane, a geocomposite drainage layer, and three feet of protective soil. (3/1/10 Tr. at 160-162.)

4. A surface water management system to control stormwater runoff, and prevent erosion, back-up of surface water off-site and contact with waste. The system will prevent any flooding of upstream or downstream properties as a result of the construction or operation of the Expansion. The system will include a series of diversion berms to intercept downward flows and prevent erosion. The diversion berms will direct stormwater to a series of downslope channels to the perimeter channels. The perimeter channels will flow into a series of six sedimentation basins. Bioretention rain gardens will be provided to reduce and filter surface water flow. (3/1/10 Tr. at 165-167; 3/2/10 Tr. at 160-162.)
5. A landfill gas management system to control landfill gas and odor. The gas management system will consist of a series of vertical extraction wells drilled into the waste mass. The vertical wells are connected by a series of header pipes. The extracted gas flows from the vertical wells, through the header pipes, to an enclosed landfill gas flare for combustion and destruction. (3/1/10 Tr. at 168-174.) Gas recovery facilities for the west and east units will provide beneficial re-use of landfill gas. Recovery will occur when sufficient quantities of gas are generated. (3/1/10 Tr. at 174-175; Pet. Ex. 1, Vol. 1, at Criterion 2, p. 11-6.)
6. An environmental monitoring system to monitor the performance of the engineered systems. The system will include groundwater monitoring wells, leachate level and leachate quality monitoring at the extraction sumps, landfill gas monitoring probes located around the perimeter of the Expansion, landfill gas quality monitoring within the interior of the waste mass, ambient air monitoring, and surface water monitoring. (3/1/10 Tr. at 182-185.)

Mr. Nickodem stated that the Expansion has been designed to meet or exceed all applicable provisions of the Act, IPCB regulations and IEPA requirements. (3/1/10 Tr. at 57-59, 127-129.)

Based on the fact that the engineered systems are designed to prevent any release of leachate, protect the Galena Group bedrock aquifer and private water wells, and meet or exceed all applicable governmental requirements, Mr. Nickodem concluded that the design of the Expansion satisfies criterion (ii). (3/1/10 Tr. at 57-59, 127-129, 137-139, 149-150, 154-157, 160, 186-187, 200-205.)

Tom Price, a licensed professional engineer in Illinois, Iowa, Indiana, Michigan, Wisconsin, Nebraska and Missouri, testified about his recommended enhancements to the surface water management system. (3/2/10 Tr. at 139-141.) He recommended five strategies to integrate surface

water management with the landscape and built environment, namely, native landscapes, naturalized sedimentation basins, filter berms, naturalized swales and green site practices. (3/2/10 Tr. at 152-164.) Mr. Price testified that these strategies will enhance the surface water management system by ensuring no increase in peak flows relative to existing conditions, improving water quality and increasing habitat diversity. (3/2/10 Tr. at 164-165.)

(b) *Operation*

Dale Hoekstra presented testimony describing the operation of the Expansion. (3/3/10 Tr. at 75-299; 3/4/10 Tr. at 5-32.) Mr. Hoekstra is the Director of Operations for WMII and has 34 years of experience in the solid waste industry, all associated with landfill and transfer station operations. He currently oversees the operations of nine landfills and four transfer stations in Illinois, and is an Illinois EPA certified landfill operator with a Class A special waste designation. (3/3/10 Tr. at 75-76.) The Expansion will accept municipal solid waste, construction and demolition debris waste, nonhazardous special waste and landscape waste. (3/3/10 Tr. at 81.) The Expansion will not accept any regulated hazardous waste, radioactive material, potentially infectious medical waste, liquid waste, and any wastes banned by the Act. (Pet. Ex. 1, Vol. 1, at Criterion 2, p. 13-2.)

Procedures will be in place to verify that only acceptable wastes are allowed for disposal. These procedures include (a) an employee training program so that all employees are informed and knowledgeable on waste identification procedures, (b) random load inspections three times per week in compliance with IPCB regulations, and (c) a waste characterization process that requires a profile sheet describing and analyzing the special waste material. The special waste characterization results are reviewed by a technical manager for approval to determine whether the material is suitable for disposal. (3/3/10 Tr. at 91-92, 106-108.)

The west unit will be constructed first, along with the exhumation and disposal of the old area waste into the new composite-lined area of Phase I of the west unit. Following the same approach, Phases 2, 3 and 4 of the west unit will be developed, including the completion of the exhumation of the old area. (3/3/10 Tr. at 83-84.) Prior to complete filling of Phase 4 in the west unit, activities would begin for the development of the east unit. (3/3/10 Tr. at 83-85.) Development of the east unit would proceed from Phase 1 through completion of Phase 9. (3/3/10 Tr. at 85-86.)

Waste delivered to the site will be required to be in tarped or enclosed vehicles. Waste will be disposed of at the active face. Daily cover is required each day, and is applied throughout the day to the active face as waste material is disposed of and compacted. (3/3/10 Tr. at 93-94.) Daily cover will consist of six inches of soil or an approved alternate daily cover material. (3/2/10 Tr. at 32-33; 3/3/10 Tr. at 93-94, 111, 201-202.) Intermediate cover is placed over areas that have not received waste for a period of 60 days. Areas that have achieved their final elevation will receive final cover. (3/3/10 Tr. at 92-95.)

The Expansion has litter, odor, dust, and mud control procedures. Those procedures include (a) requiring waste collection vehicles to be tarped or enclosed, (b) minimizing the size of the active area, (c) staging the active area to account for wind, (d) use of wind screens downwind to catch blowing paper, (e) litter collection onsite and on surrounding areas, (f) application of daily cover throughout the day and placement of intermediate cover, (g) placement of final cover over areas that reach final elevation, and (h) installation of a gas management system to remove, monitor and control methane gas. (3/3/10 Tr. at 97-99.) Dust and mud are controlled by the paved primary access road, all-weather secondary access roads, an on-site water truck and a street sweeper. (3/3/10 Tr. at 100.)

