BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.	)	
Petitioner,	)	
v.	)	PCB 10-103
	)	(Pollution Control Facility Siting Appeal)
DEKALB COUNTY BOARD,	)	
Respondent.	)	

NOTICE OF FILING

To:
John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

Persons included on the
ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on this 3rd day of January, 2011, I filed electronically with the Office of the Clerk of the Pollution Control Board **THE COUNTY BOARD OF DEKALB, ILLINOIS' BRIEF IN SUPPORT OF ITS DECISION APPROVING SITE LOCATION FOR THE DEKALB COUNTY LANDFILL EXPANSION**, a copy of which is herewith served upon you.

Respectfully submitted,
THE DEKALB COUNTY BOARD

Amy Antoniolli
Amy C. Antoniolli

Dated: January 3, 2011

Renee Cipriano
Amy Antoniolli
SCHIFF HARDIN, LLP
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606
312-258-5500

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 3rd day of January, 2011, I have served electronically the attached **THE COUNTY BOARD OF DEKALB, ILLINOIS' BRIEF IN SUPPORT OF ITS DECISION APPROVING SITE LOCATION FOR THE DEKALB COUNTY LANDFILL EXPANSION** upon the following person:

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

and by first class mail, postage affixed, upon persons included on the **ATTACHED SERVICE LIST.**

THE DEKALB COUNTY BOARD,

Amy Antoniolli
Amy C. Antoniolli

Dated: January 3, 2011

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STOP THE MEGA-DUMP, Petitioner, v. COUNTY BOARD OF DEKALB COUNTY, ILLINOIS and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB No. 10-103 (Third-Party Pollution Control Facility Siting Appeal)

THE COUNTY BOARD OF DEKALB COUNTY, ILLINOIS' BRIEF IN SUPPORT OF ITS DECISION APPROVING SITE LOCATION FOR THE DEKALB COUNTY LANDFILL EXPANSION

Now comes the County Board of DeKalb County, Illinois, by and through its attorneys, and for its Brief in Support of its Decision Approving Site Location for the DeKalb County Landfill Expansion, states as follows:

INTRODUCTION

Petitioner, a citizens' organization known as Stop the Mega-Dump, appeals the County Board of DeKalb County, Illinois' (the "County Board") decision to approve Waste Management of Illinois, Inc.'s ("Waste Management") Site Location Application (the "Application") for the DeKalb County Landfill Expansion (the "Expansion") pursuant to Section 39.2 of the Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.* (2010) (the "Act").

The County Board's decision was not against the manifest weight of the evidence and the proceedings below were fundamentally fair. For these reasons and for all of the reasons stated below, the County Board's decision should be affirmed.

PROCEDURAL HISTORY

Waste Management filed its Application for the Expansion with the County Board on November 30, 2009 (Petitioner's Exhibit 1 ("Pet. Ex. 1")). Notice of the Application was published in the *Daily Chronicle*, a newspaper of general circulation in DeKalb County, on November 7, 2009.[1] (C0001007). Waste Management also served notice of the Application on property owners within 400 feet of the landfill property boundary and members of the Illinois General Assembly at least 14 days before the Application was filed as required by 415 ILCS 5/39.2(b). (C0000994-C0001005). The Application requested local siting approval for the expansion of the existing DeKalb County Landfill located northeast of the intersection of Somonauk and Gurler Roads in unincorporated DeKalb County, Illinois. The Expansion would consist of the exhumation of an old fill area and disposal of the exhumed waste in a composite-lined cell, development of a 61-acre waste disposal area above and adjoining the existing 88-acre waste footprint and the development of a 179-acre waste disposal area east of Union Ditch No. 1. (WMII Post-Hearing Memorandum, p.1). The capacity of the Expansion is 23.2 million tons, and will provide disposal capacity for approximately 46 years. (C0000209.)

Notice of the public hearing was published in the *Daily Chronicle* on February 10, 2010. (*See* C0008111-12.) Notice of the hearing was also posted on the County's website. (C0006825-C0006827). Following proper service and publication of notice, the County Board held six days of public hearing from March 1, 2010 through March 5, 2010 and on March 11, 2010. The hearing officer, John McCarthy, gave all persons attending the hearing the opportunity to participate in the hearing, ask questions of witnesses, and/or to provide public comment. Hearing Officer McCarthy set a 30-day public comment period, which expired April

12, 2010. Petitioner Stop the Mega-Dump presented one witness and cross-examined all eight witnesses presented by Waste Management at the hearing.

On May 10, 2010, the County Board passed Resolution #R2010-31, Approving the Request of Waste Management of Illinois, Inc., for Site Location of the DeKalb County Landfill Expansion, a copy of which is attached to the Petition for Review. On or about June 11, 2010, Stop the Mega-Dump filed its Petition for Review, alleging: (a) that the County Board's findings that the Expansion satisfies the statutory criteria set forth in Sections 39.2(a)(i), (ii), (iii), (v) and (vi) of the Act were against the manifest weight of the evidence; and (b) that the proceedings before the County Board were fundamentally unfair ("STMD Pet."). The County filed the Record of Local Siting Proceedings on July 20, 2010. Illinois Pollution Control Board Hearing Officer Bradley Halloran conducted a hearing on this appeal on November 22, 2010 at the DeKalb County Department of Public Health.[2]

ARGUMENT

The County Board's approval of the Application was based upon its assessment and weighing of evidence sufficient to support a finding that the Expansion satisfies the nine siting criteria identified in Section 39.2(a) of the Act. The County Board's findings were based, in part, on its determination of the credibility of witness testimony, were reasonable, and were not against the manifest weight of the evidence and must be affirmed by this Board. Furthermore, the procedures employed by the County Board in connection with the siting hearing were fundamentally fair and provided all interested parties with the opportunity to be heard, the right to cross-examine adverse witnesses and impartial rulings on the evidence. This Board should

[1]The Record of Local Siting Proceedings will be cited to throughout this brief as "C_____."
[2]The transcript of the Board hearing will be cited to throughout this brief as "Tr. at __."

affirm the County Board decision.

I. THE COUNTY BOARD'S APPROVAL OF THE SITING APPLICATION WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The County Board's approval of the Application was supported by the evidence and must be affirmed. Section 39.2(a) of the Act requires that an applicant seeking approval for siting a pollution control facility must provide evidence demonstrating that the nine criteria listed in subsections (i) through (ix) are met. 415 ILCS 5/39.2(a). Siting approval is to be granted only if a proposed facility meets all nine of the criteria. *Town & Country Utilities, Inc. v. Pollution Control Bd.*, 225 Ill. 2d 103, 117, 866 N.E.2d 227, 235 (2007). The County Board, relying on the testimony and evidence described below, found that the Expansion meets all nine of the statutory criteria.

The Petition for Review asserts that the County Board's findings with respect to "criteria i, ii, iii, v and vi" were against the manifest weight of the evidence. (STMD Pet., par. 6). Petitioner is incorrect, as set forth below, and the County Board's finding should be affirmed.

A. Standard of Review – "Manifest Weight of the Evidence"

It is well-settled that a local siting authority's decision to grant or deny siting approval can only be reversed if the decision is contrary to the manifest weight of the evidence. *Waste Management of Illinois, Inc. v. Pollution Control Bd.*, 160 Ill. App. 3d 434, 441-42, 513 N.E.2d 592, 597 (2d Dist. 1987) (hereinafter "*Waste Management I*"). The "manifest weight of the evidence" standard is to be applied to each challenged criterion. *Id.* The "manifest weight of the evidence" standard is consistent with the legislative intent to grant local authorities the power to determine the site location suitability of a new pollution control facility. *Id.* at 441, 513 N.E.2d at 596.

