ILLINOIS POLLUTION CONTROL BOARD
August 5, 1999

SIERRA CLUB, MIDEWIN TALLGRASS PRAIRIE ALLIANCE, AUDUBON COUNCIL OF ILLINOIS, and ILLINOIS AUDUBON SOCIETY,	)	
Petitioners,	)	
v.	)	PCB 99-136
	)	(Pollution Co ntrol Facility
WILL COUNTY BOARD and WASTE MANAGEMENT OF ILLINOIS, INC.,	)	Siting Appeal)
Respondents.	)	

LAND AND LAKES COMPANY,	)	
Petitioner,	)	
v.	)	PCB 99-139
	)	(Pollution Control Facility
WILL COUNTY BOARD and WASTE MANAGEMENT OF ILLINOIS, INC.,	)	Siting Appeal)
Respondents.	)	

ALBERT F. ETTINGER, ENVIRONMENTAL LAW AND POLICY CENTER OF THE MIDWEST, APPEARED ON BEHALF OF PETITIONERS SIERRA CLUB, MIDEWIN TALLGRASS PRAIRIE ALLIANCE, AUDUBON COUNCIL OF ILLINOIS, AND ILLINOIS AUDUBON SOCIETY;

ELIZABETH S. HARVEY, MCKENNA, STORER, ROWE, WHITE & FARRUG, APPEARED ON BEHALF OF PETITIONER LAND AND LAKES COMPANY;

CHARLES F. HELSTEN AND RICHARD S. PORTER, HINSHAW & CULBERTSON, APPEARED ON BEHALF OF RESPONDENT WILL COUNTY BOARD;

CHRISTINE G. ZEMAN, HODGE & DWYER, APPEARED ON BEHALF OF RESPONDENT WILL COUNTY BOARD; and

DONALD J. MORAN, PEDERSEN & HOUPT, P.C., APPEARED ON BEHALF OF RESPONDENT WASTE MANAGEMENT OF ILLINOIS, INC.

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

This matter comes before the Board on two appeals filed pursuant to Section 40.1 of the Environmental Protection Act (Act) (40 ILCS 5/40.1 (1998)). The appeals challenge the March 4, 1999 decision of the Will County Board to grant siting approval to Waste Management of Illinois, Inc. (WMII) for the proposed Prairie View Landfill located on a portion of the former Joliet Army Ammunition Plant (Joliet Arsenal) in Will County, Illinois.

A hearing was held in this matter before Board Hearing Officer, John Knittle, at the Will County Court House, Joliet, Illinois, on June 1 and June 2, 1999. Members of the public attended the hearing. Petitioners filed

their posthearing briefs on June 16, 1999. Respondents filed their posthearing briefs on June 23, 1999. Petitioners filed their reply briefs on June 30, 1999. Additionally, one public comment was received on June 16, 1999, from Kathleen Konicki.

For the reasons explain ed below, the Board affirms the Will County Board's approval of WMII's application to construct the Prairie View Landfill.

REVIEW OF LOCAL SITING DECISIONS

Under Illinois law, local units of government act as siting authorities that are required to approve or disapprove requests for siting of new pollution control facilities, including new landfills. The process is governed by Section 39.2 of the Act. 415 ILCS 5/39.2 (1998). In addition, Illinois law provides that siting decisions made by the local siting authorities are appealable to this Board. The appeal process is governed by Section 40.1 of the Act. 415 ILCS 5/40.1 (1998).

Section 39.2(a) provides that the local siting authority, in this case the Will County Board, is to consider as many as nine criteria when reviewing an application for siting approval. 415 ILCS 5/39.2(a) (1998). Section 39.2(g) of the Act provides that the siting approval procedures, criteria, and appeal procedures provided for in Section 39.2 are the exclusive siting procedures for new pollution control facilities. However, the local siting authority may develop its own siting procedures, if those procedures are consistent with the Act and supplement, rather than supplant, those requirements. See Waste Management of Illinois v. PCB , 175 Ill. App. 3d 1023, 1036, 530 N.E.2d 682, 692-93 (2d Dist. 1988). Only if the local body finds that the applicant has proven by a preponderance of the evidence that all applicable criteria have been met can siting approval be granted. Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163, slip op. at 5.

When reviewing a local decision on the nine statutory criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. McLean County Disposal, Inc. v. County of McLean , 207 Ill. App. 3d 352, 566 N.E.2d 26 (4th Dist. 1991); Waste Management of Illinois, Inc. v. Pollution Control Board , 160 Ill. App. 3d 434, 513 N.E.2d 592 (2d Dist. 1987); E & E Hauling, Inc. v. Pollution Control Board , 116 Ill. App. 3d 586, 451 N.E.2d 555 (2d Dist. 1983), aff'd in part 107 Ill.2d 33, 481 N.E.2d 664 (1985). 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. CDT Landfill Corporation v. City of Joliet (March 5, 1998), PCB 98-60, slip op. at 4, citing Harris v. Day , 115 Ill. App. 3d 762, 451 N.E.2d 262, 265 (4th Dist. 1983).

This Board, on review, may not re-weigh the evidence on the nine criteria. Where there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. Fairview Area Citizens Taskforce v. Pollution Control Board , 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3d Dist. 1990); Tate v. Pollution Control Board , 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989); Waste Management of Illinois, Inc. v. Pollution Control Board , 187 Ill. App. 3d 79, 82, 543 N.E.2d 505, 507 (2d Dist. 1989). Because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the local government's findings. File v. D & L Landfill, Inc.
(August 30, 1990), PCB 90-94, *aff'd*, 219 Ill. App. 3d 897, 579 N.E.2d 1228 (5th Dist. 1991).

In addition to reviewing the local authority's decision on the nine criteria, the Board is required under Section 40.1 of the Act to determine whether the local proceeding was fundamentally fair. In E & E Hauling, Inc. v. Pollution Control Board , the appellate court found that although citizens before a local decision maker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. E & E Hauling, Inc. v. Pollution Control Board , 116 Ill. App. 3d at 596, 451 N.E.2d at 564; see also Industrial Fuels & Resources v. Pollution Control Board , 227 Ill. App. 3d 533, 592 N.E.2d 148 (4th Dist. 1992); Tate v. Pollution Control Board , 188 Ill. App. 3d at 1019, 544 N.E.2d at 1193. Due process requirements 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 v. Pollution Control Board , 175 Ill.

App. 3d 1023, 1037, 530 N.E.2d 682, 693 (2d Dist. 1988). The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid elements in assessing fundamental fairness. Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163, slip op. at 5.

DESCRIPTION OF PARTIES

Several parties participated as petitioners in this appeal. Among them were the following environmental organizations: Sierra Club, the Illinois Audubon Society, the Midewin Tallgrass Prairie Alliance, and the Audubon Council of Illinois. Also, Land and Lakes Company, which owns and operates several businesses in Will County, participated as a petitioner. LALC Pet. for Review at 1-2.

The respondents, as required by Section 40.1(b) of the Act, were WMII, the applicant, and the Will County Board, the governing body of the municipality. 415 ILCS 5/40.1(b) (1998).

JOLIET ARSENAL HISTORY

The Joliet Arsenal is a United States Army ordnance facility built in the early 1940s. C5. [1] Under 16 USCS § 2901 *et seq*. (1998), the Illinois Land Conservation Act of 1995 (Conservation Act), the Joliet Arsenal will be divided into four different uses. C51. The four uses include a 19,000-acre tallgrass prairie known as the Midewin National Tallgrass Prairie; a 3,000-acre industrial park; a 982-acre National Veterans Cemetery; and a 455-acre site for a landfill owned by the County of Will. C51. The Conservation Act requires, subject to State and Federal regulation, that the landfill accept all of the Joliet Arsenal restoration and clean-up waste created by the clean-up of the ordnance facility. C51. This case addresses the Will County Board's approval of WMII's application for the landfill.

BACKGROUND OF THE APPLICATION'S APPROVAL

In addition to the provisions of Section 39.2 of the Act, the County of Will has its own rules and regulations regarding landfill siting procedures. The rules and regulations are in the Will County Siting Ordinance For Pollution Control Facilities (County Ordinance). Sierra Club Exh. 1. [2] The County Ordinance, among other things, orders the Will County Board to appoint three Will County Board members to serve on a Pollution Control Facility Committee (Committee) for, *inter alia*, the purpose of the public siting hearings.