Mr. Hoekstra testified about the detection of hydrogen sulfide at the existing DeKalb County Landfill in 2008. He testified that the presence of hydrogen sulfide odors resulted from the disposal of ground gypsum board found in recycled construction and demolition debris waste. (3/3/10 Tr. at 95-99, 252, 261-262; 3/4/10 Tr. at 13.) He explained that prior to the onset of construction and demolition recycling, gypsum board had been routinely disposed of in landfills in its larger chunk, unground form, and created no hydrogen sulfide issues.

For the existing landfill, WMII added five additional gas extraction wells to its existing gas extraction system to manage the increase in methane gas generated in September 2008. To address the hydrogen sulfide odors, four more gas extraction wells and associated header piping were added in 2009. In addition, WMII increased the size of its flare from 800 cfm to 2,000 cfm in order to manage the additional landfill gas and provide additional capacity for future landfill gas generation. In October 2009, approximately 600 feet of horizontal trench collectors were added to provide additional odor control. (3/3/10 Tr. at 96-97.) Hydrogen sulfide is no longer an issue at the DeKalb County Landfill. (3/3/10 Tr. at 95, 197, 200, 216, 248.) Mr. Hoekstra testified that WMII has adopted a policy against accepting ground gypsum board at its facilities, including the DeKalb County Landfill, and that the Expansion will not accept ground gypsum board for disposal. (3/3/10 Tr. at 98-99.)

Mr. Hoekstra testified that the Expansion will be operated so as to protect the public health, safety and welfare based on (a) waste acceptance and load checking procedures; (b) waste placement procedures; (c) controlled site access and security; and (d) litter, odor, dust and mud control procedures. (3/3/10 Tr. at 114.)

(c) *Location*

Joan Underwood testified regarding the geology, hydrogeology and proposed groundwater monitoring system. She is a hydrogeologist with 32 years of experience in evaluating groundwater issues, performing hydrogeologic site characterizations and developing groundwater monitoring and remediation programs. (3/4/10 Tr. at 33, 35-36.) Ms. Underwood described in detail the geologic and hydrogeologic conditions at the site. (3/4/10 Tr. at 52-70.) She described the soil materials at the site and testified that beneath the soil layers are either the Lacustrine unit or glacial till, which lie on bedrock units including the Silurian, Maquoketa and Galena Formations. (3/4/10 Tr. at 62-67.) She testified that (a) the Silurian dolomite is a low-yielding aquifer and is not a significant source of drinking water in the area; (b) beneath the Silurian is the Maquoketa shale, which is a confining unit, *i.e.*, a barrier to groundwater movement; and (c) beneath the Maquoketa shale is the Galena-Platteville unit, which is an aquifer used for private water supply ("Galena Group aquifer"). (3/4/10 Tr. at 70-71.) She explained that the principal municipal drinking water source in the area is the deeper Ancell aquifer. (3/4/10 Tr. at 71-72.)

Ms. Underwood testified about the groundwater flow in the Silurian dolomite (found only on the eastern portion of the site) and the Lacustrine unit (found beneath the west side of the area east of Union Ditch No. 1 and beneath the west unit). She explained that the Silurian and Lacustrine units are the first units that transmit enough groundwater to monitor, and therefore, the groundwater monitoring program has been developed in those units. (3/4/10 Tr. at 74-77.) She stated that these are the units that Illinois regulations would designate as monitorable zones and require to be monitored. (3/4/10 Tr. at 78.) The groundwater monitoring system includes 37 monitoring wells

for the west unit (25 screened in the Henry Formation, 1 in the Tiskilwa Formation, 11 in the Lacustrine unit) and 37 monitoring wells for the east unit (23 screened in the Lacustrine unit and 14 screened in the Silurian dolomite). Ms. Underwood testified that the groundwater monitoring system will effectively monitor groundwater at the site and the performance of the landfill. (3/4/10 Tr. at 82-83.)

Ms. Underwood concluded that the Expansion is suitably located for groundwater safety, and will protect the public health, safety and welfare. (3/4/10 Tr. at 82-83, 142.)

(d) *STMD Witness on Hydrogen Sulfide at the Existing Landfill*

Dr. Aubrey Serewicz testified for STMD. He retired from American Home Products, Wyeth Laboratories, in 1998, after which time he became interested in sulfur compounds and did research work on sulfur compounds with the College of Health and Human Sciences at Northern Illinois University. (3/5/10 Tr. at 296.) He testified about hydrogen sulfide generally and at the existing landfill. Based on his attendance at the public hearing and his listening to the testimony presented, he gave his opinion that all landfills are unsafe, and that hydrogen sulfide from the existing landfill is moving northward downhill across Interstate 88, up the north embankment and over to Cortland Elementary School, one-half mile away. (3/11/10 Tr. at 21-23, 32, 67-68.)

His opinion, however, was not relevant because it related to the existing landfill, not the Expansion. (3/11/10 Tr. at 67-68.) He did not even know about criterion (ii) or how it could be evaluated with respect to the Expansion. (3/11/10 Tr. at 8-9.) Conditions at or operation of the existing landfill are not relevant to whether the Expansion meets the statutory criteria. Hence, his opinion on the risks of hydrogen sulfide from the existing landfill is not relevant to the issue of

whether the operation of the Expansion will protect the public health, safety and welfare and comply with criterion (ii).