Petitioner bears the burden of proof on an appeal to this Board. 415 ILCS 5/40.1(b). In determining whether a decision is against the manifest weight of the evidence, it is not sufficient that a different conclusion may be reasonable. *Wabash & Lawrence Counties Taxpayers & Water Drinkers Ass'n v. Pollution Control Bd.*, 198 Ill. App. 3d 388, 392, 555 N.E.2d 1081, 1085 (5th Dist. 1990). A decision is against the manifest weight of the evidence *only* if the opposite conclusion is clearly evident, plain or indisputable. *Worthen v. Roxana*, 253 Ill. App. 3d 378, 384, 623 N.E.2d 1058, 1062 (5th Dist. 1993).

When reviewing a decision under the "manifest weight of the evidence" standard, the reviewer may not re-weigh evidence and may not re-assess the credibility of witnesses. *Id.* It is the sole province of the hearing body to weigh the evidence, resolve conflicts in testimony and assess the credibility of witnesses. *Tate v. Pollution Control Bd.*, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989). Merely because the hearing body could have drawn different inferences and conclusions from the testimony is not a basis for reversal. *File v. D & L Landfill, Inc.*, PCB 90-94 (Aug. 30, 1991). If there is any evidence which supports the County Board's decision and the County Board could reasonably have reached its conclusion, its decision must be affirmed. *Id.*

B. Criterion (i) - Need

The County Board found that the Expansion satisfied criterion (i). The County Board's decision was not against the manifest weight of the evidence and should be affirmed.

Section 39.2(a)(i) of the Act requires that an applicant for local siting approval demonstrate that the proposed facility "is necessary to accommodate the waste needs of the area it is intended to serve." 415 ILCS 5/39.2(a)(i). This criterion requires that the applicant show

that a 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 the waste disposal capabilities, along with any other relevant factors." *Waste Management of Illinois, Inc. v. Pollution Control Bd.*, 122 Ill. App. 3d 639, 645, 461 N.E.2d 542, 546 (3d Dist. 1984) (hereinafter "*Waste Management II*"). The applicant need not show absolute necessity. *Waste Management of Illinois, Inc.*, 123 Ill. App. 3d 1075, 1084, 463 N.E.2d 969, 976 (2d Dist. 1984) (hereinafter "*Waste Management III*"). Opposition to the service area size, or to accepting waste from outside the county, are not proper reasons to deny siting. *Metropolitan Waste Sys., Inc. v. Pollution Control Bd.*, 201 Ill. App. 3d 51, 55, 558 N.E.2d 785, 787 (3d Dist. 1990).

Applying this standard, the County Board found the Expansion was necessary to accommodate the waste needs of the service area. Sheryl Smith, a solid waste consultant employed by URS Corporation and engaged by Waste Management, testified that she calculated the amount of waste generated in the service area — DeKalb County and sixteen surrounding counties including Boone, Bureau, Cook, DuPage, Grundy, Kane, Kankakee, Kendall, Lake, LaSalle, Lee, Ogle, Putnam, Will, Winnebago, and McHenry — and compared that calculation to the total amount of available disposal capacity in the twenty-eight facilities (spread over four states) that accepted or intended to accept solid waste from these counties in 2008. (3/2/10 Tr., p. 207:21 - 210:24). Ms. Smith further examined the additional potential capacity available in facilities that have not yet received operating permits, but have obtained preliminary siting approvals. (*Id.* at 211:1-8). Upon comparison of the amount of expected solid waste and the available existing and potential capacity, Ms. Smith concluded that the service area would have a 283.8 million ton capacity shortfall over the life of the Expansion. (*Id.* at 211:20 - 212:17).

Given that the Expansion would accept 23.2 million tons, Ms. Smith concluded that the Expansion was necessary to accommodate the capacity shortfall. (*Id.* at 212:21 - 213:11). Ms. Smith's written report addressing the necessity of the Expansion and including appropriate supporting documentation was incorporated into Volume 1 of the Application. (C0000050-C0000116.)

The County Board assessed the testimony provided by Ms. Smith and found her to be credible. The County Board weighed the testimony of Ms. Smith together with the supporting documentation contained in the Application. Ms. Smith's testimony and the supporting documentation submitted as part of the Application provided a sufficient evidentiary basis for the County Board to find that, as adopted in Resolution R#2010-31, the Expansion is necessary to accommodate the waste needs of the area it is intended to serve. Petitioner presented no evidence to the County Board regarding criterion (i). The County Board's decision was not against the manifest weight of the evidence and should be affirmed.

C. Criterion (ii) - Protection of Public Health, Safety and Welfare

The County Board found that the Expansion satisfies criterion (ii). The County Board's decision on criterion (ii) was not against the manifest weight of the evidence and should be affirmed.

Section 39.2(a)(ii) of the Act requires that an applicant for local siting approval demonstrate that the proposed facility "is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii). This criterion requires a demonstration that the proposed facility does not pose an unacceptable risk to the public health and safety. *Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Bd.,*

227 Ill. App. 3d 533, 546, 592 N.E.2d 148, 157 (1st Dist. 1992). 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). The determination of whether a proposed facility satisfies criterion (ii) is purely a matter of assessing the credibility of expert witnesses. *Fairview Area Citizens Task Force v. Illinois Pollution Control Bd.*, 198 Ill. App. 3d 541, 552, 555 N.E.2d 1178, 1185 (3d Dist. 1990); *File v. D & L Landfill, Inc.*, 219 Ill. App. 3d 897, 907, 579 N.E.2d 1228, 1236 (5th Dist. 1991).

Applying this standard, the County Board found the Expansion to be designed, located, and proposed to be operated such that public health, safety and welfare will be protected. Andy Nickodem, a civil engineer employed by Golder Associates and specializing in the design of landfills and other solid waste facilities, testified regarding the design of the Expansion. Mr. Nickodem testified that his firm designed a composite liner which would contain the waste disposed at the site, a leachate management system to collect and treat leachate, a final cover for the site, a surface water management system to collect surface water and a gas management system for collecting and managing gas formed through waste decomposition. (3/1/10 Tr., pp. 105:2 - 175:6). In addition, Mr. Nickodem testified regarding the phased development of the site, the groundwater, leachate, gas, surface water and ambient air monitoring systems to be employed at the site, and the procedures for closure and post-closure monitoring of the site. (*Id.* at 175:7 - 186:15). Finally, Mr. Nickodem testified to his conclusion that the Expansion is designed so as to protect the public health, safety and welfare. (*Id.* at 186:16 - 187:20). Mr. Nickodem's written report addressing the design of the Expansion and including appropriate supporting documentation was incorporated into the Application. (C0000117-492.)

Tom Price, a civil and water resources engineer employed by Conservation Design Forum, testified that he was engaged by Waste Management to recommend and design enhancements to the traditional surface water management systems for the Expansion. (3/2/10 Tr., pp. 147:22 - 148:2). Mr. Price explained how the Expansion would employ native landscapes, naturalized sedimentation basins, filter berms, naturalized swales and green site practices to retain precipitation, prevent surface water runoff, filter any runoff that did occur and capture sediment within the site. (*Id.* at 148:5 - 164:20). Mr. Price testified that these methods would prevent any increase in peak flood flows at the site, improve water quality and increase the habitat diversity at the site. (*Id.* at 164:21 - 165:13). Mr. Price's written report addressing the foregoing methods and benefits and including appropriate supporting documentation was incorporated into the Application. (C0000201-222.)