On June 2, 1997, the County of Will awarded WMII a contract to construct a new municipal solid waste landfill. [3] Tr. at 119. In February of 1998, the County of Will issued a request for proposals (RFP) seeking a consulting and engineering firm to advise the Will County Board, Committee, and Will County Land Use Department Waste Services Division staff (County Staff) regarding WMII's anticipated filing of its landfill siting application. LALC Exh. 2 at 2. On March 19, 1998, the County of Will hired the firm of Engineering Solutions to be the advisor to the Will County Board, Committee, and County Staff. LALC Exh.3.

On August 14, 1998, WMII filed its application to construct the landfill. The application consists of 4,744 pages of descriptive and technical information regarding the proposed landfill. C1-4744.

The site of the proposed landfill is approximately seven miles south of the city of Joliet and one mile east of the intersection of Route 53 and South Arsenal Road, within the property of the former Joliet Arsenal. C10, 64.

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[1] Citations to the Will County Board record will be cited as "C__." Citations to the transcript hearing held by the Pollution Control Board will be cited as "Tr. at __."

[2] Citations to the exhibits filed by petitioner Land and Lakes Company at the June 1 and June 2, 1999 hearing before the Board will be cited as "LALC Exh. __ at __." Citations to the exhibits filed by petitioner Sierra Club at the June 1 and June 2, 1999 hearing will be cited as "Sierra Club Exh. __ at __."

[3] For clarity, the Board will refer to the "County of Will" when referencing the governmental entity of Will County. The Board will refer to the local siting authority as "Will County Board."

The landfill site is designed to encompass 408 acres, with a 223 acre landfill footprint. The facility is proposed to accommodate 20 million tons of waste and to operate for 23 years. C64, 65.

On November 16, 18, 20, 23, and 25, 1998, and December 3, 4, and 7, 1998, a public hearing on the WMII application was held before Hearing Officer Larry Clark and the Committee. During the public hearing, WMII presented witnesses in support of the application. Those witnesses were a hydrogeologist, who addressed whether the landfill is located so as to protect the public health, safety, and welfare; a civil engineer, who testified as to the specific aspects of the landfill design, and how they relate to protecting the public health, safety, and welfare; an operator of another landfill, who testified regarding the operation of his facility, the plan of operations for this proposed facility, and whether the proposed facility is designed to minimize any danger to the surrounding area from fire, spills, or operational accidents; a real estate appraiser and consultant, who addressed the issue of compatibility with the surrounding area; a civil engineer, who addressed whether the facility would fall within the 100-year floodplain; a traffic engineer who testified regarding the traffic patterns to and from the proposed facility; the owner of a solid waste consulting firm, who testified regarding whether the proposed facility is consistent with the Will County Solid waste plan; and a civil engineer, who also testified that the facility is not within a regulated recharge area. C5028-5204, C5220-5415, C5482-5628.

In addition to the witnesses called by WMII at the Will County Board hearing, two witnesses testified in opposition to the facility. C5649-6432. Kevin Salam, a concerned citizen, called one witness, a geological scientist. Petitioners, Sierra Club, Midewin Tallgrass Prairie Alliance, Audubon Council of Illinois, and Illinois Audubon Society (collectively as Sierra Club), called the other witness, a professional geologist. Both witnesses testified regarding criterion two (whether the facility is so designed, located, and proposed to be operated so that the public health, safety, and welfare will be protected). No one testified in opposition to the application regarding the other eight criteria. Other members of the public gave comments at the hearing and filed written comments. C5207-5214, C5417-5476, C6935-7221. Members of the Committee and members of the public also participated in cross-examining witnesses. C4967-6471.

The last day of the County hearing was December 7, 1998. The public comment period expired 30 days later. On January 19, 1999, at the request of the Will County Board and pursuant to paragraph 12 of the County Ordinance, the County Staff submitted its "Final Report and Recommendations of Will County to the Pollution Control Facility Committee Concerning the Prairie View RDF Siting Application" (Olson Report). [4] C9344-9372, Sierra Club Exh. 1. The report was prepared by County Staff, the Will County Special Assistant State's Attorney, and Engineering Solutions. C9346. The report recommended 52 special conditions of siting. C9346. On February 5, 1999, the Committee adopted the Olson Report. Sierra Club Exh. 4 at 11.

On March 4, 1999, the Will County Board by a vote of 16-8 adopted ordinance #99-72 in which it found that WMII met its burden of proof on all nine criteria, and granted approval of the application, subject to 57 conditions. C9388-9399. Except for some modifications in the conditions recommended in the Olson Report, the Will County Board explicitly adopted the Olson Report "as the basis and reasoning for its decision to conditionally approve" the WMII application. C9392.

Three appeals were filed with this Board challenging the March 4, 1999 Will County Board decision. Sierra Club filed its appeal on April 6, 1999. Land and Lakes Company (LALC) filed its appeal on April 7, 1999. A third appeal was filed by Kathleen Konicki on April 8, 1999.

The three appeals were docketed as PCB 99-136, PCB 99-139, and PCB 99-140, respectively. By order of April 15, 1999, the Board consolidated the three appeals. By order of May 20, 1999, the Board dismissed PCB 99-140, the appeal filed by Kathleen Konicki.

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[4] The Olson Report is named after Dean Olson, the Waste Services Director of the Will County Land Use Department. C9344. The parties in this case consistently refer to the document as the Olson Report. Similarly, the Board will refer to the "Final Report and Recommendations of Will County to the Pollution Control Facility Committee Concerning the Prairie View RDF Siting Application," as the Olson Report.

In this consolidated appeal, petitioners allege that the proceedings before the Will County Board were fundamentally unfair, and, moreover, that the Will County Board's decisions on three of the nine statutory criteria are against the manifest weight of the evidence. [5] The three criteria that petitioners challenge are criteria two, three, and five, which provide:

> ii. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected (health, safety and welfare criterion);
>
> iii. the facility is located so as to minimize incompatib ility with the character of the surrounding area and to minimize the effect on the value of the surrounding property (incompatibility criterion); and
>
> v. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents (plan of operations criterion). 415 ILCS 5/39.2(a)(ii), (iii), (v) (1998).

For the reasons explained below, we find that the procedures used by the Will County Board comported with the principles of fundamental fairness, pursuant to Section 40.1 of the Act. 415 ILCS 5/40.1 (1998). Additionally, we find that the Will County Board's decision to grant the siting application is not against the manifest weight of the evidence. In this opinion, the Board will first address Sierra Club's claims, followed by LALC's claims.

SIERRA CLUB'S FUNDAMENTAL FAIRNESS ARGUMENTS

Sierra Club contends that the siting process was fundamentally unfair for several reasons. First, it asserts that the Will County Board unfairly considered evidence outside the record. Sierra Br. at 28. [6] In support of this claim, Sierra Club alleges that the Will County Board's use of the Olson Report was unfair because, *inter alia*, it was testimony that was filed after the record closed, or not filed at all. Sierra Br. at 28-29. Additionally, Sierra Club contends that the report references evidence and documents that were not properly placed in the record, and that the report contained uncross-examined expert testimony. Sierra Br. at 29.

The Sierra Club further contends that the Will County Board's reliance on the Olson Report was improper because the report was written by persons who helped draft WMII's application. Sierra Br. at 30. Further, Sierra Club argues that the burden of proof was improperly placed on the siting opponents. [7] Sierra Br. at 32. Sierra Club contends that these alleged incidents of unfairness, both alone and in combination, resulted in a fundamentally unfair siting process. Sierra Br. at 28.

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[5] In its April 6, 1999 petition in this matter, Sierra Club indicated that it intended to challenge a fourth criterion, criterion one, regarding whether the facility is necessary to accommodate the waste needs of the area intended to be served. Sierra Club has not subsequently pursued this challenge, and accordingly the Board need not further address this issue.

[6] Citations to Sierra Club's brief will be cited as "Sierra Br. at __." Citations to Land and Lakes' brief will be cited as "LALC Br. at __." Citations to the Will County Board's response brief to the Sierra Club brief will be cited as "County Resp. to Sierra Br. at __." Citations to the Will County Board's response brief to the LALC brief will be cited as "County Resp. to LALC Br. at __." Citations to Land and Lakes' reply brief will be cited as "LALC Reply Br. at __."

[7] Sierra Club raises an additional claim that this Board should prohibit siting authorities from giving substantial weight to expert reports that were not subject to cross-examination or rebuttal. Sierra Br. at 31. The Board interprets this claim to be a request and will address it within the context of Sierra Club's other claims regarding the Olson Report.

To cure the perceived fundamental unfairness, Sierra Club seeks a remand, so that Sierra Club can cross-examine the authors of the Olson Report. Sierra Br. at 3. However, Sierra Club also argues that a remand is unnecessary, because the Will County Board's decision that WMII satisfied the relevant criteria was against the manifest weight of the evidence. Sierra Br. at 3.