3. Criterion (iii)

WMII presented two witnesses who testified regarding criterion (iii). David Yocca, a landscape architect and land planner, testified on the first part of criterion (iii) relating to whether the Expansion is located so as to minimize incompatibility with the character of the surrounding area. (3/5/10 Tr. at 185-291.) Pete Poletti, a real estate appraiser and consultant, testified about the second part of criterion (iii) that considers whether the Expansion is located to minimize the effect on the value of surrounding property. (3/3/10 Tr. at 5-74.)

(a) *Minimize Incompatibility*

Mr. Yocca testified that the predominant land use within one mile of the site is agriculture, accounting for 92.5 percent of the surrounding land use, followed by residential use at 5.2 percent. The remaining 2.3 percent of surrounding land is of an open space, commercial, retail or institutional use. (3/5/10 Tr. at 197.) He testified about strategies that can be taken to minimize impact of a proposed land use, including a multi-functional landscape approach, context-sensitive screening, green site development practices and implementation of local green policies. (3/5/10 Tr. at 203-204.)

Mr. Yocca testified that plantings will be incorporated into the setbacks and buffers as part of the context-sensitive screening and that these planted elements will identify and replicate elements of the rural landscape within the screening, such as hedgerows and windbreaks. (3/5/10 Tr. at 205-209.) He further testified that setbacks and buffers to create screening will be provided around the entire Expansion, including areas of undulating earthen berm, ranging from 8 to 12 feet in height,

and planted with native prairie. He stated that the screening will be context-sensitive as well, and vary around the Expansion based upon existing conditions along each side. He explained that the screening berms will be developed in a phased approach, ahead of landfill construction. (3/5/10 Tr. at 210-214, 226-227, 233, 240.) He also testified that green site practices will be employed in the entrance area, and will include a green roof, permeable paving systems and bioretention rain gardens. (3/5/10 Tr. at 215-219.) Mr. Yocca gave his opinion that the Expansion has been located so as to minimize incompatibility with the character of the surrounding area. (3/5/10 Tr. at 224.)

(b) *Minimize Effect on Property Value*

In performing his evaluation, Mr. Poletti conducted a review of the Expansion, an inspection of the DeKalb County Landfill property and the surrounding area, a review of land uses in the area, a review of real estate sales documents and an analysis of local property transactions. (3/3/10 Tr. at 11.) He also performed a case study based on the existing DeKalb County Landfill, as well as the effects of other existing landfills on surrounding property values. (3/3/10 Tr. at 11.)

Mr. Poletti compared sale prices of similar properties located in a target area, an area surrounding an operating landfill where one would expect property values to be affected by those operations, and a control area, an area some distance from the operating landfill, but having similar properties as the target area, where the values are not affected by the operating landfill. (3/3/10 Tr. at 14.)

Based on his study, Mr. Poletti concluded that there was no measurable difference in prices between the target and control group properties. (3/3/10 Tr. at 19, 35-36.)

Mr. Poletti reviewed the landscaping and screening plan for the Expansion. The plan will include an undulating land form, use of natural vegetation, trees and plantings to blend with

vegetation historically occurring on the site, setbacks ranging from 475 feet to 500 feet to the limits of waste along Somonauk and Gurler Roads and berming to screen views of the operation. (3/3/10 Tr. at 21-22, 38-39.) He stated that existing features, including Interstate 88 and topography, also serve to buffer the site from the surrounding property. (3/3/10 Tr. at 22.)

Mr. Poletti testified that based upon (1) the location of the Expansion in a low-density land use area, (2) the results of the existing DeKalb County Landfill case study, (3) other operating landfill case studies and (4) the proposed screening, landscape, setbacks and visual buffering, the Expansion is located so as to minimize the effect on the value of surrounding property. (3/3/10 Tr. at 24, 39, 62.)

4. Criterion (v)

Mr. Hoekstra testified concerning criterion (v). The plan of operations for the Expansion will include a fire prevention and control plan, a spill prevention and control plan, an accident prevention plan, an emergency action plan and site security. (3/3/10 Tr. at 116-119.) No witness contradicted or refuted Mr. Hoekstra's testimony.

5. Criterion (vi)

David Miller testified regarding criterion (vi). Mr. Miller has 42 years of experience as a traffic engineer, directing over 1,600 traffic impact studies. He has evaluated traffic impact for 34 pollution control facilities, including 19 landfills and 15 transfer stations. (3/4/10 Tr. at 254-256.)

Mr. Miller testified that his analysis consisted of reviewing collected information on surrounding roadways including roadway characteristics (number of lanes, traffic controls, speed limits and jurisdiction) and traffic controls, and observed traffic operations during peak and off-peak times. It also included conducting daily and peak hour traffic counts (manual and mechanical) on

surrounding roadways and intersections, and evaluating capacity and level of service for surrounding roadways and intersections. (3/4/10 Tr. at 258-259.) Mr. Miller estimated the amount of traffic that would be generated by the Expansion, including the number of trucks and other vehicles using the Expansion, and assigned future 2013 traffic and Expansion traffic to the surrounding roadways and intersections. Capacity and level of service ("LOS") for the surrounding roadway intersections were then evaluated. (3/4/10 Tr. at 259.) In addition, recommended improvements were evaluated for the new facility entrance. (3/4/10 Tr. at 282.)

Mr. Miller testified that traffic patterns for transfer trailers going to and from the Expansion, as described in the Agreement, will require transfer trailers to arrive via Interstate 88, exit to the north at Peace Road, travel north to Illinois Route 38, travel east to Somonauk Road, travel south on Somonauk Road to the site entrance. The return trip would be the same maneuver, only in reverse. (3/4/10 Tr. at 260, 289.) This route will be enforced by WMII and transfer trailer operators deviating from the designated route can lose disposal privileges. (3/4/10 Tr. at 287, 290.)