Dale Hoekstra, director of operations for Waste Management and an Illinois EPA certified landfill operator, testified regarding the proposed development timeline for the Expansion, the procedures to be employed to prevent landscape waste, hazardous waste, tires and other unacceptable wastes from being admitted to the site, and Waste Management's proposed litter and odor control procedures. (3/3/10 Tr., pp. 82:6 - 95:9, 103:16 - 113:22). In addition, Mr. Hoekstra testified regarding the detection of hydrogen sulfide at the existing landfill in 2008, the steps taken to identify and remedy the source of that emission, and the fact that hydrogen sulfide has not been detected at the landfill since those steps were undertaken. (*Id.* at 95:10 - 99:23). Mr. Hoekstra also testified regarding the proposed procedures for containing dust and mud at the site and Waste Management's sustainability and renewable energy programs. (*Id.* at 99:24 - 103:15). Mr. Hoekstra stated that the proposed procedures for waste acceptance,

placement, compacting and cover, the proposed dust, mud, odor and litter control procedures, and the access and security measures indicated that the Expansion would be operated to protect the public health, safety and welfare. (*Id.* at 113:23 - 115:8).

Joan Underwood, an environmental manager and hydrogeologist employed by Quantum Management Group, testified regarding geology and hydrogeology at the Expansion. (3/4/10 Tr., pp. 34:15-253:10). Her evaluation of the geologic and hydrogeologic conditions at the Expansion assisted in the development of a groundwater monitoring system and in the design of the Expansion. (*Id.* at 48:12 - 77:12). Ms. Underwood identified the upper groundwater units that were capable of being monitored, and explained that these units were not used as a source of drinking water. (*Id.* at 77:13 - 79:11). Ms. Underwood then described the design and operation of the proposed groundwater monitoring system. (*Id.* at 79:12 - 82:21). Finally, Ms. Underwood opined that, based on the design of the landfill and the ability of Waste Management to effectively monitor the groundwater, the Expansion was located so as to protect the public health, safety and welfare. (*Id.* at 82:22 - 83:12). Ms. Underwood's written report addressing geologic and hydrogeologic conditions at the Expansion and including appropriate supporting documentation was incorporated into the Application. (C0000158-198.)

Aubrey Serewicz, a former chemistry professor at Northern Illinois University and former process control engineer for Wyeth Laboratories, testified on behalf of the Petitioner regarding his views about hydrogen sulfide. (*See* 3/5/10 Tr., pp. 293 - 363). Mr. Serewicz admitted he did not review the Application before testifying at hearing. (3/11/2010 Tr. p. 18). Mr. Serewicz was unable to provide any evidence or explanation of how, if there were any emission of hydrogen sulfide from the landfill, it could reach Cortland school in sufficient

amounts to cause exposure.

The County Board assessed the testimony provided by the witnesses appearing on behalf of Waste Management and found them to be credible. The County Board weighed the testimony of these witnesses together with the supporting documentation contained in the Application. This testimony and the aforementioned supporting documentation provided a sufficient evidentiary basis for the County Board to find that, as adopted in Resolution #R2010-31, the Expansion satisfies criterion (ii). The County Board evaluated and weighed the testimony of Dr. Serewicz and found that his testimony was not credible. The fact that the County Board elected to impose certain conditions on Waste Management's operation of the Expansion is irrelevant to whether the Expansion satisfies criterion (ii). Indeed, the Act specifically authorizes local siting authorities to grant siting approval subject to such conditions: "[i]n granting approval for a site the county board or governing body of the municipality may impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section and as are not inconsistent with regulations promulgated by the Board." 415 ILCS 5/39.2(e).

Contrary to Petitioner's claims, the County Board's imposition of conditions does not constitute an implicit finding that the Expansion fails to satisfy criterion (ii). (STMD Pet., par. 7). Rather, the County Board elected to impose conditions concerning the operation of the Expansion in accordance with its authority under the Act. "Conditions can be imposed 'to accomplish the purposes' of section 39.2 which means that local authorities can impose 'technical' conditions on siting approval." *County of Lake v. Pollution Control Bd.*, 120 Ill. App. 3d 89, 99, 457 N.E.2d 1309, 1315 (2d Dist. 1983). If Petitioner's argument were credited, no local siting authority could ever condition approval of a siting application, since the imposition of such conditions would "automatically" mean that the proposed facility failed to meet one of the statutory criteria. There is no legal support for this interpretation of Section 39.2.

Nor do the County Board's conditions improperly defer any factual finding to the Illinois Environmental Protection Agency, as Petitioner claims. (STMD Pet., par. 7). Rather, the conditions require Waste Management to submit a Perimeter Air Monitoring Plan and Notification Protocol to the County Health Department and to take various other actions prior to submitting a development permit application for the Expansion to the IEPA. (C0008537-48, Resolution # R2010-31, Special Conditions. #5, #6, #11, and #13). Petitioner's claim that the County Board improperly defers remediation of an existing health hazard to the IEPA is factually false.

The County Board's requirement that Waste Management take certain actions to the satisfaction of the County Health Department, on the other hand, is fully consistent with the County's authority under the Act to impose conditions concerning the operation of the Expansion, as described above. (STMD Pet. at pars. 5-7, 13, 15, 17). There is no legal authority for the proposition that the imposition of such conditions implicitly defeats a siting application, as Petitioner claims. (STMD Pet., par. 7).

Weighing the evidence of record, the County Board found the Expansion was designed, located, and proposed to be operated in a manner that would be protective of public health safety and welfare. Because the County Board's finding with respect to criterion (ii) was not against the manifest weight of the evidence, that finding should be affirmed.

D. Criterion (iii) - Minimization of Incompatibility and Effect on Property Value

The County Board found that the Expansion satisfies criterion (iii). The County Board's decision was not against the manifest weight of the evidence and should be affirmed.

Section 39.2(a)(iii) of the Act requires that an applicant for local siting approval demonstrate that the proposed facility "is located so as to minimize the incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property." 415 ILCS 5/29.2(a)(iii). An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize the incompatibility. *Waste Management III*, 123 Ill. App. 3d at 1090, 463 N.E.2d at 980. Criterion (iii) does not require the effects of the expansion to be eliminated, only that the effects be minimized. *Clean Quality Resources, Inc. v. Marion County Bd.*, PCB 91-72 (Aug. 26, 1991).

Applying this standard, the County Board found the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property. David Yocca, a landscape architect and land planner employed by Conservation Design Forum, testified regarding the landscape design, screening and setback efforts to be employed at the Expansion, the compatibility of these efforts with the surrounding land uses, character and ecology, and methods of integrating these efforts into local green or sustainability policy initiatives, including DeKalb County's "Go Green!" initiative. (3/5/10 Tr., pp. 193:24 - 223:23). Mr. Yocca opined, based upon his understanding of the foregoing, that the Expansion was located so as to minimize incompatibility with the character of the surrounding area. (*Id.* at 223:24 - 225:2). Mr. Yocca's written report addressing the foregoing and including appropriate supporting documentation was incorporated into the Application. (C0000496-561.)