WILL COUNTY BOARD'S RESPONSE TO SIERRA CLUB

Evidence Outside the Record

The Will County Board denies that it considered evidence outside the record. Although the Will County Board acknowledges that the Olson Report was filed after the 30-day public comment period expired, the Will County Board asserts the report was filed as part of the record as required by the County Ordinance. County Resp. to Sierra Br. at 12, 14. The Will County Board also asserts that no one had a right to respond to the report, and that the report did not have to be filed as part of the public record. County Resp. to Sierra Br. at 12. Further, the Will County Board contends it is no different for the report to have been filed on the last day of the public comment period, or after the close of the public comment period, because regardless, no objector would have had the opportunity to respond to the report. County Resp. to Sierra Br. at 13. The Will County Board also argues that Sierra Club failed to present any evidence of prejudice as a result of the Olson Report being admitted after the public comment period closed. County Resp. to Sierra Br. at 24.

The Will County Board d enies that the report relied on evidence not admitted at the public hearing. County Resp. to Sierra Br. at 15. The Will County Board notes that Sierra Club failed to identify any new tangible evidence on which the report relied. County Resp. to Sierra Br. at 12. The Will County Board also asserts that the report was merely an analysis by Will County's technical advisors regarding the evidence at the hearing and the public comments. County Resp. to Sierra Br. at 16.

Olson Report Authors and Prefiling Review Process

The Will County Board further denies that the proceedings were fundamentally unfair because the Olson Report authors reviewed portions of the siting application before it was filed. County Resp. to Sierra Br. at 18. The Will County Board notes that Sierra Club failed to provide any legal authority for the assertion that county employees may not review the application and make suggestions before the application is filed. County Resp. to Sierra Br. at 18. The Will County Board further responds that case law makes clear that pre-application communications are irrelevant to whether a process is fundamentally fair. County Resp. to Sierra Br. at 19. Additionally, the Will County Board argues that there is no evidence that the Olson Report authors were biased on behalf of the applicant; and moreover, even if they were biased toward approving the application, fundamental fairness would not have been affected because the authors did not vote on the siting approval, and did not participate in the Will County Board's deliberations. County Resp. to Sierra Br. at 19.

Burden of Proof Not Shifted

The Will County Board also denies that the burden of proof was shifted to the objectors. County Resp. to Sierra Br. at 22. The Will County Board argues that Sierra Club does not provide any support for the claim. County Resp. to Sierra Br. at 22. Additionally, to the extent that Sierra Club relies on the Olson Report to sustain its claim, the Will County Board notes that the Olson Report authors had no authority to approve the application. Furthermore, no statements in the report suggest that the Olson Report authors thought that the burden of proof had shifted. County Resp. to Sierra Br. at 22. Lastly, the Will County Board argues that the minutes of the Will County Board meetings show that the Will County Board was aware the applicant had the burden of proof. County Resp. to Sierra Br. at 22.

Waiver

The Will County Board argues that Sierra Club has waived its request for a remand, because Sierra Club declined to depose the Olson Report authors prior to the hearing before this Board on June 1 and June 2, 1999.

County Resp. to Sierra Br. at 23. The Will County Board asserts that Sierra Club's lack of diligent discovery should not be rewarded with a remand so that Sierra Club can cross-examine the Olson Report authors. County Resp. to Sierra Br. at 23.

The Will County Board further argues that the Sierra Club has waived its claim that the Olson Report could not be filed after the public comment period. County Resp. to Sierra Br. at 23. The Will County Board asserts that the County Ordinance provides that the Committee may recommend that a report by a county department be filed. County Resp. to Sierra Br. at 24. This opportunity to request a report appears in the County Ordinance after the section explaining the 30-day public comment period. County Resp. to Sierra Br. at 24. Therefore, the Will County Board believes that Sierra Club was put on notice that a report may be filed, and Sierra Club failed to object to this procedure. County Board Resp. to Sierra Br. at 24.

WMII'S RESPONSE TO SIERRA CLUB

Olson Report Was Not Expert Testimony

WMII argues that neither Sierra Club, nor any party, had the right to respond to the Olson Report or cross-examine the authors of the report. WMII Resp. to Sierra Br. at 9. The Olson Report was an analysis and summary by County Staff of the testimony and evidence presented at the public hearing. WMII Resp. to Sierra Br. at 5. WMII argues that for the Olson Report to achieve its purpose of assisting the Committee, the report had to include the consideration of all the evidence presented, which included waiting for the hearing to conclude and the 30-day comment period to expire. WMII Resp. to Sierra Br. at 6. WMII denies that the report is an advocacy document submitted during the hearing process to support or oppose the siting request. WMII Resp. to Sierra Br. at 7.

WMII further argues that the Act does not permit the cross-examination of person s who submit written comments during the 30-day period after the last public hearing. WMII Resp. to Sierra Br. at 8. Therefore, WMII argues that even if the report had been filed immediately before the end of the 30-day public comment period, Sierra Club would have had no opportunity to cross-examine the authors, and no fundamental unfairness would result. WMII Resp. to Sierra Br. at 6.

Prefiling Process Fundamentally Fair

WMII argues that there is no evidence that the Olson Report authors wrote the a pplication submitted by WMII. WMII Resp. to Sierra Br. at 9. WMII also notes that although WMII considered all of the comments provided by the county's consultants, Engineering Solutions, WMII "only accepted or incorporated some of them." WMII Resp. to Sierra Br. at 9. WMII denies that the county instructed WMII what to include in the siting application. WMII Resp. to Sierra Br. at 10.

Additionally, WMII asserts that contacts between the applicant and the local government before filing the application are irrelevant to the question of whether the siting proceedings were conducted in a fundamentally fair manner. WMII Resp. to Sierra Br. at 10. Additionally, WMII asserts that the Will County Board had no contacts or communications with WMII regarding the siting application either before or after it was filed. WMII Resp. to Sierra Br. at 10. Moreover, Sierra Club had a full and fair opportunity to present its evidence, object to evidence, and cross-examine witnesses who testified during the siting hearing. WMII Resp. to Sierra Br. at 12.

ANALYSIS OF SIERRA CLUB'S FUNDAMENTAL FAIRNESS CLAIMS

As noted above, this Board is required under Section 40.1 of the Act to determine whether the procedures used by the local siting authority comport with the principles of fundamental fairness. The Board has previously addressed the meaning of fundamental fairness as it applies to Section 39.2 proceedings. See Citizens for Controlled Landfills, *et al.* v. Laidlaw Waste System, Inc. *et al.* (September 26, 1991), PCB 91-89, PCB 91-90; Gallatin National Company v. The Fulton County Board *et al.* (June 15, 1992), PCB 91-256; Daly v. Village of Robbins (July 1, 1992), PCB 93-52 and PCB 93-54. The manner in which the hearing is conducted, the opportunity to be heard, the

existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163, slip op. at 5.

In the instant case, Sierra Club challenges the fundamental fairness of the proceedings, based on the Olson Report. Before addressing the substance of petitioners' arguments, a brief recitation of some facts regarding the Olson Report is necessary. Pursuant to paragraph 11 of the County Ordinance, the public comment period closed 30 days after the public hearing ended on December 7, 1998. Sierra Club Exh. 1 at 4. Pursuant to paragraph 12 of the County Ordinance, on January 19, 1999, the Olson Report was submitted to the Will County Clerk's Office, by its authors: County Staff, the Will County Special Assistant State's Attorney, and Engineering Solutions. C9344-9345. Specifically, paragraph 12 of the County Ordinance states in pertinent part:

> Upon completion of the evidentiary hearing, the County departments, County Board members and the County Executive shall have reasonable time to file their final reports and recommendations with the County Board when requested by the Pollution Control Facility Committee . . . . Sierra Club Exh. 1 at 4.

The Olson Report contains a summary of both the witnesses' testimony and the filed public comments, as well as the recommendations of the report's authors. C9344-9372. On February 5, 1999, three weeks after the Olson Report was filed with the Will County Clerk, the Committee adopted the Olson Report as its recommendation to the Will County Board. Sierra Club Exh. 4 at 11. The Will County Board, in turn, adopted the Olson Report on March 4, 1999, "as the basis and reasoning for its decision." C9392.

Summary of Sierra Club's Claims

Sierra Club challenges the fundamental fairness of the proceedings, based on four aspects of the Olson Report. The four aspects are:

1. whether the Olson Report was timely filed;

2. whether WMII properly filed documents, which the Olson Report referenced, on the last day of the public comment period;

3. whether the Olson Report's authors' could review the application before it was filed; and

4. whether the Olson Report shifted the burden of proof to siting opponents.

