

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF )  
 ILLINOIS, INC., )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 COUNTY BOARD OF )  
 DEKALB COUNTY, ILLINOIS )  
 )  
 Respondent, )

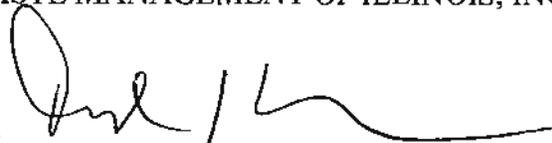
No. PCB 10-104

**NOTICE OF FILING**

TO: See Attached Service List

**PLEASE TAKE NOTICE** that on **November 27, 2013**, we filed with the Illinois Pollution Control Board, the attached **Reply Brief of Waste Management of Illinois, Inc.** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

By:   
 \_\_\_\_\_  
 One of Its Attorneys

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WASTE MANAGEMENT OF ILLINOIS,	)	
INC.,	)	
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Petitioner,	)	
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v.	)	No. PCB 10-104
	)	
COUNTY BOARD OF DEKALB COUNTY,	)	
ILLINOIS,	)	
	)	
Respondent.	)	

REPLY BRIEF OF WASTE MANAGEMENT OF ILLINOIS, INC.

Petitioner, Waste Management of Illinois, Inc. ("WMII"), by and through its attorneys, Pedersen & Houpt, replies to the Response of the County Board of DeKalb County to Waste Management of Illinois, Inc.'s Memorandum in Support of the Appeal of Special Condition 32 ("County Br."), as follows:

INTRODUCTION

The County Board of DeKalb County ("County Board") argues that WMII has not met its burden of demonstrating that the imposition of Special Condition 32 is against the manifest weight of the evidence. (County Br. at 3.) The County Board contends that WMII fails to consider "the unique situation on Somonauk Road" and the fact that increased traffic on Somonauk Road will cause "farm vehicle traffic to pull off the road and onto the shoulders more often." (County Br. at 3.) By pulling off onto the shoulder, the farm vehicles create "a safety hazard which can be minimized by widening the shoulders." (Id.) The County Board's argument, however, is unavailing because it attempts to justify Special Condition 32 on the basis of a misreading of criterion (vi). Criterion (vi) requires an applicant to minimize the impact of facility traffic patterns on existing traffic flows, not the impact of farm vehicle traffic on existing

traffic flows. Moreover, criterion (vi) does not require an applicant to design facility traffic patterns to minimize the impact of safety hazards caused by existing traffic flows.

Special Condition 32 is valid only if it is reasonable and necessary to accomplish or meet the purpose of criterion (vi). 415 ILCS 5/39.2(e). To satisfy criterion (vi), an applicant must present evidence demonstrating that it has designed "the traffic patterns to or from the facility ... as to minimize the impact on existing traffic flows." 415 ILCS 5/39.2 (a) (vi). Criterion (vi) does not require either the identification or elimination of types of traffic, noise, dust, driver negligence or other safety hazards. See Fox Moraine, LLC v. United City of Yorkville, 2011 IL App (2d) 100017, appeal denied \_\_ Ill. 2d \_\_\_, 968 N.E.2d (2012) (criterion (vi) does not require elimination of all traffic problems); Tate v. Pollution Control Board, 188 Ill.App.3d 994, 1024 (4th Dist. 1989) (traffic noise, dust and driver negligence does not relate to the effect on traffic flow or to the issue with which criterion (vi) is concerned).

As the County Board states, Special Condition 32 was imposed to "alleviate some of the problems that will naturally flow from increased traffic on Somonauk Road." (County Br. at 4.) These problems are safety hazards caused by slow-moving, oversized farm vehicles, not expansion facility traffic. These safety hazards are not the type of problem that criterion (vi) is intended to address. See Fox Moraine, ¶116. Therefore, Special Condition 32 is neither reasonable nor necessary to accomplish the purpose of criterion (vi).

#### ARGUMENT

1. The Purpose of Special Condition 32 Is Neither Related to Nor Governed by Criterion (vi).

The County Board added Special Condition 32 as the final condition to its grant of siting approval, and imposed the condition pursuant to criterion (vi). (County Board Resolution

#R2010-31, May 10, 2010.) Special Condition 32 states that the shoulder width on either side of Somonauk Road from the I-88 overpass to Route 38 shall be increased to five feet and shall be built to the standard slope for an aggregate shoulder within approved IDOT standards. It further provides that "WMII shall be responsible for funding and maintaining the shoulder improvements and the slope improvements." (Resolution at 11.)

The County Board acknowledges that the concern Special Condition 32 is intended to address relates to the presence of farm vehicle traffic on Somonauk Road. (County Br. at 1-3.) When farm vehicle equipment travels on Somonauk Road, and "meets another vehicle on the roadway, the farm vehicle has to pull off the road which does create a safety issue because of the steepness of the shoulder." (County Br. at 1.) When the farm vehicle pulls off the road and onto the shoulder, it displaces some of the gravel and creates a drop-off at the edge of the pavement. (County Br. at 1-2.) This creates a safety concern which "could be alleviated by providing a wider shoulder." (County Br. at 2.)