Peter Poletti, a certified real estate appraiser employed by Poletti and Associates, testified that he had reviewed the land uses surrounding the Expansion, had conducted a case study of the

existing DeKalb County Landfill's effect on property values and had determined that the Landfill had no statistically significant effect. (3/3/10 Tr., pp. 11:4 - 20:22). Mr. Poletti further testified that the Expansion would result in an undulating landform consistent with the surrounding natural terrain, that the Expansion would be covered by local, native vegetation, and that several perimeter berms would act as a buffer between local residences and the Expansion. (*Id.* at 20:23 - 23:14). Mr. Poletti opined that, based on the surrounding, low-density land uses, his case study showing that property values were unaffected by the existing Landfill, and the screening, landscaping, vegetation and setback measures to be employed at the site, the Expansion was so located as to minimize the effect on the value of the surrounding property. (*Id.* at 24:3-23). Mr. Poletti's written report addressing the foregoing and including appropriate supporting documentation was incorporated into the Application. (C0000562-669.)

The County Board assessed the testimony provided by Mr. Poletti and Mr. Yocca and found them to be credible. The County Board weighed the testimony of these witnesses together with the supporting documentation contained in the Application. The witness testimony and the aforementioned supporting documentation provided a sufficient evidentiary basis for the County Board to find that, as approved in Resolution #2010-31, the Expansion is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property. Petitioner presented no evidence to the County Board regarding criterion (iii). The County Board's decision was not against the manifest weight of the evidence and should be affirmed.

E. Criterion (v) - Minimization of Danger from Operational Accidents

The County Board found that the Expansion satisfies criterion (v). The County Board's decision was not against the manifest weight of the evidence and should be affirmed.

Section 39.2(a)(v) of the Act requires that an applicant for local siting approval

demonstrate that "the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents" 415 ILCS 5/39.2(a)(v). "There is no requirement that the applicant guarantee no accidents will occur, for it is virtually impossible to eliminate all problems." *Wabash*, 198 Ill. App. 3d at 394, 555 N.E.2d at 1086.

Applying this standard, the County Board found the plan of operations for the facility is designed to minimize the danger to the surrounding are from fire, spills, or other operational accidents. Dale Hoekstra testified that the Expansion's plan of operations, incorporated into Volume 2 of the Application, was designed to minimize the danger to the surrounding area from fire, spills and other operational accidents. (3/3/10 Tr., pp. 115:9 - 116:15; C0000676-746). Mr. Hoekstra explained that fire control, spill control, accident prevention, equipment safety and fueling, emergency coordination and emergency communications training was provided to Waste Management employees and that fire extinguishers, protective clothing and emergency spill kits were located throughout the facility as required by the relevant fire codes or as appropriate and were available to all employees. (*Id.* at 116:18 - 119:2). Mr. Hoekstra also testified regarding the site's controlled access points, perimeter security and video surveillance systems. (*Id.* at 119:3-9).

The County Board assessed the testimony provided by Mr. Hoekstra and found him to be credible. The County Board weighed the testimony of Mr. Hoekstra together with the plan of operations and supporting documentation contained in the Application. Mr. Hoekstra's testimony and the aforementioned supporting documentation provided a sufficient evidentiary basis for the County Board to find that the plan of operations for the Expansion is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. Petitioner presented no evidence to the County Board regarding criterion (v). The County Board's decision was not against the manifest weight of the evidence and should be affirmed.

F. Criterion (vi) - Traffic Patterns

The County Board found that the Expansion satisfies the sixth statutory criterion. The County Board's decision was not against the manifest weight of the evidence and should be affirmed.

Section 39.2(a)(vi) of the Act, requires that the applicant establish that "the traffic patterns to or from the facility are so designed as to minimize the impact on traffic flows." 415 ILCS 5/39.2(a)(vi). "The operative word in the statute is 'minimize.' It is impossible to eliminate all problems." *Fairview*, 198 Ill. App. 3d at 554, 555 N.E.2d at 1186.

Appluing this standard, the County Board found that the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows. David Miller, a licensed traffic engineer and Chief Executive Officer of Metro Transportation Group, testified that he had analyzed the traffic impact of the Expansion by collecting information regarding the surrounding roadways, traffic controls and peak hour traffic counts and, thereby, determined the traffic capacity and level of traffic service surrounding the Expansion. (3/4/10 Tr., pp. 258:16 - 267:10). Mr. Miller then compared this capacity to the estimated traffic to be generated by the Expansion and determined that the Expansion would have no statistically significant impact on existing traffic flows. (*Id.* at 267:11 - 276:4). Mr. Miller also conducted gap and sight distance studies at key intersections surrounding the Expansion and determined that the traffic generated by the Expansion would safely integrate with existing traffic flows. (*Id.* at 276:5 - 282:15). Mr. Miller recommended several improvements to the existing access drive and noted that Waste Management had agreed to implement those improvements as part of the Expansion. (*Id.* at 282:16 - 284:19). Finally, Mr. Miller opined that, based upon the foregoing, the traffic patterns to and from the facility were so designed as to minimize the impact on existing traffic flows. (*Id.* at 284:20 - 285:24). Mr. Miller's written report addressing the foregoing and including

appropriate supporting documentation was incorporated into the Application. (C0000749-963.)

The County Board assessed the testimony provided by Mr. Miller and found him to be credible. The County Board weighed Mr. Miller's testimony together with the supporting documentation contained in the Application and the absence of any evidence to the contrary. The DeKalb County Highway Department submitted a letter concurring with the conclusions of the traffic study. Mr. Miller's testimony and the aforementioned supporting documentation provided a sufficient evidentiary basis in favor of the County Board's finding that the traffic patterns to and from the facility are so designed as to minimize the impact on existing traffic flow. The County Board's decision was against the manifest weight of the evidence and should be affirmed.

As stated above, the County Board's determination with respect to each of the contested criteria was not against the manifest weight of the evidence. Accordingly, the County Board's vote to approve the Application should be affirmed.

II. FUNDAMENTAL FAIRNESS

The local siting proceedings held before the County Board were fundamentally fair in all respects. The proceedings provided all members of the public with the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence. The County Board members acted impartially and without prejudging the evidence and relied on the evidence of record in determining that the Expansion satisfied the nine criteria set forth in Section 39.2(a) of the Act. The County Board's decision should be affirmed.

A. Standards of "Fundamental Fairness"

On appeal, Section 40.1 of the Act requires this Board to review the proceedings before the local decisionmaker to determine if the proceedings were fundamentally fair. 415 ILCS 5/40.1(a). A non-applicant who participates in a local pollution control siting hearing has no property interest at stake entitling him to the protection afforded by the constitutional guarantees of due process. *Land & Lakes Co. v. Illinois Pollution Control Bd.*, 319 Ill. App. 3d 41, 47, 743 N.E.2d 188, 193 (3d Dist. 2000). Instead, procedures at the local level must comport with adjudicative due process standards of fundamental fairness. *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d 586, 596, 451 N.E.2d 555, 564 (2d Dist. 1983) (hereinafter "*E & E Hauling I*"); *aff'd* 107 Ill. 2d 33, 481 N.E.2d 664 (1985).

The "fundamental fairness" standards are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. *Waste Management of Illinois, Inc. v. Pollution Control Bd.,* 175 Ill. App. 3d 1023, 1037, 530 N.E.2d 682, 693 (2d Dist. 1988) (hereinafter "*Waste Management IV*"). These standards consist of "minimal standards of procedural due process, including the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence." *Land & Lakes*, 319 Ill. App. 3d at 48, 743 N.E.2d at 193.