For the reasons explained below, the Board finds that the Will County Board siting proceedings were fundamentally fair.

Filing of the Olson Report

Waiver. The Board finds that Sierra Club has not waived its claim that the post public comment filing of the Olson Report was fundamentally unfair. Generally, a party can, by inaction in the proceeding before the local siting board, waive its right to raise the issue on appeal to the Board. Material Recovery Corporation v. Village of Lake In The Hills (July 1, 1993), PCB 93-11, slip op. at 5-6, citing Fairview Area Citizens Taskforce v. IPCB, 198 Ill. App. 3d at 548, 555 N.E.2d at 1182-83. Because the County Ordinance does not specify when the report may be filed, however, the Board is not convinced that the County Ordinance sufficiently notified Sierra Club that a report might be requested and filed after the public comment period closed.

Additionally, the Will County Board cites no authority supporting its argument that notice that a report might be filed is sufficient grounds for a party to object to such a potential filing. Therefore, the Sierra Club's claim is not waived.

Timely Filing. For the reasons that follow, the Board finds that it was not fundamentally unfair that the Olson Report's authors filed the report after the public comment period closed.

The Act does not prohibit a county board from establishing its own rules and procedures governing conduct of a local siting process if the rules and procedures are not inconsistent with the Act and are fundamentally fair. See Waste Management of Illinois v. PCB , 175 Ill. App. 3d at 1036, 530 N.E.2d at 692-93. In the instant case, paragraph 12 of the County Ordinance authorized county departments, county board members, and the county executive to file final reports and recommendations with the Will County Board upon the request of the Committee. Sierra Club Exh. 1 at 4. Paragraph 12 does not specify when the Committee may request final reports and recommendations from the county departments, county board members, and the county executive, nor does it specify when the reports must be filed. Sierra Club Exh. 1 at 4. The Act does not contemplate the filing of such reports. Therefore, paragraph 12 of the County Ordinance is not inconsistent with the Act.

In addition to paragraph 12 being not inconsistent with the Act, the Board also finds that paragraph 12, which does not specify when final reports must be filed, is not fundamentally unfair. It is not disputed that a county board is entitled to hire a consultant to advise the county board. Fairview Area Citizens Taskforce v. IPCB , 198 Ill. App. 3d at 548, 555 N.E.2d at 1182; Material Recovery v. Village of Lake in the Hills (July 1, 1993), PCB 93-11. However, no cases specifically address whether a consultant's report must be submitted during the public comment period. In response to a question raised at the hearing before this Board, Charles Helsten, attorney for Will County, explained why the report was not filed until after the public comment period expired:

> [U]ntil it's requested, we can't submit it . . . . Here's the second reason, and again, this is my call. We possibly could have submitted something had we elected to during the public comment period before that closed. However, at that point in time, in my opinion, with knowing we have objectors, you're in a damned if you, damned if you don't scenario. If you submit it before you receive all public comment, you're open to the criticism that you did not consider all public comment. Tr. at 142-143.

The logic behind the filing of the report after the close of the public comment period, therefore, was to ensure that the siting authority would be able to consider all public comments. Approximately one page in the Olson Report was devoted to a summary of the public comments received. C9356. Based at least in part on the content of the public comments, the Olson Report recommended special conditions to the siting. C9356. In the instant case, filing the report after the close of the public comment period allowed the Committee to address the concerns expressed in the comments by recommending special conditions to siting. C9356.

Additionally, the filing of the report after the close of public comment did not prejudice Sierra Club by denying Sierra Club an opportunity to respond. Neither Section 39.2 of the Act, nor the County Ordinance create a right to respond to a public comment or expert report. Additionally, parties cannot cross-examine those who submit written comments. Southwest Energy Corporation v. Illinois Pollution Control Board , 275 Ill. App. 3d 84, 93, 655 N.E.2d 304, 310 (4th Dist. 1995). Therefore, even if the report had been filed during the public comment period, Sierra Club did not have a right to respond to the report, or cross-examine the Olson Report's authors.

Second, the Board rejects Sierra Club's argument that because the report was filed after the public comment period expired, the report was actually filed after the record was closed. Sierra Br. at 29. Sierra Club fails to cite any authority for the proposition that in a landfill siting process, the record in the proceeding is closed after the public comment period expires. The Board declines to make such a ruling here.

Third, the Board believes the report is not, as Sierra Club argues, "basically expert testimony that was not given to the Will County Board until well after the evidentiary record closed." Sierra Br. at 28. Rather, the Board has thoroughly read the Olson Report and finds that it is a summary of the testimony, the public comments, and recommendations from the authors of the report.

Document Filing

The Board also rejects Sierra Club's assertion that the Olson Report improperly includes references to evidence and documents that were not in the record. Sierra Club Br. at 29. First, Sierra Club alleges that the rebuttal testimony to criterion two was improperly rejected because it was based on the authors' "asserted leachate experience that was nowhere discussed in the hearing record." Sierra Br. at 29. The Board finds that the authors' expertise on leachate is not relevant to the fundamental fairness analysis. The Olson Report fairly reflected the testimony that was both for and against criterion two. C9347-9357. The Will County Board was free to reject the Olson Report's recommendations.

Second, the Board is not persuaded by Sierra Club's claim that the Olson Report rejects the testimony of the two rebuttal witnesses to criterion two "based on certain documents that WMII improperly placed into the record on the last day of the comment period and numerous other unidentified documents that the Olson Report authors say they studied on their own." Sierra Br. at 29. The documents to which Sierra Club refers, but does not name, are the documents WMII filed on January 7, 1999. WMII included the documents as part of its memorandum in reply to Kevin Salam's brief opposing WMII's site location application. The documents are various federal documents prepared by or for the U.S. Army. C7941-C9307.

Sierra Club alleges WMII violated the County Ordinance when WMII filed the documents on January 7, 1999. Sierra Br. at 29. The relevant provision of the County Ordinance states:

> Any additional exhibits to be used by the applicant during the public hearing and not a part of the application shall be submitted at least twenty-four (24) hours prior to the commencement of the public hearing. Any additional exhibit used by the applicant, that in any way changes information provided with the application, or provides information not submitted as a part of the application, shall be considered an amendment to the application and all sections of this Ordinance pertaining to amendments shall take effect. Sierra Club Exh. 1 at 5.

The Board has previously held that it is without statutory authority to compel enforcement of a local ordinance. Stephen A. Smith v. City of Champaign (August 13, 1992), PCB 92-55, slip op. at 4, citing Citizens for Controlled Landfills v. Laidlaw Waste Systems (September 26, 1991), PCB 91-89 and 91-90 (cons.), slip op. at 5-6. However, if a petitioner argues that an alleged failure to follow a local ordinance rendered a proceeding fundamentally unfair, the Board will review the alleged failure on that basis. Stephen A. Smith v. City of Champaign (August 13, 1992), PCB 92-55, slip op. at 4, citing Citizens for Controlled Landfills v. Laidlaw Waste Systems (September 26, 1991), PCB 91-89 and 91-90 (cons.), slip op. at 5-6.

Assuming that Sierra Club's contention raises a fundamental fairness issue, the Board finds that no fundamental fairness occurred. The transcripts of the Will County hearing show that Sierra Club knew that WMII experts relied on the documents prepared by or for the U.S. Army, some of which WMII submitted on January 7, 1999. Specifically, WMII's expert, Joan Underwood testified, in part:

> The site, the arsenal has been under investigation looking at environmental conditions for over 30 years. During this 30 years up until this point, about $25 million has been spent trying to understand the environmental conditions at this site; and in that process, over 50 consultants or governmental agencies have looked at that data or helped to collect it so there's been extensive work that's been done at the arsenal in relationship to understanding environmental conditions in the area. C5483

Additionally Underwood testified:

> Two, the Army has conducted numerous investigations across the arsenal and they also lease the property for the agricultural activities. C5489.

Underwood further testified:

> My conclusion was based on three things . . . the extensive investigations that have been done by the Army and the result of those investigations. . . . C5499.

Moreover, both Kevin Salam and Jerry Heinrich, a member of the public, cross-examined Underwood regarding the U.S. Army reports:

> Salam: Okay. What we discussed in my previous round of questions and you're also relying on the Army's investigation?
>
> Underwood: Yes. C5518A.
>
> * * *
>
> Heinrich: Are you aware that the United States Forest Service expressed concern about the Army's conclusion that these areas that are not identified as contaminated sites are safe and not in need of further mitigation? C5526.