This is not a concern, however, which is properly addressed by criterion (vi). The language of criterion (vi) is plain and clear: local siting approval shall be granted only if "the traffic patterns to and from the facility are so designed as to minimize the impact on existing traffic flows." 415 ILCS 5/39.2 (a) (vi); see Metropolitan Life Insurance Co. v. Hamer, 2013 IL 114234, ¶18 (statutory language must be given its plain and ordinary meaning). Hence, criterion (vi) requires only that facility traffic patterns be designed so as to minimize impact on existing traffic flows. 415 ILCS 5/39.2 (a) (vi); Fox Moraine, ¶116. Criterion (vi) does not state that facility traffic patterns must be designed to minimize the impact of existing traffic on existing traffic flows, or to minimize the impact of safety hazards created by non-facility related traffic.

The plain language of Criterion (vi) does not require that an applicant eliminate all traffic problems or concerns, much less concerns that existed before the proposed expansion or that are created by non-facility related farm vehicles. Fox Moraine, ¶116.

Assuming the County Board's description of the concern to be true in all respects, one must still conclude that the safety issue is created by farm vehicles, and is unrelated to the design of expansion traffic patterns. Thus, the alleged safety issue may not be remedied by a special condition whose only legitimate purpose under criterion (vi) is to help minimize the impact of facility traffic patterns on existing traffic flows. Rather, the condition must be reasonable and necessary to satisfy the requirement that the expansion traffic patterns be designed to minimize the impact on existing traffic flows, and not to satisfy a safety concern created by existing farm vehicle traffic flows that affects existing traffic flows.

If the special condition, as is the case here, does not promote or further the design of expansion traffic patterns so as to minimize impact on existing traffic flows, which includes the farm vehicles, it is not reasonable and necessary to accomplish the purpose of criterion (vi).

The County Board concedes that "when farm vehicle equipment meets another vehicle on the roadway, the farm vehicle has to pull off the road which does create a safety issue because of the steepness of the shoulder." (County Br. at 1.) Indeed, "each and every time one of these farm vehicles encounters an oncoming vehicle on Somonauk Road, they must pull off the road and onto the shoulder." (County Br. at 3.) In other words, the County Board acknowledges that this is an existing issue and will continue to be one regardless of whether the landfill expands. This alone demonstrates that Special Condition 32 is neither reasonable nor necessary to accomplish the purposes of criterion (vi), as existing traffic flows will continue to face the same

issues regardless of how the landfill's traffic "patterns" are "designed." It should be stricken for this reason alone. See Will County Bd. v. Illinois Pollution Control Bd., 319 Ill. App. 3d 545, 548 (3d Dist. 2001) (holding that the county board may only impose conditions that are reasonable and necessary to meet the relevant siting criteria).

Further, the single case cited by the County Board makes abundantly clear that criterion (vi) does not require WMII to eliminate the impact of the landfill expansion on existing traffic flows, only to minimize it. See File v. D&L Landfill, Inc., 219 Ill. App. 3d 897, 908 (2d Dist. 1991) ("The operative word is 'minimize,' and it is recognized that it is impossible to eliminate all problems."); see also E&E Hauling v. Pollution Control Board, 116 Ill. App. 3d 586, 616 (2d Dist. 1983) ("[T]he statute does not require petitioners to show that the expansion will have no impact on existing traffic flows, but only that the design minimizes the impact."). Nevertheless, the County Board has required WMII to widen the shoulders of Somonauk Road based on a *one percent* increase in vehicle traffic, which the County Board claims "will correspondingly cause the farm vehicle traffic to pull off the road and onto the shoulders more often."<sup>1</sup> (County Br. at 3.) Even if this is true, the County Board's argument implies that only the complete elimination of additional traffic, *i.e.*, a *zero percent* increase in traffic, can satisfy the County Board. This is not what the law requires. A one-percent increase in traffic volume that has no effect on the level of service plainly demonstrates that WMII has "minimized" the effect of its traffic patterns on existing traffic flows.

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<sup>1</sup> The County Board's Response incorrectly describes the increase in vehicular traffic on Somonauk Road from the landfill expansion as three percent (3%). In fact, the traffic expert projected that Somonauk Road traffic would increase by two percent (2%) between 2010 and 2013, regardless of whether the landfill expanded. Adding landfill traffic on top of normal traffic growth in 2013 would increase Somonauk Road traffic by an additional one percent (1%), from sixteen percent (16%) to seventeen percent (17%). (3/4/10 Tr. at 274.)

2. Special Condition 32 Lacks Any Support in the Record

In reviewing whether a special condition is valid, this Board must determine whether the decision to impose the condition is against the manifest weight of the evidence. Veolia ES Zion Landfill v. City Council of the City of Zion, No. PCB 11-10, slip op. at 3 (P.C.B. April 21, 2011) As Special Condition 32 lacks any support in the record, it is against the manifest weight of the evidence, and should be stricken.