Petitioner argues that "the proceedings of the DeKalb County Board, including the public hearing, post-hearing procedures and the decision making process as well as the actions of the DeKalb County Board prior to the public hearing were not fundamentally fair." STMD Pet., par. 5. The evidence established otherwise, demonstrating that Petitioner had the opportunity to be heard, cross-examine witnesses, and present its case.

B. The Public Was Afforded a Full Opportunity to be Heard, to Present Evidence and to Cross-Examine Adverse Witnesses.

The notice and registration provisions of the DeKalb County Pollution Control Facility Siting Ordinance (the "Ordinance") (C0006790-6800) and the Articles of Rules and Procedures for the County Board's Pollution Control Facility Committee (the "Articles") (C0006801-6822) had no adverse effect on the fundamental fairness of the proceedings before the County Board. Article III, Section 5 of the Articles and Section 50-54(a)(3) of the Ordinance, taken together, purport to define who may "participate in" the public hearing required by Section 39.2(c) of the Act — that is, who may present evidence and cross-examine witnesses — and limit all other members of the public to providing non-sworn, public comment. (C0006793-94, C0006802.) Petitioner contends that, in fact, a wider range of citizens are permitted to "participate" in the hearing and that the Ordinance and Articles "discouraged" those citizens from attending and participating in the public hearing.

Petitioner overlooks key facts which, in turn, cause it to misstate the nature of the inquiry. This Board is to determine whether the local siting proceedings were, in fact, fundamentally unfair, not whether a local ordinance, if followed, *could have* rendered the proceedings fundamentally unfair.[3] In this case, there is no factual basis for a claim of fundamental

[3]Petitioner has not, in fact, identified Illinois law requiring that all members of the public be permitted to present evidence and cross-examine witnesses at a local siting proceeding and has articulated no legal basis for its contention that the Ordinance and Articles, if followed, would restrict rights of the public or otherwise render the proceedings fundamentally unfair.

unfairness — irrespective of the content of the Ordinance and Articles — because the proceedings before the County Board were not, in fact, conducted in accordance with the challenged provisions of the Ordinance and Articles. On the first day of the siting hearing, the hearing officer explicitly authorized any person who wished to participate in the hearing to do so, regardless of whether that person met the definition of a "participant" under the Ordinance and Articles. (3/1/10 Tr., pp. 36:10-22, 48:21 - 49:21, 51:9 - 54:3, 57:2-6). Five individuals did, in fact, ask to participate in the hearing and did, in fact, cross-examine eight witnesses during the six days of proceedings. (3/1/10 - 3/5/10, 3/11/10 Trs., *passim*). One of these individuals presented a witness who testified on the last two days of the hearing. (3/5/10 Tr., pp. 292:14 - 343:21; 3/11/10 Tr., pp. 7-75).

In addition, the hearing officer explicitly invited the public to ask questions and provide oral public comment during the course of the hearing itself and advised the public that any person could file a written comment with the County Board. (3/1/10 Tr., pp. 7:22 - 8:9, 11:16 - 12:17). Twenty members of the public in fact provided oral public comment, and all written comments were entered into the record. (3/1/10 Tr.; 3/2/10 7:00 pm Tr.; C0007884-8056).

No witness has stated that he or she decided not to attend or to participate in the public hearing because of the local siting Ordinance and Articles. There exists no evidence indicating that a member of the public was denied an opportunity to speak at or participate in the hearing on the grounds that the Ordinance and Articles forbade them from doing so or, for that matter, any other grounds. At hearing before the Board, several members of the public stated they were not aware until that day of any geographical restriction[4] on who could participate in the public hearing. Tr. at 114, 116. In fact, thirteen persons were allowed to register as participants even though they did not satisfy the requirements of the Articles and Ordinance.

[4]These requirements are found in Section 50-54(a)(3) of the Ordinance and Article III, Section 5 of the Articles.

Accordingly, there is no factual basis for Petitioner's contention that the Ordinance and Articles rendered the proceedings fundamentally unfair. All members of the public, even if not registered as participants, were in fact given the opportunity to be heard, to present evidence and to cross-examine witnesses. The proceedings were fundamentally fair.

Local siting proceedings have been found to have met the standards of adjudicative due process despite conditions or procedures that restricted or limited public participation. In *City of Columbia*, about 75 people were unable to access the hearing room because of overcrowding. *City of Columbia*, PCB 85-177, 85-220, 85-223 (Apr. 3, 1986). After the hearing, the hearing officer restricted public comment. This Board held that neither the lack of capacity nor the restriction of public comment rendered the proceeding fundamentally unfair.

Similarly, in *County of Kankakee v. City of Kankakee*, PCB 03-31, 03-33 & 03-35 (Jan. 9, 2003), fifty to 150 people who attended the first evening of the siting hearing were unable to gain access to the hearing room. Even though a number of citizens testified before the Board that they were frustrated and disgruntled with the proceedings, those proceedings were not, in the Board's view, fundamentally unfair.

The Board has even found a rule limiting parties' testimony to five minutes reasonable. *Daly v. Village of Robbins*, PCB 93-52, PCB 93-54 (July 1,1993). The County Board's proceedings did not limit or restrict public participation in any of the ways described above. In fact, the hearing officer went out of his way to accommodate the public and to ensure that all those who wanted to participate, ask questions of any witness, or provide public comments or statements on the record were given the opportunity to do so.

In this matter, there is no evidence that anyone was, in fact, restricted from participating in the public hearing. The purely theoretical "restrictions" on public participation alleged by Petitioner fall far short of the actual restrictions present in *City of Columbia* and *County of*

Kankakee. If those actual restrictions did not render Columbia's and Kankakee's local siting proceedings fundamentally unfair, the theoretical restrictions in this matter cannot render the DeKalb County Board's proceedings fundamentally unfair. The proceedings before the DeKalb County Board were fundamentally fair and the County Board's decision should be affirmed.

C. The Public Was Able to Review and Copy Waste Management's Application.

The County Board made the Application available to the public for inspection and copying and otherwise complied with all statutory requirements relating thereto. No witness testified that he or she was unable to review or copy the Application. The proceedings were fundamentally fair in this respect and the County Board's decision should be affirmed.

Section 39.2(c) of the Act required Waste Management to file a copy of the Application with the county. The Application was required to include (i) the substance of Waste Management's proposal, and (ii) all documents submitted as of the date to the IEPA relating to the proposed facility. 415 ILCS 5/39.2(c). All documents or other material on file with the county board were to be made available for public inspection at the office of the county board and could be copied upon payment of the actual cost of reproduction. *Id.*

The County Board complied with the Section 39.2(c) of the Act in all respects. The Application was filed by Waste Management with the County Board and was made available for public inspection at the office of the County Clerk, office of the County Board, and at three local libraries, the Town of Cortland, the City of Sycamore. (Holmes Dep., pp. 6:2-7, 7:7-10, 12:21-24, 27:19 - 28:5, 28:16 - 29:17; Bockman Dep. p. 36, 43:14). Members of the public were able to make copies at their own expense if they so desired. (*Id.* at 8:1-8, 11:7-24, 20:23 - 21:3, 26:22 - 27:7). No witness testified that he or she was denied the opportunity to review the Application and no witness testified that he or she was denied the opportunity to make copies.

D. The County Board Did Not Prejudge the Facts.

The County Board is presumed to have acted objectively and without prejudgment of the facts. Petitioner cannot overcome this presumption, particularly as each County Board member who voted to approve and who testified through deposition confirmed that they did not prejudge the relevant facts prior to voting on the Application. The proceedings were fundamentally fair and the County Board's decision should be affirmed.