The record contains numerous other references to documents prepared by or for the U.S. Army. See C5485, 5489, 5491, 5492, 5499, 5513, 5518A, 5526, 5531, 5533-35, and 5538. Underwood also listed several U.S. Army reports as references in the expert report that she prepared and that WMII submitted with the application. C491-501.

Because the record is clear that the parties were on notice that Underwood relied on the documents filed on the last day of the public comment period, the Board finds that no fundamental unfairness occurred under the facts of this case. The Board notes, however, that under facts other than these, filings as late as occurred here could well introduce prejudice to the point of rendering an entire proceeding fundamentally unfair.

Olson Report Authors' Prefiling Review

Sierra Club alleges the record shows that the County Staff and the consultants played a substantial role in drafting the siting application. Sierra Br. at 4. To support its claim, Sierra Club notes that Christopher G. Rubak, a senior engineer with WMII, testified at the June 1, 1999 Board hearing, that the County Staff and the consultants reviewed portions of WMII's draft application before the application was filed. Sierra Br. at 4. Sierra Club further alleges that this prefiling process was fundamentally unfair, because as the authors of the Olson Report, the County Staff and consultants could not objectively review an application they had "largely preapproved . . . earlier." Sierra Br. at 30.

Testimony at the June 1, 1999 Board hearing included Mr. Rubak reading a paragraph from a letter from Charles Helsten to counsel for WMII, which said:

> Any preliminary information which WMII would like to submit and/or discuss with Will County (relating to issues such as compliance with all siting ordinance requirements, compliance with solid waste management plan, compliance with Section 39.2 of the Act, et cetera), which is technical/scientific in nature can be submitted to Donna Shehane and Engineering Solutions. . . . Designated representatives from Engineering Solutions and Donna will be more than happy to discuss any issues which may arise between now and the time that you prepare and file your siting application concerning the issues noted above. [8] Tr. at 50-51, LALC Exh. 1 at 2.

Rubak further testified that WMII followed this procedure. Tr. at 51. He explained that Shehane wrote comments on the draft report, and that Rubak did not receive oral comments from her other than when they discussed her written comments. Tr. at 53. He further testified that comments from Engineering Solutions were

[8] Donna Shehane is a staff member of the Waste Services Division of Will County.

forwarded to him by Shehane, and that those comments were also written on the draft report submitted by WMII. Tr. at 54. Additionally, Rubak testified that he had about ten phone conversations with Engineering Solutions. Tr. at 55. Further, Rubak testified that he had contact with subconsultants retained by Engineering Solutions, and that generally the subconsultants' comments were written on the draft submitted by WMII. Tr. at 55.

Helsten explained that revisions were made to WMII's draft as a result of some, but not all, of the comments from Engineering Solutions and its subconsultants. Tr. at 56, 58. Additionally, draft reports for criteria two and five were resubmitted after revisions were made. Tr. at 56. All comments were considered by WMII. Tr. at 57. Lastly, Ruback did not know that the County Staff and engineers would later write a report to be filed with the Will County Board. Tr. at 59.

WMII responds that contacts between the applicant and the local government before the application is filed are irrelevant to the question of whether the siting proceedings were conducted in a fundamentally fair manner. WMII Resp. to Sierra Br. at 10, citing Residents Against A Polluted Environment v. County of LaSalle (June 19, 1997), PCB 97-139. WMII also notes that pursuant to E&E Hauling v. Pollution Control Board , 107 Ill. 2d at 42-43, 481 N.E.2d at 668, there is no inherent bias when a local government body is charged with both investigatory and adjudicatory functions. WMII Resp. to Sierra Br. at 11. WMII reasons from E&E Hauling that if the County of Will could have been an applicant requesting siting approval from the Will County Board, it was within the County of Will's legal right to provide comments on a draft application for the facility. WMII Resp. to Sierra Br. at 11.

The Will County Board responds that there is no evidence that the Olson Report authors were not neutral during the prefiling review process. County Resp. to Sierra Br. at 19. However, even if the authors were biased, they did not vote on the application, and therefore their participation in the prefiling review process was not fundamentally unfair. County Resp. to Sierra Br. at 19.

The Board rejects Sierra Club's claim that the authors of the Olson Report could not objectively review an application it had "largely preapproved. . . earlier." Sierra Br. at 30. First, there is no evidence that the County Staff and consultants "approved" the application during the prefiling review process. It was not until the Olson Report was filed on
January 19, 1999, that the County Staff and consultants' opinion of the application became evident.

Second, even if the County Staff and consultants somehow informally indicated approval of the application during the prefiling review process, the Board does not believe that as a result the process became fundamentally unfair. As the Will County Board notes, the County Staff and consultants neither voted on the siting approval, nor participated during the Will County Board's deliberation. County Resp. to Sierra Br. at 19.

Third, a consultant report or staff recommendation is not binding on the decision-maker. McLean County Disposal Company, Inc. v. County of McLean (November 15, 1989), PCB 89-108, slip op. at 5. Therefore, even if the County Staff and consultants did not review the application with objectivity, the Will County Board did not have to accept the Olson Report findings. The fact that the majority of the Will County Board accepted the findings does not substantiate Sierra Club's claim that County Staff and consultants were not objective after the prefiling review process.

Shifting the Burden of Proof

Lastly, Sierra Club asserts that the Will County Board's adoption of the Olson Report improperly placed the burden of proof on the objectors. Sierra Br. at 32. To support its claim, Sierra Club argues that the report rejects the opinions of Roberta Jennings and Charles Norris "largely because they allegedly failed to offer sufficient evidence to support their respective opinions that the flaws in WMII's analysis rendered WMII's experts' opinions unreliable." Sierra Br. at 32. Sierra Club interprets the Olson Report to place the burden of offering evidence on the opponents. Sierra Br. at 32. The Board disagrees with Sierra Club's interpretation of the Olson Report.

First, there is no evidence that the Will County Board believed the objectors had the burden of proof in this matter. The Olson Report is replete with the County Staff and consultants' observations that the evidence presented by WMII satisfied the siting criteria. C9347, C9356, C9358-9363. The Olson Report shows that the County Staff and consultants understood that it was the applicants' burden to satisfy the applicable criteria in Section 39.2(a) of the Act. The fact that the County Staff and consultants were unpersuaded by Jennings' and Norris' testimonies does not suggest, let alone prove, that the burden of proof shifted to the objectors.

Second, the minutes from the March 4, 1999 Will County Board meeting, at which the siting application was approved, show that the Will County Board members were aware of the burden of proof. Specifically, they were told that if they determined that the record meets the nine siting criteria, they must approve the siting. C9375. They were not told that the objectors had to disprove the evidence admitted at the siting hearing.

The minutes also show that County Board Member Kathleen Konicki suggested that WMII did not meet criterion two. C9378. Additionally, Will County Board Member Brandolino summarized what Board Member Konicki was recommending regarding Konicki's belief that criterion two had not been met through the burden of proof. C9378. The Board is convinced that these examples show there was no confusion regarding the burden of proof in this matter. Therefore, the Board finds there is no proof the Olson Report shifted the burden of proof to the objectors.

LALC FUNDAMENTAL FAIRNESS ARGUMENTS

Petitioner LALC argues that the siting process used by the Will County Board was rendered fundamentally unfair by activities conducted prior to the submission of WMII's siting application. LALC Br. at 6. Specifically, LALC alleges that the siting process was fundamentally unfair because the County Staff and consultants hired to review the application, reviewed and commented on WMII's application prior to its filing. LALC Br. at 6-7. LALC argues that the public did not have the opportunity to comment on the application until after "the County had completed its extensive review of the draft application." LALC Br. at 7. The result of the prefiling review process, LALC asserts, essentially transferred the burden of proof from the applicant to the objectors, because by engaging in the prefiling process, "the County gave its stamp of approval to WMII's siting application," and the objectors had to disprove the veracity of the application. LALC Br. at 7.

WILL COUNTY BOARD'S RESPONSE TO LALC

The Will County Board disputes LALC's claim that the prefiling review process was fundamentally unfair. The Will County Board first notes that the prefiling review process was never revealed to the Will County Board. County Resp. to LALC Br. at 6. Furthermore, the Will County Board argues that the County Staff acted independently and did not participate in the Will County Board's decision. County Resp. to LALC Br. at 8. Although the Will County Board acknowledges that County Staff and their consultants preliminarily reviewed parts of WMII's application before it was filed with the Will County Board, the Will County Board notes that WMII was not obligated to adopt any of the County Staff's suggestions. County Resp. to LALC Br. at 7.