Mr. Miller testified that the Expansion will have an estimated total of 474 trips per day, or 237 trips in and 237 trips out. Of this total, 354 trips are waste vehicles of different types, and 120 trips are employee, vendors and visitors. This total includes both existing trips and new trips. The existing landfill has 178 trips per day total. Therefore, the new traffic is 296 trips per day, or 148 vehicles per day, including waste vehicles and employee, vendors and visitors. (3/4/10 Tr. at 268, 308.)

Mr. Miller testified that Expansion peak hours, estimated to be 9:00 a.m. to 10:00 a.m., and 1:00 p.m. to 2:00 p.m., do not coincide with street peak hours on the surrounding roadways. (3/4/10 Tr. at 269.) Expansion-generated traffic was assigned to the existing surrounding roadways, as well

as to projected 2013 surrounding roadways, and did not cause a decrease in LOS to the evaluated roadway segments or intersections. (3/4/10 Tr. at 269-276.)

Mr. Miller also testified that a gap study was performed for three movements at the site entrance, including vehicles leaving the site turning north onto Somonauk Road, vehicles leaving the site turning south onto Somonauk Road, and vehicles traveling south on Somonauk Road and turning left, or east, into the site entrance. He found that for all movements adequate gaps are available to accommodate all vehicle movements for the Expansion. (3/4/10 Tr. at 276-280.)

Mr. Miller testified that the traffic patterns to and from the Expansion have been so designed as to minimize the impact on existing traffic flows. (3/4/10 Tr. at 285.) No other witness testified with respect to criteria (vi) and no evidence was presented to refute Mr. Miller's testimony.

### **III. STANDARD OF REVIEW**

Section 39.2 of the Act vests authority in local governments to approve or disapprove siting for a new pollution control facility. 415 ILCS 5/39.2. A local government's decision is reviewable by this Board for fundamental fairness and compliance with the nine statutory criteria for local siting approval. County of Kankakee v. Illinois Pollution Control Board, 396 Ill.App.3d 1000, 1014, 2009 Ill. App. LEXIS 1185 at \*30 (3d Dist. 2009).

The Board may hear new evidence relevant to the fundamental fairness of the proceedings. Land and Lakes Company v. Pollution Control Board, 319 Ill.App.3d 41, 743 N.E.2d 188, 194 (3d Dist. 2000). In a local siting proceeding, fundamental fairness includes only the minimal standards of procedural due process, such as the right to be heard, the right to cross examine adverse witnesses and the right to impartial rulings on the evidence. Peoria Disposal Company v. Illinois Pollution Control Board, 385 Ill.App.3d 781, 797, 896 N.E.2d 460, 475 (3d Dist. 2008). These due process

requirements are defined by balancing the individual's interest against society's interest in effective and efficient governmental operation. Waste Management of Illinois, Inc. v. Pollution Control Board, 175 Ill.App.3d 1023, 530 N.E.2d 682 (2d Dist. 1988).

On a review of the statutory criteria, the Board must confine itself to the record developed by the local siting authority, and findings of fact should not be disturbed unless such findings are against the manifest weight of the evidence. Land and Lakes Company, 319 Ill.App.3d at 48, 743 N.E.2d at 193. A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain or indisputable from a review of the evidence. Id.

The Board is required to apply its technical expertise when examining the record to determine if the local siting decision is supported by the record. Town & Country Utilities, Inc. v. Illinois Pollution Control Board, 225 Ill.2d 103, 123-124, 866 N.E.2d 227, 238-239 (2007). If there is any evidence in the record supporting the decision, the Board must affirm. The Board may not reweigh the evidence and substitute its judgment for that of the County Board. Fox Moraine, LLC v. United City of Yorkville, No. PCB 07-46, slip op. at 6 (Oct. 1, 2009). If there is conflicting evidence, the Board is not free to reverse simply because the County Board credited certain witnesses and not others. Id.

#### IV. ARGUMENT

##### **A. The Decision Granting Site Location Approval is Supported By Clear and Convincing Evidence**

STMD contends that the County Board's findings on criteria (i), (ii), (iii), (v) and (vi) are against the manifest weight of the evidence.

As stated above, the decision of a local siting authority regarding compliance with the statutory criteria will not be disturbed unless the decision is contrary to the manifest weight of the

evidence. Land and Lakes Company, 319 Ill.App.3d at 53, 743 N.E.2d at 197. The province of the County Board is to weigh the evidence, resolve conflicts in testimony and determine the credibility of witnesses. Fox Moraine, No. PCB 07-46, slip op. at 5. Simply because there may be some evidence which, if accepted, would have supported a contrary conclusion does not mean that this Board may reweigh the evidence and substitute its judgment for that of the County Board. Tate v. Illinois Pollution Control Board, 188 Ill.App.3d 994, 1026, 544 N.E.2d 1176, 1197 (4th Dist. 1989); Landfill 33 v. Effingham County Board, Nos. PCB 03-43, 03-52 (cons.), slip op. at 3 (Feb. 20, 2003). If there is any evidence which supports the County Board's decision, and this Board finds that the County Board could have reasonably reached its conclusion, the decision must be affirmed. File v. D & L Landfill, No. PCB 09-94, slip op. at 3 (Aug. 30, 1990). That a different decision might also be reasonable is insufficient for reversal; the opposite conclusion must be clear and indisputable. Willowbrook Motel v. Pollution Control Board, 135 Ill.App.3d 343, 481 N.E.2d 1032 (1st Dist. 1985).