County board members engaged in landfill siting hearing under Section 39.2 of the Act are presumed to be objective and capable of fairly judging the particular controversy. *Waste Management IV*, 175 Ill. App. 3d at 1040, 520 N.E.2d at 695. "The presumption of the validity of the actions of a public official will be overcome only where it is shown by clear and convincing evidence that the official has an unalterably closed mind in critical matters." *Fox Moraine, LLC v. City of Yorkville*, PCB 07-146 (Oct. 1, 2009). Such a showing must depend on evidence of actual bias. *Residents Against a Polluted Environment v. Pollution Control Bd.*, 293 Ill. App. 3d 219, 225-26, 687 N.E.2d 552, 556-57 (3d Dist. 1997) (hereinafter "*Residents I*").

The presumption is not overcome merely because a member of the siting authority has previously taken a public position or expressed strong views on a related issue. 415 ILCS 5/39.2(d); *Waste Management IV*, 175 Ill. App. 3d at 1040, 530 N.E.2d at 695. In *E & E Hauling v. Pollution Control Bd.*, 107 Ill. 2d 33, 43, 481 N.E.2d 664, 668 (1985) (hereinafter "*E & E Hauling II*") the Illinois Supreme Court concluded that even if the decisionmakers had already formed opinions about the proposed landfill, those opinions did not equate to a *per se* prejudgment of adjudicative facts.

In this matter, the County is entitled to a presumption that the Board members each acted impartially and objectively and there is no evidence in the record that overcomes this presumption. Of the sixteen County Board members who voted in favor of the Application, fifteen subsequently testified under oath that they did not consider any information or evidence

not presented in the siting proceeding or contained in the siting record in making their decision to approve the Application.[5] (Allen Dep., p. 30:5-16; L. Anderson Dep., p. 21:3-7; Augsburger Dep, p. 21:18-24; De Fauw Dep., p.15:5-11; Emerson Dep., pp. 13:21-14:3; Fauci Dep, p. 43:8-14; Haines Dep., p. 42:3-8; Hulseberg Dep., p. 18:3-8; Metzger Dep., p. 16:13-19; Oncken Dep., p. 31:8-15; Stoddard Dep., p. 33:1-12; Tobias Dep., pp. 33:5-34:5; Turner Dep., p. 19:5-9; Vary Dep., p. 35:4-10; Walt Dep., p. 23:3-9). Thirteen further testified that no information or facts not presented to the County Board affected or influenced their decision to approve the Application. (Allen Dep., p. 30:11-16; L. Anderson Dep., p. 21:8-12; Augsburger Dep, p. 22:8-14; De Fauw Dep., p.15:12-18; Emerson Dep., p. 14:4-10; Haines Dep., pp. 42:17-43:20; Hulseberg Dep., p. 18:9-15; Metzger Dep., pp. 16:20-17:2; Oncken Dep., p. 31:16-23; Stoddard Dep., p. 33:13-17; Tobias Dep., p. 34:6-11; Turner Dep., p. 19:10-14; Vary Dep., p. 35:11-17; Walt Dep., p. 23:10-15). Finally, all fifteen testified that they did not make their decision to approve the Application prior to the receipt of all the evidence. (Allen Dep., p. 30:17-20; L. Anderson Dep., p. 21:13-16; Augsburger Dep, p. 22:22-24; De Fauw Dep., p.15:19-21; Emerson Dep., p.14:11-16; Fauci Dep, p. 43:15-24; Haines Dep., pp. 40:11-23; Hulseberg Dep., p. 18:16-18; Metzger Dep., p. 17:3-11; Oncken Dep., pp. 31:24-32:2; Stoddard Dep., p. 33:18-20; Tobias Dep., p. 34:12-14; Turner Dep., p. 19:15-19; Vary Dep., pp. 35:18-36:11; Walt Dep., p. 23:16-19).

One member of the public, Mrs. Paulette Sherman (*nee* Tolene), claimed that on a break during the first day of the local hearing County Board Member Riley Oncken said to her in a private conversation "I don't know why all of these people are here. We've already made up our minds." Tr. at 18. Ms. Sherman admitted that Mr. Oncken's statement did not clarify who or

[5]The County Board voted to approve the Application in a 16-8 decision. (Mins. of County Bd. Proceedings, May 10, 2010). Those Members voting "yea" were Mrs. Allen, Mr. Larry Anderson, Mr. Augsburger, Mrs. De Fauw, Mr. Emerson, Ms. Fauci, Mr. Haines, Mr. Hulseberg, Mr. Metzger, Mr. Oncken, Mr. Stoddard, Mr. Stuckert, Mrs. Turner, Ms. Vary, Mr. Walt and Chairman Tobias. (*Id.*) All of these members except Mr. Stuckert were deposed in this appeal.

what he was referring to, but that in her opinion, he was referring to the members of the County Board. Tr. at 30-32. Mr. Oncken has consistently testified he never made any statement to the effect that the matter was a done deal, that he had made up his mind or that any other County Board member had made up their mind. (Tr. at 198; C0007114-15.) He also stated he did not make a decision on how he would vote on the Application until shortly before the May 10, 2010 vote and did not consider any evidence outside of the record in making that decision. Tr. at 198.

Even if the statement had occurred, it would not have been determinative of prejudgment by the County Board. The Board has addressed claims of prejudgment and bias in landfill siting appeals in the past. When faced with such a claim, the Board has considered statements made on the record at the local level that decisionmakers can act in a fair and impartial manner to weigh in favor of the presumption that elected officials can act without bias. *See Peoria Disposal Co. v. PCB*, 385 Ill. App. 3d 781, 896 N.E.2d 460 (3rd Dist. 2008). Relying in part on Mrs. Sherman's allegation, members of Stop the Mega-Dump orally moved to terminate and dismiss the public hearing on March 3, 2010. (C0007113.) County Board Member Oncken immediately addressed the issue on the record stating, in part:

> To be absolutely clear, I have not made a decision on Waste Management's application to expand the landfill in DeKalb County until all of the evidence is presented and I have an opportunity to review the testimony and evidence which has been given. I am in no position to judge the merits of the application and whether Waste Management has met its burden of proof on the nine criteria. I have and will continue to judge the evidence impartially, fairly and without bias or prejudice of any kind. (C0007114-15.)

On May 10, 2010, the day of the County Board's vote on the Application, County Board Member Oncken again explained his understanding of the role of the decisionmaker in a siting appeal:

> The law in this situation is very clear. We must set aside our personal feelings, prejudices, opinions, and render an opinion based solely on the evidence presented. Just as a jury swears they will fairly and impartially render a verdict based on the information presented without any inside information or outside

> information, so must we. . . . Certainly as the proposed facility is in my district – and I have heard from many citizens about their concerns and objection – it would be politically smart for me to vote against this. . . . To do so in this situation would disregard the law and would compromise my integrity. (C0008504-05.)

County Board Member Oncken's understanding is accurate and his statements on the record not only refute the allegation that he ever stated the County Board members had "made up their minds" prior to the May 10, 2010 vote, but also show that he himself was prepared to and did in fact make a fair and unbiased decision on the Application. Confirming this, County Board Member Oncken testified that he did not make up his mind on the Application until all of the evidence was in. Oncken Dep., pp. 31:24-32:2; Tr. at 198.

There is no evidence of actual bias on the part of any County Board member and Petitioner cannot overcome the presumption of objective and unbiased decisionmaking. The proceedings were fundamentally fair and the County Board's decision should be affirmed.