The Will County Boar d also disputes LALC's claim that the prefiling review process essentially transferred the burden of proof to the objectors. The Will County Board argues that LALC fails to present any evidence to support its claim. County Resp. to LALC Br. at 13. The Will County Board notes that to establish a claim of a violation of fundamental fairness, LALC must show how the proceeding was unfair and how LALC was prejudiced by the unfair action. County Resp. to LALC Br. at 13. The Will County Board contends that the evidence of the prefiling review process fails to show that the burden of proof shifted to the objectors. County Resp. to LALC Br. at 13.

The Will County Board also argues that LALC has waived its argument regarding fundamental unfairness, because LALC failed to object at the proceedings. County Resp. to LALC Br. at 10. The Will County Board argues that a claim of bias or partiality of an administrative agency must be promptly asserted upon knowledge of the

alleged disqualification. [9] County Resp. to LALC Br. at 10, citing E & E Hauling, Inc. v. Pollution Control Board , 107 Ill. 2d at 38, 481 N.E.2d at 666.

WMII'S RESPONSE TO LALC

Prefiling Review Process Not Fundamentally Unfair

WMII responds to LALC's claims by asserting that LALC fails to show how it was prejudiced by the prefiling review process. WMII Resp. to LALC Br. at 9. WMII asserts that the prefiling review did not prohibit anyone from analyzing the application, objecting to the evidence contained in the application, or presenting evidence. WMII Resp. to LALC Br. at 9. Additionally, WMII notes that LALC has not claimed that it was deprived of a fair opportunity to present evidence, object to evidence presented, and cross-examine witnesses, which WMII asserts are the "essence" of fundamental fairness. WMII Resp. to LALC Br. at 9.

No Prior Approval Before Application Filed

WMII alleges that LALC's allegation that the application was preapproved before it was filed is groundless. WMII Resp. to LALC Br. at 10. WMII argues there is no evidence that the Will County Board prepared or approved the siting application. WMII Resp. to LALC Br. at 10. WMII further notes that the fact that the hearing lasted seven days, and approval was subject to 57 conditions, belies LALC's claim. WMII Resp. to LALC Br. at 10-11. Finally, WMII argues that neither the consultants nor the County Staff was the decision-maker, therefore they could not have approved the application before it was filed. WMII Resp. to LALC Br. at 11.

Act Does Not Authorize Review of Procedures Before Application Is Filed

WMII acknowledges that the Act allows for the consideration of the fundamental fairness of the procedures used by the county board in reaching its decision. WMII Resp. to LALC Br. at 12. The consideration, however, requires that the application first be filed. WMII Resp. to LALC Br. at 12. Therefore, WMII contends that the Act does not authorize the review of legislative acts in procedures before the siting application is filed. WMII Resp. to LALC Br. at 12. WMII argues that LALC fails to offer any compelling legal or policy reasons to justify a departure from the Act's plain language. WMII Resp. to LALC Br. at 13.

ANALYSIS OF LALC'S FUNDAMENTAL FAIRNESS ARGUMENTS

Waiver

The Illinois Supreme Court addressed the issue of waiver in E&E Hauling :

> Generally, of course, a failure to object at the original proceeding constitutes a waiver of the right to raise the issue on appeal. People v. Carlson , 79 Ill. 2d 564, 576-77, 404 N.E.2d 233, 238-39 (1980). 'A claim of disqualifying bias or partiality on the part of a member of the judiciary or an administrative agency must be asserted promptly after knowledge of the alleged disqualification.' Duffield v. Charleston Area Medical Center, Inc. , 503 F.2d 512, 515 (4th Cir. 1974). The basis for this can readily be seen. To allow a party first to seek a ruling in a matter, and upon obtaining an unfavorable one, permit him to assert a claim of bias would be improper. E&E Hauling , 107 Ill.2d at 38-39, 481 N.E.2d at 666.

The Board finds that LALC has not waived its fundamental fairness claim. The Board believes the instant case differs from E&E Hauling in that LALC did not sufficiently know about the prefiling review procedure to raise the claim at hearing. LALC alleges that it was not fully informed of the prefiling review and comment process. LALC

[9] LALC alleges it does not claim that the prefiling review process showed predecisional bias by the Will County Board. LALC Br. at 7.

Reply Br. at 6. Moreover, LALC did not have a copy of the RFP until after the application had been approved. LALC Reply Br. at 6. In this instance, the Board does not find that parties must investigate documents predating the application filing date, such as the RFP, to preserve a claim of fundamental fairness. Therefore, the Board will address the claim.

Preapproval of Application

The Board rejects LALC's claim that the prefiling review process resulted in the County Staff and consultants "preapproving the application." The Act reserves the only relevant "approval" in this matter for the decision-maker, the Will County Board. 415 ILCS 5/39.2(a). The County Staff and consultants' opinions are irrelevant and not an issue for review by this Board. Additionally, the Board finds that the County Staff and consultants' only contact with the Will County Board was through the Olson Report, a copy of which was provided to each member of the Committee. Lastly, the Board notes that there is no contention that the Will County Board members themselves in any way participated in any of the prefiling review process, and thereby "preapproved" the application.

MANIFEST WEIGHT OF THE EVIDENCE ARGUMENTS

The remaining issue to consider is whether the decision of the Will County Board to grant siting approval is against the manifest weight of the evidence. Sierra Club contests the decision with respect to criteria two and three and LALC contests the decision with respect to criteria two and five. [10] For the reasons set forth below, the Board finds that the decision is not against the manifest weight of the evidence.

Sierra Club Arguments

Criterion Two

Sierra Club alleges that the testimony of Joan Underwood, Paul Wintheiser, and Dale Hoekstra, who testified for WMII as to criterion two, was unreliable. Sierra Br. at 8. Sierra Club's basis for challenging their testimony is that another expert, Roberta Jennings, testified that there were four fatal flaws in WMII's geologic and hydrogeologic analysis. Sierra Br. at 8. Additionally, Sierra Club's expert, Charles Norris, testified that WMII's experts' opinions that the application satisfied criterion two were based on computational mistakes and improperly performed or interpreted tests. Sierra Br. at 13-14.

Jennings' Testimony. Jennings testified that Underwood failed to address the findings in WMII's test borings that showed the presence of numerous permeable pathways and conduits at the site that would affect the monitoring system. Sierra Br. at 8-9, citing 5688-5691. Jennings also testified that Underwood failed to do horizontal plan views and contour mapping necessary to support Underwood's conclusion that borings containing sand and gravel did not constitute permeable pathways. Sierra Br. at 9, citing C5696-5698. Jennings further testified that Underwood applied an improper diffusion coefficient in the groundwater impact assessment computer model. Sierra Br. at 11, citing C5672-5680. Jennings alleged that the result of this improper coefficient was that WMII failed to realize that higher concentrations of constituents could occur closer to the liner and near the overlooked permeable pathways. Sierra Br. at 12, citing C5672-5680. Jennings also testified that WMII "made no attempt to accurately characterize the actual leachate to be expected from known waste consisting of bioremediated soil and construction debris from an arsenal known to contain TNT related byproducts." Sierra Br. at 12, citing C5670-5672. Finally, Jennings testified that WMII failed to do background monitoring in the

[10] In Sierra Club's petition for review filed with this Board on April 6, 1999, Sierra Club alleged that the Will County Board's decision was against the manifest weight of the evidence as to criteria one, two, three, and five. Petition for Review at 5. In their brief, Sierra Club alleges only that the county board's decision was against the manifest weight of the evidence as to criteria two, three, and five. Sierra Br. at 35. However, the brief only contains argument regarding criteria two and three. Sierra Br. at 35-37. No argument is made in the brief addressing criteria one and five. However, LALC challenges evidence regarding criterion five. LALC Br. at 12. Therefore, the Board will review criteria two, three, and five for purposes of this appeal.

overlooked permeable pathways, and as a result, failed to include the permeable pathways in the groundwater monitoring plan. Sierra Br. at 13, citing C5748-5749. Jennings concluded that WMII failed to comply with criterion two because WMII wrongly concluded that their groundwater monitoring plan was sufficient. Sierra Br. at 13.

Norris' Testimony. Sierra Club asserts that Norris' testimony further confirms that WMII failed to satisfy criterion two. In support of its claim, Sierra Club argues that Norris questioned WMII's figure for hydraulic conductivity (Sierra Br. at 14, citing C6156), its laboratory testing procedures (Sierra Br. at 15, citing C6145-6149), and both its hydrogeology and engineering (C6184).