As set forth above, WMII established criteria (i), (ii), (iii), (v) and (vi) by clear and convincing evidence. No relevant or probative evidence was presented that controverted WMII's prima facie case. Accordingly, the decision granting siting approval should be affirmed.

1. Criterion (i): The Expansion is Necessary to Accommodate the Waste Needs of the Service Area

Need is established where an applicant shows that a proposed facility is reasonably required by the disposal needs of the service area, taking into account the waste production and waste disposal capacity of the area. Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, 112 Ill. App.3d 639, 461 N.E.2d 542, 546 (3d Dist. 1984). WMII is not required to show absolute necessity to satisfy criterion (i). Landfill 33, Nos. PCB 03-43, 03-52 (cons.), slip op. at 26.

WMII presented credible evidence and expert opinion establishing that the Expansion is necessary to accommodate the waste needs of the area it is intended to serve. No testimony or evidence was presented that contradicted or impeached WMII's evidence that the Expansion is necessary. Because there is ample evidence supporting the County Board's finding of need, the decision of the County Board is not against the manifest weight of the evidence and must be affirmed. Tate, 188 Ill.App.3d at 1023-1024, 544 N.E.2d at 1195-1196; Fairview Area Citizens Task Force ("FACT") v. Pollution Control Board, 198 Ill.App.3d 541, 551-552, 555 N.E.2d 1178, 1184-1185 (3d Dist. 1990); Landfill 33, Nos. PCB 03-43, 03-52 (cons.), slip op. at 26; Industrial Fuels & Resources v. Pollution Control Board, 227 Ill.App.3d 533, 544-545, 592 N.E.2d 148, 156 (1st Dist. 1992).

2. Criterion (ii): The Expansion is Designed, Located and Proposed to be Operated Such That the Public Health, Safety and Welfare Will Be Protected

Criterion (ii) requires a demonstration that the proposed facility does not pose an unacceptable risk to the public health and safety. Industrial Fuels, 227 Ill.App.3d at 547, 592 N.E.2d at 157. It does not, however, require a guarantee against any risk or problem. Clutts v. Beasley, 185 Ill.App.3d 543, 541 N.E.2d 844, 846 (5th Dist. 1989).

WMII presented persuasive evidence from four expert witnesses to establish criterion (ii), that the Expansion is so designed, located and proposed to be operated that the public health, safety and welfare will be protected. STMD did not present or offer any evidence to demonstrate that the design of the Expansion is flawed from a public safety standpoint or that its proposed operation poses an unacceptable risk to public health or safety. STMD presented the testimony of Dr. Aubrey Serewicz, regarding hydrogen sulfide at the existing landfill. However, his testimony provided no evidence or opinion on whether the Expansion satisfied criterion (ii), specifically whether the design

was flawed or whether the proposed operation would pose an unacceptable risk to public health or safety. (3/5/10 Tr. at 295-298, 322-323, 334-338; 3/11/10 Tr. at 16, 23, 67-68, 71-73.)

As there was no testimony or evidence presented that clearly refuted WMII's proof that criterion (ii) has been satisfied, the County Board decision on criterion (ii) must be affirmed. Industrial Fuels, 227 Ill.App.3d at 547, 592 N.E.2d at 157; Fox Moraine, No. PCB 07-46, slip op. at 82.

3. Criterion (iii): The Expansion Is Located to Minimize Incompatibility with the Character of the Surrounding Area and the Effect on Surrounding Property Values

Criterion (iii) does not require that a proposed facility be compatible with its surrounding area. It requires that an applicant take reasonable steps to minimize any incompatibility that is shown to exist. File v. D&L Landfill, 219 Ill.App.3d 897, 907-908, 597 N.E.2d 1228, 1236 (5th Dist. 1991). WMII's expert on the first part of criterion (iii) testified that the Expansion is located so as to minimize incompatibility with the character of the surrounding area, and the expert on the second part testified that it was located to minimize the effect on the value of surrounding property. Their conclusions were not refuted. Because there is no evidence in this record establishing that the County Board's finding on criterion (iii) is clearly and indisputably wrong, the Board must affirm the County Board's finding. File, 219 Ill.App.3d at 907-908, 579 N.E.2d at 1236; FACT, 198 Ill. App.3d at 552-553, 555 N.E.2d at 1186.

4. Criterion (v): The Plan of Operations Is Designed to Minimize Danger to the Surrounding Area from Fire, Spills, or other Operational Accidents

Criterion (v) concerns the safety of the landfill's operation with the emphasis on planning to avoid or minimize the danger from catastrophic accidents. Industrial Fuels, 227 Ill.App.3d at 547, 592 N.E.2d at 157. The standard is not the guarantee of an accident-proof facility, but the

minimization of potential danger. Id. WMII presented expert testimony that the plan of operation for the Expansion has been designed to minimize the danger to the surrounding area from fire, spills or other operational accidents. No other witnesses testified on criterion (v). Thus, the evidence in the record supports the County Board's finding that the Expansion satisfies criterion (v) and that finding should be affirmed. Fox Moraine, No. PCB 07-46, slip op. at 82 (where record contains support for decision on criterion (v), decision must be affirmed).

5. Criterion (vi): Traffic Patterns to or from the Expansion are Designed to Minimize Impact on Existing Traffic Flows

Criterion (vi) is satisfied upon a showing that traffic patterns to or from the Expansion will minimize impact on existing traffic flows. An applicant is not required to demonstrate no impact or eliminate any problems; an applicant need only show that any impact has been minimized. FACT, 198 Ill.App.3d at 554-555, 555 N.E.2d at 1187. A traffic plan is not required; the key is to minimize impact on traffic because it is impossible to eliminate all problems. Id.