There is no testimony or evidence in this record establishing the safety issue identified by the County Board as the reason or purpose for Special Condition 32. Specifically, there is no evidence indicating the number, type, frequency and time of farm vehicles traveling on Somonauk Road between the I-88 overpass and Route 38. There is no evidence of any accidents or incidents involving farm vehicles on Somonauk Road, including any events where farm vehicles pulled off the road and moved over or onto the shoulder. Finally, there is no evidence of any damage to any shoulder of Somonauk Road caused by farm vehicle moving over it and displacing gravel.

Even if there were evidence in this record suggesting that farm vehicles frequently damaged the shoulder of Somonauk Road, there is no support in the record that the County Board's solution -- widening the shoulders to five (5) feet and changing the slope of the embankment -- would have any effect on Somonauk Road traffic, much less solve the purported problem. When a condition is "arbitrary" and unsupported by the record, it should be stricken. See County of Lake, 120 Ill. App. 89, 102 (2d Dist. 1983)) (affirming PCB's striking of condition where "[t]he time limitation imposed by the condition is arbitrary . . . [given that] there was no evidence to support a 20-year period"). The County Board proffered no testimony, expert or

otherwise, that widening the shoulder to five feet and changing the slope of the embankment would have any effect on traffic on Somonauk Road.<sup>2</sup> The County Board does not dispute, or even address, this lack of evidence.

The County Board further alleges that "each and every time one of these farm vehicles encounters an oncoming vehicle on Somonauk Road, they must pull off the road and onto the shoulder. This is not due to driver negligence." (County Br. at 3.) Even assuming, in the absence of any evidence, that this factual allegation is true, WMII would agree that pulling onto the shoulder is not a result of driver negligence. What is driver negligence, however, is the driver who, after pulling onto the shoulder, pulls *off* the shoulder and down the embankment. We know this is negligence, rather than an unavoidable safety hazard, because farm vehicles have executed this simple maneuver for many years.<sup>3</sup> Special Condition 32 clearly aims to widen the shoulder so that the occasional *errant* driver does not have an accident. A condition meant to combat driver error does not further the purposes of criterion (vi). See Fairview Area Citizens Taskforce v. Pollution Control Bd., 198 Ill. App. 3d 541, 554 (3d Dist. 1990) ("[P]otential negligence of the truck drivers [is not] relevant to the effect on traffic flow."); see also Tate v. Illinois Pollution Control Bd., 188 Ill. App. 3d 994, 1024 (4th Dist. 1989) (ruling

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<sup>2</sup>The County Board's argument that Special Condition 32 is "feasible" is belied by the record, including the County Board's own expert, Mr. Schwartz, who admitted under cross-examination that he did not know whether the County already had an easement for the wider shoulder, or if WMII would need to purchase land from private owners. (9/17/13 Tr. at 17-18.) In this light, the County Board's conclusory statement that "the road is already there is evidence that the County already has an easement" is nonsensical. The issue here is not whether the County has an easement for land on which a road, shoulder or embankment are already built, but whether it has an easement for the *additional* land that would be necessary to widen the shoulder and alter the embankment. The weight of the evidence strongly suggests that Special Condition 32 is, if anything, not feasible at all.

<sup>3</sup>Indeed there is not one statistic, anecdote or other shred of evidence in the record that the current shoulders have raised the risk of accident for farm vehicles or other traffic.

that "potential negligence of truck drivers is not the issue" with which Criterion 6 is concerned). For this additional reason, Special Condition 32 should be stricken.

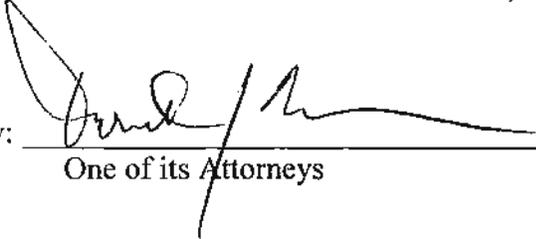
**CONCLUSION**

The traffic safety issue the County is attempting to remedy by Special Condition 32 already exists and thus predates the proposed expansion. It has not been caused or created by any proposed traffic patterns to and from the expansion, and may not be remedied by a special condition that is not relevant to or probative of the requirements of criterion (vi).

In other words, Special Condition 32 is neither reasonable nor necessary to accomplish the purpose of Section 39.2(a)(vi) of the Act, that is, to meet the requirements of criterion (vi). Nothing in the record supports Special Condition 32. Accordingly, WMII respectfully requests that this Board strike Special Condition 32, and award such other and further relief as it deems appropriate.

Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

By:   
One of its Attorneys

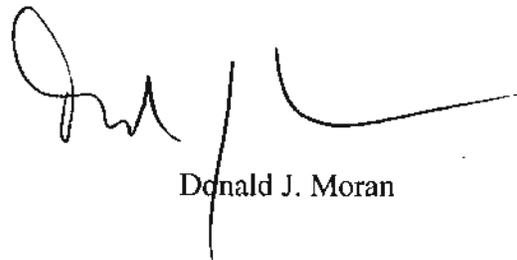
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**PROOF OF SERVICE**

I, Donald J. Moran, an attorney, on oath states that he served the foregoing **Reply Brief of Waste Management of Illinois, Inc.** 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 November 27, 2013:

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