Criterion Three

Sierra Club also alleges that WMII failed to satisfy criterion three, the incompatibility criterion, because WMII's application "hardly acknowledged" the Midewin National Tallgrass Prairie, and "did almost nothing" to show the landfill's compatibility with the prairie. Sierra Br. at 36. Sierra Club argues that criterion three was not satisfied because of real and potential threats to the Midewin National Tallgrass Prairie, including pollution of Prairie Creek, vector impact on the prairie ecosystem, and "the aesthetic harm done to the prairie landscape by a towering landfill on the horizon." Sierra Br. at 36-7.

Will County Board's Response To Sierra Club

Will County Board's response to Sierra Club's claims focuses on the fact that the expert testimony of Underwood, Wintheiser, and Hoekstra, was deemed credible by the Will County Board, and that the record, therefore, supports Will County Board's finding that criteria two and three were satisfied.

Criterion Two

Joan Underwood's Testimony. The Will County Board notes that WMII's expert, Joan Underwood, is a geologist and hydrogeologist with a Masters of Science in Hydrology. County Resp. to Sierra Br. at 31. Underwood testified that she reviewed information from the United States Geological Survey, the Illinois Geological Survey, the Illinois Water Survey, and previous studies concerning the Joliet Arsenal, to learn about the site's subsurface conditions. County Resp. to Sierra Br. at 31, citing C5033-5034. Underwood also designed a test boring and well installation program, and collected subsurface information on the soils, groundwater, and bedrock under the site. County Resp. to Sierra Br. at 31, citing C5034-5035. She determined that the site had three basic units: (1) the Wedron Group (clay diamicton, or glacial sediments of an unsorted nature); (2) the Mason Group (clay, silty clay, or silt); and (3) Silurian bedrock (a limestone-type material). County Resp. to Sierra Br. at 32, citing C5043, 5072-5073. Underwood also testified that she found small occurrences of sand and gravel between the Wedron and Mason Groups, which she believed was sporadic and discontinuous. County Resp. to Sierra Br. at 32, citing C5043, C5072-5073.

From her studies of the site, Underwood determined that the groundwater flowed from east to west. County Resp. to Sierra Br. at 32, citing C5044. She determined the flow by installing a series of wells in the uppermost aquifer and measuring the hydraulic head, *i.e.*, water levels in various wells. County Resp. to Sierra Br. at 32, citing C5043. Because the groundwater moves from a high hydraulic head to a low hydraulic head, Underwood was able to determine that the groundwater flowed from east to west. County Resp. to Sierra Br. at 32, citing C5044.

Underwood concluded that the facility was located so as to protect the public health, safety, and welfare. She based her conclusion on the following: (1) the site's consistent geology; (2) the series of low permeability formations underlying the site; and (3) the groundwater flow direction that permits an effective groundwater monitoring program be designed. County Resp. to Sierra Br. at 32, citing C5046.

The Will County Board noted that on cross-examination, Underwood explained that she tested for subsurface fractures by examining the different core holes for changes in color or staining, by examining the

weathering zones at the site, and by supplementing the vertical core holes with core holes placed at an angle. County Resp. to Sierra Br. at 32-33. The Will County Board further notes that Sierra Club suggests that Underwood's testimony regarding fractures in the soil was inconsistent with her testimony regarding the direction of groundwater flow. County Resp. to Sierra Br. at 33.

Lastly, the Will County Board noted that it assessed Underwood's credibility favorably, and it is not this Board's function to reassess credibility of witnesses. County Resp. to Sierra Br. at 36.

Paul Wintheiser Testimony. Paul Wintheiser testified that a liner system would act as a barrier to prevent liquid and gas from leaving the landfill. County Resp. to Sierra Br. at 34, citing C5111-5112. Wintheiser further testified that a leachate management system would be placed on top of the liner system. County Resp. to Sierra Br. at 34, citing C5112. Wintheiser explained that when waste was placed in the landfill, it would be covered daily with six inches of soil or another approved alternative material. County Resp. to Sierra Br. at 34, citing C5123. Further, a surface water management system would move water across the final cover, so that water cannot enter the final cover. County Resp. to Sierra Br. at 34, citing C5113. A gas management system will be used to remove gas from inside the landfill. County Resp. to Sierra Br. at 34, citing C5114. The facility's monitoring system will monitor groundwater, landfill gas, ambient air, and leachate. County Resp. to Sierra Br. at 34, citing C5130-5131. Because of these and other design systems, Wintheiser believed the facility was properly designed to protect the public health, safety, and welfare. County Resp. to Sierra Br. at 34, citing C5139.

Dale Hoekstra Testimony. Dale Hoekstra, who is the vice president for WMII, testified to the facility's operating plan. County Resp. to Sierra Br. at 35, citing C5363. Hoekstra testified that the facility would be fenced and locked, and that a sign would indicate the hours of operation, the name and operator of the facility, Illinois Environmental Protection Agency permit number, emergency response number, and types of materials accepted. County Resp. to Sierra Br. at 35, citing C5366-5367. Additionally, Hoekstra concluded there would not be a problem with vectors because daily cover will be used, and the active area would be only enough to manage the incoming waste. County Resp. to Sierra Br. at 35, citing C5387. Hoekstra concluded that the facility would be operated to protect the public safety, health, and welfare. County Resp. to Sierra Br. at 35, citing C5375.

Additional Response

The Will County Board asserts that Sierra Club argues that WMII's expert testimony must be given no weight simply because another expert disagreed. County Resp. to Sierra Br. at 41. The Will County Board notes that this Board's responsibility is not to re-weigh the evidence, but rather to determine whether the Will County Board's decision was against the manifest weight of the evidence. County Resp. to Sierra Br. at 40, citing Tate v. IPCB, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195. The Will County Board concludes that Sierra Club has failed to demonstrate that a result opposite to the Will County Board's decision on criterion two is clearly evident, plain, or indisputable. County Resp. to Sierra Br. at 43.

Criterion Three

As to criterion three, the Will County Board responds that two witnesses testified that 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 area. County Resp. to Sierra Br. at 43. First, William McCann, a real estate appraiser and consultant, testified that the facility was in a location that would minimize incompatibility with the character of the surrounding area, and that a landfill was not incompatible with the land's historic use for agricultural and industrial purposes. County Resp. to Sierra Br. at 43, citing C5542-5543. Additionally, McCann testified that the ultimate development of the site as a vista to view the prairie, and as a place for hiking paths, would minimize the incompatibility with the surrounding area. County Resp. to Sierra Br. at 43, citing C5543-5544.

Wintheiser testified that the prairie was considered in the facility's design to minimize the facility's impact on the surrounding area. County Resp. to Sierra Br. at 44, citing C5189. Wintheiser further testified that the traffic would go in the opposite direction of the prairie and the contours of the final cover system would be gradual and blend with the surrounding land forms. County Resp. to Sierra Br. at 44, citing C5189.

WMII's Response to Sierra Club

Criterion Two

WMII argues that the record contains "substantial and persuasive evidence" that the proposed facility has been designed, located, and proposed to be operated so as to protect the public health, safety, and welfare. WMII Resp. to Sierra Br. at 14, citing C5028-5104, 5104-5312, 5363-5414, and 5482-5540. Moreover, WMII argues that just because there may be some evidence which would have supported a contrary conclusion, the Board is still not authorized to re-weigh the evidence. WMII Resp. to Sierra Br. at 13.

Criterion Three

WMII argues that the Midewin Tallgrass National Prairie, as Sierra Club described, does not exist. WMII Resp. to Sierra Br. at 15. WMII argues that the character of the surrounding area described in criterion three refers to current land uses. WMII Resp. to Sierra Br. at 15. Additionally, WMII witnesses testified that the proposed facility is compatible with the character of the surrounding area and that WMII has proposed features such as the land form and buffers, which are intended to minimize the possible visual and operational impacts of the facility on the surrounding area. C5011-5012, C5542-5545. WMII further notes that no witnesses testified in opposition to criterion three. WMII Resp. to Sierra Br. at 15. WMII argues that the opposite ruling on criterion three is not clearly evident or indisputable. WMII Resp. to Sierra Br. at 15.

LALC Arguments

LALC argues that the Will County Board's decision that WMII satisfied criteria two and five is against the manifest weight of the evidence. As to criterion two, LALC alleges that WMII failed to demonstrate the liner design and other structural components of the facility are compatible with the leachate expected to be generated. Specifically, LALC contends that the leachate will not be typical municipal solid waste leachate because the waste that will be accepted at the facility includes the "construction debris, refuse and other materials related to any restoration and cleanup of the Arsenal property." LALC Br. at 10. LALC notes that the materials from the arsenal can contain "constituents that are not compatible with the proposed lining system." LALC Br. at 11. Furthermore, LALC argues that at the hearing before the Will County Board, William Karpas of LALC stated that the waste that the facility would receive "definitely does not sound like typical municipal solid waste to me." Sierra Br. at 10-11, C5201.