WMII presented expert testimony and evidence that criterion (vi) was satisfied. No evidence was presented establishing that impact on existing traffic flows was not minimized. The record contains support for the County Board's finding that criterion (vi) was satisfied, and that finding should be affirmed. File, No. PCB 09-94, slip op. at 3.

**B. The Local Siting Proceedings Were Fundamentally Fair In All Aspects**

STMD contends that the local siting proceedings were fundamentally unfair based on the arguments that (1) the Ordinance and Rules and Procedures limited public participation, (2) access to the Application was limited, (3) certain County Board members prejudged the Application, (4) alleged ex parte contacts involving a pre-filing landfill tour and pre-filing review of the Application improperly tainted the County Board, and (5) the County Board improperly earmarked anticipated

host fees before deciding the Application. As detailed below, neither the evidence nor the law support STMD's arguments.

1. Fundamental Fairness Standards in Local Siting Proceedings

Local siting procedures must comport with due process standards of fundamental fairness, which refer to the principles of adjudicative due process. E&E Hauling v. Pollution Control Board, 116 Ill.App.3d 586, 451 N.E.2d 555 (2d Dist. 1983), *aff'd* 107 Ill.2d 33, 481 N.E.2d 664 (1985). Fundamental fairness includes impartial rulings on the evidence, the opportunity to be heard and the right to examine witnesses. Daly v. Pollution Control Board, 264 Ill.App.3d 968, 637 N.E.2d 1153, 1155 (1st Dist. 1994). STMD presented no evidence that the County Board's local siting procedures were in any way fundamentally unfair.

2. The Public Had Full Access to the Application

The Act and the Ordinance set forth the requirements for making the Application available to the public. Section 39.2(c) states that:

(c) An applicant shall file a copy of its request with the county board of the county or the governing body of the municipality in which the proposed site is located. The request shall include (i) the substance of the applicant's proposal and (ii) all documents, if any, submitted as of that date to the Agency pertaining to the proposed facility, except trade secrets as determined under Section 7.1 of this Act. All such documents or other materials on file with the county board or governing body of the municipality shall be made available for public inspection at the office of the county board or the governing body of the municipality and may be copied upon payment of the actual cost of reproduction.

415 ILCS 5/39.2(c).

Section 50-54(d) of the Ordinance likewise provides:

(d) *Public inspection.* A copy of the application and all related documents or other materials on file with the county board shall be

made available for public inspection in the office of the county board and at a library or libraries specified by the County. Members of the public shall be allowed to obtain a copy of said request or any part thereof upon payment of actual cost of reproduction and proper request as outlined in The Freedom of Information Act (5 ILCS 140/1 et seq.).

Ordinance, Sec. 50-54(d).

In accordance with Section 39.2(c) of the Act and Section 50-54(d) of the Ordinance, the Application was filed with the County Board and made available for public inspection and copying for three months prior to the commencement of the public hearing and up to the decision date of May 10, 2010. It was accessible at the County Clerk's Office, the Office of the County Board, the City of DeKalb, the Town of Cortland and the DeKalb, Sycamore and Cortland public libraries. (Bockman Tr. at 36, 43; IPCB Tr. at 36, 40; Ordinance, Sec. 50-54(c)(1),(d).) Although STMD does not dispute that the Application was available for public inspection and copying at various public locations and that no one was denied the opportunity to review and copy the Application, it argues that the proceedings were fundamentally unfair because the Application was not available in an electronic form. Neither Section 39.2(c) of the Act nor Section 50-54(d) the Ordinance require that the Application be made available to the public in electronic form or free of cost, and STMD has not provided any authority that fundamental fairness requires an applicant or the local governing body to do so.

Even if it were true that individuals experienced delays in reviewing or copying the Application, STMD is required to show actual prejudice in order to succeed in its argument that the procedures were fundamentally unfair. Tate, 188 Ill.App.3d at 1017, 544 N.E.2d at 1191. In Tate, the applicant failed to attach certain IEPA documents to the application. The missing documents, however, were on file with the IEPA and the petitioners knew the documents were available at that

location. In rejecting the petitioners' fundamental fairness argument, the appellate court held that because the petitioners and the public had the opportunity to review the documents before the proceedings, the petitioners could not demonstrate any prejudice as a result of the applicant's technical failure to comply with Section 39.2(c) of the Act. Id. The court reasoned that "any error which may have occurred [as a result of the applicant's failure to file the IEPA documents with the application] is harmless at best." Id. Here, STMD cannot show any prejudice resulting from any alleged limited access in reviewing or copying the Application because there has been no claim by any member of the public or STMD that they were denied that opportunity, or that they suffered prejudice as a result of not being able to obtain an electronic version of the Application. (IPCB Tr. at 64-65, 74.) In fact, STMD's witness, Mac McIntyre, testified that upon his request, he was provided with a DVD of the Application and that he made the DVD available to STMD members. (IPCB Tr. at 65-66.)

Because (a) the Application was available at various public locations after filing and throughout the local siting process, (b) there is no evidence that the public's ability to review or copy the Application was denied or restricted and (c) STMD obtained, at its request, an electronic version of the Application, STMD's fundamental fairness argument on this point must be denied.

3. The Public Had Ample Opportunity to Participate in the Public Hearing

Because "the public hearing before the local governing body is the most critical stage of the site approval process," a fundamentally fair hearing places a premium on the right of the public to be heard. Peoria Disposal Co. v. Peoria County Board, No. PCB 06-184, slip op. at 36 (June 21, 2007); Daly, 264 Ill.App.3d at 970-971, 973, 637 N.E.2d at 1155-1156.