E. There Were No *Ex Parte* Contacts between Applicant and the County Board.

The County Board and its members participated in no improper *ex parte* contacts with the Applicant. The only contacts between County Board members and the Applicant identified in the Petition for Review — tours of Waste Management's Prairie View landfill in Will County, Illinois — occurred prior to the filing of Waste Management's Application and are specifically permitted under Illinois law.

No County Board member engaged in *ex parte* communications with the Applicant, in that no member communicated with the Applicant about the Expansion once the Application was filed and the local siting proceedings were, thereby, initiated. "In the context of a siting proceeding, ... an *ex parte* contact is a contact between the siting authority and a party with an interest in the proceeding without notice to the other parties to the proceeding." *Residents Against a Polluted Environment v. County of LaSalle*, PCB 96-243, slip op. at 8 (Sept. 19, 1996) (hereinafter "*Residents II*"). In order to constitute a true *ex parte* contact, therefore, the contact

must occur post-filing in the context of a "proceeding." *Id*. at 16.

Fifteen of the sixteen County Board members who voted in favor of the Application testified that they had no communications with the Applicant regarding the Expansion from the time the Application was filed until the County Board made its decision.[6] (Allen Dep., p. 29:11-22; L. Anderson Dep., p. 17:7-15; Augsburger Dep, p. 14:7-13; Emerson Dep., p. 10:12-20; Fauci Dep., p. 33:2-7; Haines Dep., p. 29:5-10; Hulseberg Dep., pp. 11:12-12:5; Metzger Dep., p. 11:17-21; Oncken Dep., pp. 25:8-26:4; Stoddard Dep., pp. 25:20-27:11; Tobias Dep., pp. 32:23-33:4; Turner Dep., p. 17:19-23; Vary Dep., pp. 28:2-29:1; Walt Dep., p. 16:1-8). Accordingly, there is no evidence of *ex parte* communications between the County Board and the Applicant in this matter.

Neither this Board nor Illinois' courts, furthermore, have ever held that *pre*-filing contacts could constitute impermissible *ex parte* communications or could render post-filing siting proceedings fundamentally unfair. To the contrary, this Board has held that "contacts between the applicant and the siting authority prior to the filing of the siting application do not constitute impermissible *ex parte* contacts." *Residents Against a Polluted Environment v. County of LaSalle*, PCB 97-139 (Jun. 19, 1997) (hereinafter "*Residents III*"). In fact, "contacts between the Applicant and the County Board prior to the filing of the Application are irrelevant to the question of whether the siting proceedings, themselves, were conducted in a fundamentally fair manner." *Id.*

Pre-filing contacts are permissible regardless of their content. Thus, pre-filing contacts concerning matters related to a subsequently proposed pollution control facility are permitted. *Residents I*, 293 Ill. App. 3d at 222-24, 687 N.E.2d at 555-56. Even closed door, pre-filing meetings between an applicant and a decisionmaker are not improper. *Beardstown Area Citizens*

[6] Mr. Stuckert did not appear for deposition.

for a Better Environment v. City of Beardstown, PCB 94-98 (Jan. 11, 1995); *see also Southwest Energy Corp. v. Pollution Control Bd.*, 275 Ill. App. 3d 84, 92, 665 N.E.2d 304, 310 (4th Dist. 1995) (pre-filing luncheon attended by applicant and city council members did not render proceedings unfair).

In this matter, ten of the County Board members who voted to approve the Application visited and toured the Prairie View Recycling and Disposal Facility, operated by Waste Management. (County's Ans. to Interrogs, No. 4; C0008534-35). Each of these tours occurred prior to the November 30, 2009, filing of the Application. (Allen Dep., p. 18:1-4; Fauci Dep., p. 18:8-11; Haines Dep., p. 11:2-6; Hulseberg Dep., p. 9:13-17; Oncken Dep., pp. 9:23 - 10:1; Stoddard Dep., p. 7:5-11; Tobias Dep., 11:14-16, 12:2-10; Turner Dep., p. 6:14-16; Vary Dep., p. 10:2-4).

Pre-filing facility tours are specifically authorized by Illinois law and are not impermissible *ex parte* contacts. Indeed, this Board has recognized that pre-filing facility tours do not render subsequent siting proceedings fundamentally unfair. In *County of Kankakee,* PCB 03-31, 03-33 & 03-35, the applicant took members of the siting authority to tour a local landfill prior to filing its application. *County of Kankakee*, PCB 03-31, 03-33, & 03-35, slip op. at 16. The siting authority also hosted a "special presentation" by the applicant less than one month before the application was filed at which the applicant's expert witnesses spoke concerning the application's satisfaction of the 39.2 criteria and impugned the credibility of experts that were anticipated to appear on objector's behalf at the upcoming hearing. This Board ultimately found that neither of these pre-filing contacts rendered the proceedings fundamentally unfair. *Id*; *cf. Southwest Energy,* 275 Ill. App. 3d at 92, 665 N.E.2d at 310 (facility tour rendered proceedings unfair if occurring after application filing and without participation of siting opponents).

The pre-filing facility tours in this matter are permissible under the holding in *County of*

Kankakee. Indeed, such tours do not even rise to the level of pre-filing contacts held to be permissible in *Kankakee*. If the applicant in *Kankakee* could conduct an entire pre-filing "hearing" for the benefit of the local siting authority without rendering the subsequent siting proceedings fundamentally unfair, the pre-filing facility tours in this matter cannot possibly render the County Board's proceedings fundamentally unfair.

Even if the pre-filing facility tours, somehow, constituted impermissible *ex parte* contacts, such conducts would not require reversal, as they did not result in harm. "The 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." *Residents II*, PCB 96-243. Petitioner cannot make such a showing. All ten of the County Board members who toured the Prairie View facility subsequently testified that they did not consider any information or evidence not presented in the siting proceeding or contained in the siting record in making their decision to approve the Application.[7] (Allen Dep., pp. 29:23-31:1; De Fauw Dep., p. 15:5-18; Fauci Dep, pp. 42:11-43:14; Haines Dep., p. 42:2-8; Hulseberg Dep., p. 18:3-15; Oncken Dep., p. 31:8-23; Stoddard Dep., p. 33:1-17; Tobias Dep., pp. 33:24-34:11; Turner Dep., p. 19:5-14; Vary Dep., p. 35:4-17). Accordingly, the pre-filing tours could not have resulted in harm to Petitioner.

The pre-filing facility tours did not constitute impermissible *ex parte* contacts and were, in fact, explicitly permitted under Illinois law. Even if they were not, the County Board members who participated in the tours and who subsequently voted to approve the Application testified that they did not consider the tours in reaching their decision. The proceedings below

[7] Mrs. De Fauw was not questioned regarding the facility tour.

were fundamentally fair and the County Board's decision should be affirmed.

F. The County Board Has Not "Committed or Earmarked" Host Fees from the Expansion.

The County Board has not "committed or earmarked expected host fees from the expanded landfill," as Petitioner claims. (STMD Pet., par. 5(E)). Instead, the County Board passed an ordinance authorizing — not requiring — the County to issue bonds for the purpose of funding a renovation and expansion of the County jail. (DeKalb County Ord. No. 2010-05, §§ 1-2). The ordinance further provides that if the bonds are, in fact, issued, they may be repaid from one or more potential revenue sources including, but not limited to, "host community agreement fees to be paid to the County with respect to the DeKalb County Landfill currently operated by Waste Management of Illinois, Inc." (*Id.* at § 4(ii)). Nothing in the ordinance specifically refers to host fees from the Expansion, in particular.