LALC also argues that the Will County Board's finding that WMII's application satisfies criterion five is against the manifest weight of the evidence. LALC Br. at 12. LALC asserts that WMII failed to provide a plan to identify and respond to ordnance and explosive wastes found on-site or in waste materials accepted from the Joliet Arsenal. LALC Br. at 12. LALC notes that the application states the facility would accept over 500,000 cubic yards of soil contaminated with explosives and over 700,000 cubic yards of old landfill wastes from the Joliet Arsenal. LALC Br. at 12. LALC contends that confirmatory testing is the only way to ensure that each load is not explosive, and no confirmatory testing will be done, unless it is required by permit. LALC Br. at 12.

Will County Board's Response to LALC

Criterion Two

The Will County Board argues that it weighed the evidence and determined that WMII met its burden for criterion two, despite the less credible conflicting testimony by witnesses for the objectors. County Resp. to LALC Br. at 16. The Will County Board noted the evidence presented by Underwood, Wintheiser, and Hoekstra, supports its finding. County Resp. to LALC Br. at 16-24. Specifically, Wintheiser explained that the liner system will have three layers and is designed to be compatible with typical municipal solid waste. C5118-5119, C5199-5202.

The Will County Board disputes LALC's assertion that the material from the clea nup of the Joliet Arsenal will produce a unique leachate or one that is not compatible with the liner system. County Resp. to LALC Br. at 19. The Will County Board notes that LALC's reliance on William Karpas' statement during his cross-examination of Wintheiser that "the army material did not sound like typical solid waste to him," should not be given much weight, because Karpas made that statement while he was the examiner, and thus was not subject to cross-examination. County Resp. to LALC Br. at 22.

The Will County Board also reasserts that it had the responsibility to assess the credibility of the conflicting expert opinions of Jennings and Wintheiser, and decided in favor of Wintheiser. County Resp. to LALC Br. at 22. For example, Jennings could not say why leachate would be different at this facility, even with the debris from the army site. County Resp. to LALC Br. at 23. Also, the Will County Board noted that it conditioned the approval of the application on the requirement that if there was any question regarding the contents of the load, the load may not be accepted until additional tests are run. County Resp. to LALC Br. at 23.

Criterion Five

The Will County Board argues that criterion five was satisfied because the facility is indeed designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. County Resp. to LALC Br. at 24. The Will County Board cites to evidence in the record to refute LALC's claim that criterion five was not satisfied. First, Hoekstra testified that employees will be required to go through a safety training program that will include proper safety techniques, equipment operation, and Occupational Safety and Health Administration standards. County Resp. to LALC Br. at 24, citing C5378. Additionally, various plans will be implemented addressing accident prevention, fire prevention and control, and spill prevention and control. County Resp. to LALC Br. at 24, citing C5378-5379. Moreover, in response to LALC's claim, Hoekstra explained that employees at the facility will be trained to identify ordnance before the facility is built. Resp. to LALC Br. at 25, citing C5412.

Additionally, the Will County Board notes that LALC does not support its claim with evidence from the record that "it is impossible to visually identify explosive constituents in soil contaminated with explosives." County Resp. to LALC Br. at 25, quoting LALC Br. at 12. Moreover, Hoekstra testified that the Army will have to document that the waste is safe for disposal at the facility before it is received. County Resp. to LALC Br. at 25, citing C5406-5407.

WMII's Response to LALC

Criterion Two

WMII responds that LALC's contentions regarding criterion two are "based on speculation that the liner might not be compatible with the leachate expected to be generated." WMII Resp. to LALC Br. at 15. WMII notes that LALC admits that the leachate's effect on the liner is "unkown." WMII Resp. to LALC Br. at 15. WMII further notes that no expert testified that the liner was deficient or violated governmental requirements. WMII Resp. to LALC Br. at 15.

Criterion Five

WMII responds that witnesses testified that the plan of operation for the facility has been designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. WMII Resp. to LALC Br. at 17. WMII argues that the standard is not the guarantee of an accident-proof facility, but the minimization of potential danger. Industrial Fuels & Resources v. Pollution Control Board , 227 Ill. App. 3d, 592 N.E.2d 148, 157-158 (1st Dist. 1992). WMII further argues that an opposite ruling is not clearly evident or indisputable. WMII Resp. to LALC Br. at 17.

ANALYSIS OF MANIFEST WEIGHT OF THE EVIDENCE ARGUMENTS

Criterion Two

This Board finds that the Will County Board's decision that the requirements of criterion two were met was not against the manifest weight of the evidence. The determination of whether the proposed facility is so designed, created, and proposed to be operated that the public health, safety, and welfare would be protected requires an assessment of the credibility of expert witnesses. Fairview Area Citizens Taskforce v. Pollution Control Board, 198 Ill. App. 3d at 552, 555 N.E.2d at 1185. In the instant case, the Will County Board decided in favor of WMII's witnesses. Although Jennings and Norris disagreed with WMII's witnesses, it is not the function of this Board to re-weigh evidence or reassess credibility. This Board is not free to reverse simply because the Will County Board credits one group of witnesses and not another group. Fairview Area Citizens Taskforce v. Pollution Control Board , 198 Ill. App. 3d at 550, 555 N.E.2d at 1184. The Board finds that the Will County Board could reasonably have placed its reliance on the testimony of Underwood, Wintheiser, and Hoekstra, and the corresponding evidence in the application.

Regarding LALC's allegation that WMII failed to demonstrate the liner design and other structural components of the facility are compatible with the leachate expected to be generated, the Board finds that Wintheiser's testimony was adequate, and that the Will County Board sufficiently relied on the testimony. The Board finds that Will County Board's decision regarding criterion two was not against the manifest weight of the evidence.

Criterion Three

Criterion three requires an applicant to show that it has done or will do what is reasonably feasible to minimize incompatibility with the character of the surrounding area. Waste Management of Illinois, Inc. v. Pollution Control Board , 123 Ill. App. 3d 1075, 1090, 463 N.E.2d 969, 980 (2d Dist. 1984). This requirement does not require the applicant to choose the best possible location or to guarantee that no fluctuation in property value occurs. Clutts v. Beasley , 185 Ill. App. 3d 543, 547, 541 N.E.2d 844, 846 (5th Dist. 1989).

Again, the Board cannot re-weigh the evidence or the credibility of the witnesses. The Board finds that Will County Board's decision is consistent with the manifest weight of the evidence. The record contains sufficient evidence upon which the Will County Board could reasonably have placed its reliance concerning WMII's effort to minimize incompatibility with the character of the surrounding area. Two witnesses testified for WMII, and none testified in opposition to criterion three. The Board finds that Will County Board's decision regarding criterion three was not against the manifest weight of the evidence.

Criterion Five

Criterion five requires the applicant to show that there is a plan of operations for the facility that is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. 415 ILCS 39.1(a)(v) (1998). LALC asserts that WMII failed to provide a plan to identify and respond to ordnance and explosive wastes found on-site or in waste materials accepted from the Joliet Arsenal. The Board finds that the record contains sufficient evidence upon which the Will County Board could have reasonably placed its reliance concerning WMII's plan to minimize the danger to the surrounding area from fire, spills, or other operational accidents. WMII's application contains an emergency action plan. C666-670. Part of the plan includes instructing employees and contractors of the potential presence of ordnance and explosive wastes and what steps should be taken if they are discovered. C670. Further, Hoekstra testified that employees at the facility will be trained in the identification of ordnance before the facility is built. C5412. There was no testimony presented to the contrary. Therefore, the decision of the Will County Board was not against the manifest weight of the evidence.

CONCLUSION

The Board finds that the hearing conducted by the Will County Board regarding the matter of the application of Waste Management of Illinois, Inc., for siting approval for the proposed Prairie View Landfill was fundamentally fair. The Board additionally finds that the decision of the Will County Board to grant siting approval was not against the manifest weight of the evidence.

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

ORDER

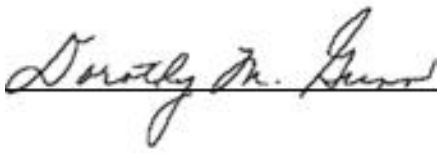
For these reasons presented in the Board's opinion, the Board affirms the March 4, 1999 decision of the Will County Board that granted Section 39.2 pollution control facility siting approval to Waste Management of Illinois, Inc., for the proposed Prairie View Landfill.

IT IS SO ORDERED.

Board Members K.M. Hennessey and M. McFawn concurred.
Board Member G.T. Girard abstained.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinio n and order was adopted on the 5th day of August 1999 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board