Each person who registered as a participant as provided in the Ordinance and the Articles and Rules was granted participant status at the public hearing, even those persons who signed up after the February 22 deadline and those persons who did not meet the eligibility requirements for a participant as defined in the Ordinance. (Ordinance, Sec. 50-54(a)(3); Rules and Procedures, Art. III, Sec. 5.) Thus, four persons who registered late and 13 persons who did not own property near the Expansion were granted participant status at the public hearing. Ms. Lovings admitted that she was allowed to register as a participant at the public hearing even though she missed the registration deadline, and that she had been given full opportunity to question witnesses and provide public comment. She also testified that the Hearing Officer was very accommodating of people who wanted to speak at the public hearing. (IPCB Tr. at 45-46.)

All persons who attended the public hearing, even those who did not register as participants, were permitted to question the witnesses, and all eight of WMII's expert witnesses were cross-examined. All persons who attended the public hearing were permitted to give public comment, and 20 did so. No one testified or presented any evidence that anyone was prevented or restricted from participating in the public hearing, presenting information or evidence, or cross-examining witnesses. (IPCB Tr. at 77.)

The local siting proceedings in County of Kankakee v. City of Kankakee, Nos. PCB 03-31, 03-33, 03-35 (cons.), slip op. at 60-62 (Jan. 9, 2003), were found to have been fundamentally fair even though between 50 and 150 interested persons, many of whom had preregistered, were denied the opportunity to attend and participate on the first night of the hearing as a direct result of the local siting authority's refusal to provide adequate accommodations. Even though it was evident long before the hearing began that the accommodations were insufficient, the hearing officer refused to

permit members of the public to stand at the back of the hearing room and refused to reconvene the hearing to arrange for alternate accommodations, including, at a minimum, placing extra seating and sound speakers in the hallway outside the hearing room.

The facts here do not even come close to resembling the restricted access to the public hearing in County of Kankakee. Here, no evidence was presented that the ability of any member of the public to participate in the public hearing was denied or restricted in any fashion. Therefore, STMD's fundamental fairness argument on this point must be denied.

4. STMD has Failed to Show that Either the Pre-filing Landfill Tours or the Pre-filing Review of the Application Constituted Improper Ex Parte Contacts

In determining whether improper ex parte contacts rendered the local siting proceedings fundamentally unfair, the Board must decide (1) whether improper ex parte contacts actually occurred, and (2) if so, whether those contacts resulted in any prejudice. Southwest Energy Corp. v. Pollution Control Board, 275 Ill.App.3d 84, 92, 655 N.E.2d 304, 310 (4th Dist. 1995). An ex parte contact is one that takes place after the application for site location approval has been filed, without notice and outside the record between one in a decision making role and a party before it. Town of Ottawa v. Pollution Control Board, 129 Ill.App.3d 121, 472 N.E.2d 150 (3d Dist. 1984). To be improper, it must be shown that the ex parte contacts were substantive communications that influenced the decision of the local siting authority. FACT, 198 Ill.App.3d at 548-549, 555 N.E.2d at 1183. If the communications were not substantive in nature, they will not be deemed to have influenced the local siting decision. Waste Management of Illinois, Inc. v. County Board of Kankakee County, No. PCB 04-186, slip op. at 38-39 (Jan. 24, 2008). Furthermore, the Board has held that "[t]he mere occurrence of ex parte contacts does not, by itself, mandate automatic reversal. It must be shown that the ex parte contacts caused some harm to the complaining party." Waste

Management of Illinois, 175 Ill.App.3d at 1043, 530 N.E.2d at 697; Residents Against A Polluted Environment v. County of LaSalle, No. PCB 96-243, slip op. at 21 (Sept. 19, 1996).

STMD argues that WMII engaged in improper ex parte contacts with the County Board by (1) hosting tours of the WMII Prairie View landfill, and (2) engaging in a pre-filing review of the Application. (IPCB Tr. at 230-232.) These arguments must be denied because all of the contacts complained of occurred prior to the filing of the Application, and therefore, cannot be improper ex parte contacts as a matter of Illinois law.

A pre-filing tour or visit to the existing or other landfill is not impermissible conduct. Landfill 33, Nos. PCB 03-43, 03-52 (cons.), slip op. at 58-60; County of Kankakee, Nos. PCB 03-31, 03-33, 03-35 (cons.), slip op. at 52-55. Pre-filing review of a site location application by the county through its technical consultant is not improper ex parte contact and has long been permitted under Illinois law. Land and Lakes Company, 319 Ill.App.3d at 49-52, 743 N.E.2d at 194-196. Moreover, the Ordinance expressly authorizes and addresses pre-filing contacts relating to the Agreement and review of a draft application in Section 50-54(a)(2) of the Ordinance, which provides:

(a)(2) If the County and Applicant agree that a pre-filing review is warranted, then a pre-filing deposit of \$75,000 shall be submitted prior to the County engaging professional services to review the draft concept application. Any pre-filing review shall occur completely prior to the Applicant initiating the siting process as described in Section 39.2 of the Act. A memorandum of understanding between the Applicant and County will be drafted and signed by each party prior to entering into pre-filing discussions. The memorandum of understanding shall define the roles of the County and Applicant and the detail of how the deposit will be utilized by the County. Any part of the pre-filing deposit that is not utilized for costs will be returned to the Applicant. Any costs incurred by the County associated with the pre-file review above and beyond the pre-filing deposit shall be

the responsibility of the Applicant. Nothing in this Ordinance requires that a pre-filing review be performed.

Ordinance, Sec. 50-54(a)(2).