The Chairman of the County Board's Finance Committee, Michael Haines, explained that the ordinance in question merely authorizes the issuance of bonds and creates the "possibility" that these bonds would be repaid with the revenue from landfill tipping fees. (Haines Dep., pp. 6:15 - 8:4). The ordinance in fact identifies two other "possible" revenue sources: sales tax receipts and United States bond subsidy payments. (Ord. No. 2010-05, § 4). Certainly, nothing in the ordinance *requires* the issuance of bonds or the collection of host fees — whether existing or future — from Waste Management and the passage of the ordinance does not, therefore, require or imply that the County Board must or needed to approve the Expansion. It is simply factually incorrect to say that the County Board has "committed or earmarked" host fees from the Expansion.

In any case, the fact that economic benefit is likely to result to the County from successful siting is irrelevant to the issue of bias or prejudgment. Municipalities may consider such economic benefit in their siting decisions so long as they find that the statutory criteria have been met. *Fairview*, 198 Ill. App. 3d at 546-47, 555 N.E.2d at 118-82. "County boards and other governmental agencies routinely make decisions that affect their revenues. They are public service bodies that must be deemed to have made decisions for the welfare of their governmental units and their constituents." *E & E Hauling II*, 107 Ill. 2d at 43, 481 N.E.2d at 668 (County Board's consideration of revenue from landfill not indicative of bias or prejudgment). The Board has held that a decisionmaker's actions of purchasing and annexing land, and adopting certain ordinances for the purpose of siting a landfill prior to the local siting proceedings do not evidence an inherent bias. *T.O.T.A.L. v. City of Salem,* PCB 96-79, 96-82 (consol.) slip op. at 9 (Mar. 7, 1996) *("T.O.T.A.L."*); *aff'd T.O.T.A.L. v. PCB, City of Salem, et al.*, 288 Ill.App.3d 565, 680 N.E.2d 810 (5th Dist. 1997). In *T.O.T.A.L.*, the City of Salem was both the decisionmaker and applicant. Objectors alleged that bias, prejudice, and conflict of interest rendered the siting hearings fundamentally unfair because the City of Salem purchased and annexed property to be used for an expansion of the existing landfill, adopted a resolution authorizing the expenditure of city funds to prepare an application, then heard its own application. Relying on *E & E Hauling II*, the Board found that the City of Salem's prior actions did not create inherent bias. *T.O.T.A.L.*, slip op. at 8-9; citing *E & E Hauling II*, 107 Ill. 2d at 43, 481 N.E.2d at 668. The Board's decision in *T.O.T.A.L.* was affirmed by the Fifth District Appellate Court, which held that actions that do not contemplate the siting criteria, such as annexing or purchasing land or expending money to prepare a siting application, could not constitute prejudgment of

adjudicatory facts.

With respect to the County Board's bond authorization, Petitioner's contention is both factually and legally incorrect. The County Board did not, in fact, commit or earmark host fees from the Expansion. Furthermore, in passing Ordinance 2010-05, the County Board, like the City of Salem in *T.O.T.A.L.*, did not contemplate the siting criteria and, therefore, did not prejudge the adjudicatory facts presented in the siting proceeding. In any case, the County Board would not be forbidden from considering the County's revenues in connection with its decision on the Application. The proceedings below were fundamentally fair and the County Board's decision should be affirmed.

G. The County Board Understood the Burden of Proof and Its Role in the Siting Process.

Resolution #R2010-31, passed by the County Board on May 10, 2010, and approving the Application, explicitly sets forth the County Board's accurate understanding of the local siting approval process. Specifically, the Resolution states that:

> WHEREAS, the DeKalb County Board has the authority pursuant to the Illinois Environmental Protection Act (415 ILCS 5/39.2) to approve or deny requests for siting pollution control facilities in DeKalb County; and
>
> WHEREAS, the Act establishes the criteria a proposed facility must meet before a local siting authority may grant approval; and
>
> WHEREAS, the Act allows the DeKalb County Board, in granting site approval, to impose such conditions as may be reasonable and necessary to accomplish the purposes of Section 39.2 of the Act and as are not inconsistent with Illinois Pollution Control Board regulations; and
>
> * * *
>
> WHEREAS, Waste Management of Illinois, Incorporated, as operator of the DeKalb County Sanitary Landfill, has submitted an Application for site approval of an expansion of that landfill; and

* * *

> WHEREAS, the DeKalb County Board, having considered the Application, the record of hearing, public comments, and the recommendation of the DeKalb County Pollution Control Facilities Committee finds that Waste Management of Illinois, Incorporated has met each of the nine siting criteria subject to the special conditions as follows:

(C0008537-48, Resolution #R2010-31).

The Resolution's description of the County Board's authority and obligation to approve or deny siting applications, the statutory source of the criteria to be considered and the applicant's burden to meet the statutory criteria is both factually and legally correct in all respects.

Before voting on the Application, County Board Chairwoman Ruth Anne Tobias reviewed the County Board's role in stating:

> The decision we have before us must be based on the information and evidence submitted on the nine very specific criteria set out in the Environmental Protection Act. There are two important points here. We must base our decision on whether compliance with the nine criteria has been demonstrated and that decision must be based on the information and evidence presented during the siting proceeding. I must remind everyone, and I know we all have them, personal beliefs, political positions and general policy considerations must be put to the side as we consider whether the nine criteria have been met. We must also come to this decision without prejudgment and again base our decision on the information presented during the siting proceeding. (C0008532.)

The Petition for Review makes no argument and adduces no evidence suggesting that the County Board misunderstood its authority and obligations or the procedure and burdens of proof in a local siting proceeding. The proceedings below were fundamentally fair and the County Board's decision should be affirmed.

H. Pre-Filing Review of Siting Applications is Specifically Permitted under Illinois

Law.

The County Board engaged Patrick Engineering to conduct a pre-filing review of the Application, specifically with respect to criterion (ii). (Burger Dep., pp. 4:23 - 6:7, 9:7-17, 10:13-23). No County Board members participated in that review. (*Id.* at 9:18-22). Patrick Engineering communicated various comments and criticisms of the draft Application to Waste Management. (*Id.* at 11:13 - 12:16).

As an initial matter, the pre-filing review could not possibly constitute an *ex parte* contact with the County Board, as Petitioner claims, since no County Board member participated in the pre-filing review. (Pet., par. 5(G)). Furthermore, pre-filing reviews of a proposed application by the decision maker's technical staff have been explicitly authorized by this Board. *Sierra Club v. Will County*, PCB 99-136 (Aug. 5, 1999).

The County Board had no improper *ex parte* contacts and the proceedings below were fundamentally fair. The County Board's decision should be affirmed.

CONCLUSION

The County Board's findings that Waste Management satisfied statutory criteria (i), (ii), (iii), (v), and (vi) were not against the manifest weight of the evidence of record. Therefore, the DeKalb County Board respectfully requests the Board to hold that the County Board's decision was not against the manifest weight of the evidence and should be affirmed.

Furthermore, the County Board afforded the public a full opportunity to participate in the public hearing, to be heard, to present evidence and to cross-examine witnesses. The County Board complied with all statutory requirements with respect to public inspection and copying of the Application. The County Board did not prejudge the facts and did not engage in

impermissible *ex parte* communications with Waste Management. The County Board understood the burden of proof and its role in the siting process. The County Board further requests that the Board hold that the local siting proceedings before the County Board were fundamentally fair and affirm the County Board's decision .