STMD has not presented any evidence of pre-filing collusion between WMII and the County Board, or of post-filing ex parte contacts with the County Board or its consultant, Patrick Engineering. Not only has STMD failed to present evidence that any improper ex parte contacts occurred, it has not presented any facts that show how the local siting process was irrevocably tainted as a result of the ex parte contacts. In the absence of any such evidence, the pre-filing contacts between WMII and the County Board and its consultant could not have deprived STMD, or anyone else for that matter, of fundamental fairness.

5. There is No Evidence of Prejudgment

STMD contends that the County Board prejudged the Application based on the alleged Fauci and Oncken statements, and on the speculation that the DeKalb County jail expansion plan will use host fees as a funding source. (IPCB Tr. at 230-231.) These contentions of bias and prejudgment have no evidentiary support.

STMD must satisfy an exacting burden of proof in order to establish prejudgment by the County Board. The members of a local siting authority are presumed to have made their decision in a fair and objective manner. E&E Hauling, 107 Ill.2d at 42, 481 N.E.2d at 667-668; Waste Management of Illinois, 175 Ill.App.3d at 1040, 530 N.E.2d at 695. That presumption is not overcome merely because a member of the authority has previously taken a public position or expressed strong views on a related issue. Id.; *see also* 415 ILCS 5/39.2(d). The presumption can

only be overcome upon a showing that members of the local governing body actually prejudged the adjudicative facts, i.e., facts pertaining to the statutory criteria. FACT, 198 Ill.App.3d at 547, 555 N.E.2d at 1182.

STMD did not present credible testimony or other evidence of prejudice. With regard to the Fauci and Oncken comments, STMD's two witnesses admitted either that the comments were taken out of context, or that the comments were made without any meaningful context from which to ascribe any prejudice. Although Dan Kenney, STMD's Chairperson, testified that Ms. Fauci told him the Expansion "was pretty much a done deal," he acknowledged that the statement was made sometime in August 2009, after the Agreement went into effect on April 17, 2009. (IPCB Tr. at 49-50.) Mr. Kenney also admitted that in March 2010 at the public hearing, Ms. Fauci told him that he had misquoted her and taken her statements out of context. (IPCB Tr. at 53-61.) Similarly, although STMD supporter Paulette Sherman testified that Mr. Oncken said "I don't know why all these people are here. We've already made up our minds," she admitted that he did not say who he meant by "we" or what he meant by "made up our minds." (IPCB Tr. at 16-17, 18-22, 28, 30.) Mr. Oncken testified that he never made a comment to Ms. Sherman or anyone else that the Expansion was a done deal or that he or any other County Board member had made up their minds. (IPCB at 197-198.) Rather, Mr. Oncken confirmed that he made his decision shortly before the vote on the Application. He unequivocally testified that he did not consider any evidence outside of the record in making his vote, and that based on the evidence presented, WMII had demonstrated that the statutory criteria were satisfied. (IPCB Tr. at 198, 204-205.) On these facts, STMD clearly has not met its burden to establish prejudice.

STMD's assertion that host fees were purportedly earmarked for the jail expansion plan is also inadequate to demonstrate that the County Board predetermined the Application. Not only is the assertion speculative, simply pointing to host fees to support a claim of bias is insufficient as a matter of law. Similar fundamental fairness arguments concerning host agreements have been rejected by the Board based on the well-settled principle that negotiating a host agreement is a purely legislative function and, therefore, carries no indication of prejudgment or bias in a local siting proceeding. Residents, No. PCB 96-243, slip op. at 41-43. It is also well-settled that provisions for the payment or receipt of fees under a host agreement is not indicative of predisposition because government officials routinely make decisions that affect their revenues, and therefore, the officials must be deemed to make decisions for the general welfare and not for financial gain. E&E Hauling, 107 Ill.2d at 42-43, 451 N.E.2d at 667-668 (county's receipt of \$30,000 per month in revenue from landfill was not evidence of county board's interest in approving site location application).

STMD also has not presented any evidence of actual influence. There is no evidence in the record that County Board members were obligated or required to vote on the Application to satisfy the County's obligations concerning the bond issuance. At their depositions, County Board members testified to the contrary, that their vote was impartial and based on the evidence and public comment presented. Moreover, the fact that there were certain County Board members who voted in favor of the Agreement, but voted against the Application is strong evidence that the County Board was not biased as a result of the Agreement or the host fees specified therein.

In summary, there is nothing to support STMD's assertion of bias or prejudice, or that the local siting procedures were fundamentally unfair. Therefore, WMII requests that the Board reject STMD's fundamental fairness arguments and deny the claims of fundamental unfairness.

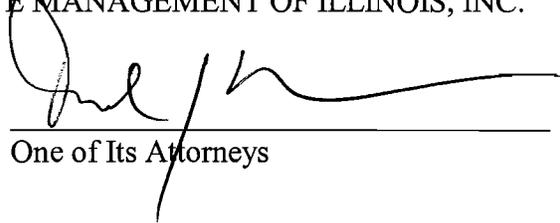
**V. CONCLUSION**

For the reasons set forth above, the County Board decision granting Site Location Approval for the Expansion should be affirmed.

Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

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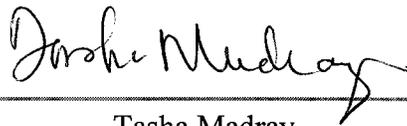
**PROOF OF SERVICE**

I, Tasha Madray, a non-attorney, on oath states that she served the foregoing **Waste Management of Illinois, Inc.'s Brief in Support of the Decision of the DeKalb County Board Approving Site Location for the DeKalb County Landfill Expansion** by electronic mail at the e-mail addresses indicated below and by enclosing same in an envelope addressed to the following parties as stated below, and by depositing same in the U.S. mail at 161 N. Clark St., Chicago, Illinois 60601, on or before 5:00 p.m. on this 3rd day of January, 2011:

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