BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF KANKAKEE, Petitioner, v. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB 03-03-125 (Third-Party Pollution Control Facility Siting Appeal)
MERLIN KARLOCK, Petitioner, v. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB 03-133 (Third-Party Pollution Control Facility Siting Appeal)
MICHAEL WATSON, Petitioner, v. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB 03-134 (Third-Party Pollution Control Facility Siting Appeal)
KEITH RUNYON, Petitioner, v. COUNTY OF KANKAKEE, COUNTY BOARD OF KANKAKEE, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB 03-135 (Third-Party Pollution Control Facility Siting Appeal)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on June 23, 2003, we filed with the Illinois Pollution Control Board, the attached **WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION FOR LEAVE TO FILE RESPONSE BRIEF IN EXCESS OF PAGE LIMIT *INSTANTER* AND RESPONSE BRIEF OF WASTE MANAGEMENT OF ILLINOIS, INC.** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

By _____
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One of Its Attorneys

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PROOF OF SERVICE

Victoria L. Kennedy, a non-attorney, on oath states that she served the foregoing **WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION FOR LEAVE TO FILE RESPONSE BRIEF IN EXCESS OF PAGE LIMIT *INSTANTER* AND RESPONSE BRIEF OF WASTE MANAGEMENT OF ILLINOIS, INC.** on the following parties by hand delivery:

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and on the following parties both by facsimile at the facsimile numbers listed below and by depositing same in the U.S. mail at 161 N. Clark St., Chicago, Illinois 60601 on or before 5:00 p.m. on this 23rd day of June, 2003:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION FOR LEAVE TO FILE RESPONSE BRIEF IN EXCESS OF PAGE LIMIT *INSTANTER*

Respondent WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII"), by its attorneys, Pedersen & Houpt, moves the Pollution Control Board ("Board") for leave, pursuant to Section 101.302(k) of the Board's Procedural Rules, to file, *instanter*, its Response Brief in excess of 50 pages. In support thereof, states as follows:

1. On June 2, 2003, the four Petitioners in this matter filed their respective opening briefs in support of their petitions contesting site location approval granted by the Kankakee County Board ("Board") on January 31, 2003. WMII's response brief to all four opening briefs is due June 23, 2003.

2. Petitioner City of Kankakee ("City") filed an opening brief 26 pages in length. Petitioner Merlin Karlock ("Karlock") filed an opening brief 38 pages in length. Petitioner Michael Watson ("Watson") filed an opening brief 50 pages in length. Petitioner Keith Runyon ("Runyon") filed an opening brief 24 pages in length. All together, Petitioners' briefs total 138 pages to which WMII must respond in a single response brief.

3. Petitioners' briefs raise numerous issues involving a substantial record.

4. WMII seeks leave to exceed the 50-page limit on briefs because WMII is unable to adequately respond in 50 pages or less to the various and extensive factual and legal arguments contained in Petitioners' briefs. WMII's Response Brief is attached hereto.

5. Whereas Petitioners will have the additional opportunity to submit additional argument in their reply briefs, WMII's Response Brief is the only opportunity WMII will have to address all of the factual and legal arguments in support of site location approval.

WHEREFORE, Respondent WASTE MANAGEMENT OF ILLINOIS, INC. respectfully requests that the Board grant leave to file its Response Brief in excess of 50 pages *instanter*, and providing such other and further relief as the Board deems appropriate.

Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

By _____
One of Its Attorneys

Donald J. Moran
Lauren Blair
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(312) 641-6888

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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RESPONSE BRIEF OF WASTE MANAGEMENT OF ILLINOIS, INC. IN SUPPORT OF THE DECISION OF THE KANKAKEE COUNTY BOARD GRANTING SITE LOCATION APPROVAL FOR EXPANSION OF THE KANKAKEE LANDFILL

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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EXPANSION OF THE KANKAKEE LANDFILL

I. INTRODUCTION

Waste Management of Illinois, Inc. ("WMII") filed a Site Location Application ("Application") with the Kankakee County Board ("County Board") pursuant to Section 39.2 of the Illinois Environmental Protection Act ("Act")[1] on March 29, 2002, requesting local siting approval for an approximate 302-acre expansion of the Kankakee Recycling and Disposal Facility ("existing facility") located in unincorporated Kankakee County, Illinois. Due to the lack of notice on certain property owners, WMII submitted "the previously filed Site Location Application dated March 29, 2002" with additional materials to the Kankakee County Board on August 16, 2002. (WMII Pub. Hrg. Ex. 2; C43-C44.)

Public hearings on the Application were conducted on November 18 through December 6, 2002. When the public hearings commenced, nine motions to dismiss were filed. The Hearing Officer denied each of these motions. WMII presented eight expert witnesses at the public hearings who testified in support of the request and one witness who testified on the issue of notice to two property owners. Four witnesses testified at the public hearings in opposition to the request. On January 31, 2003, the County Board granted site location approval for expansion of the Kankakee Landfill. ("Expansion" or "Subject Site.")

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[1] See 415 ILCS 5/39.2 (2000).

Petitioners, Merlin Karlock ("Karlock"), Keith Runyon ("Runyon"), Michael Watson ("Watson") and the City of Kankakee ("City") have collectively challenged virtually every issue that may be raised in a Section 39.2 siting approval: (1) lack of jurisdiction for alleged failure to serve notice, to file the Illinois Environmental Protection Agency ("IEPA") operating record, to comply with the Kankakee County Regional Pollution Control Facility Ordinance ("Siting Ordinance"), and to comply with the Host Agreement, (2) fundamental unfairness due to alleged failure to file operating record, failure to comply with the Siting Ordinance, perjury, improper *ex parte* contacts, and prejudgment by the County Board, and (3) County Board's decision on criteria 1, 2, 3, 5, 6, 7 and 8 was against the manifest weight of the evidence. In support of these claims, Petitioners misconstrue governing law, mischaracterize the evidence in the record, misstate facts and speculate. This brief responds to this extensive array of claims by focusing on the more prominent contentions.[2]

A. Facts

1. Expansion Size and Capacity

The Expansion will be constructed on a 664-acre site. WMII proposed that the Expansion would include a 302-acre waste disposal area, with a disposal capacity of approximately 30 million tons. (App. at Crit. 2, pp. 1-1, 3-1; Crit. 1, p. 1.) The 302-acre footprint included a horizontal expansion of approximately 296 acres and an approximate 6-acre vertical overlay to the existing facility. The 664-acre Subject Site includes all 179 acres of the existing facility. (App. at Executive Summary, p. ES-1; Crit. 2, p. 1-1, and Drawing No. 1.) The 179-acre existing facility has a 51-acre area permitted for solid waste disposal. (App. at Crit. 2,

[2] Public Hearing Exhibits will be identified by party, (WMII Pub. Hrg. Ex. __.). Petitioners' Opening Briefs will be identified as (Watson Br. at __.), (Karlock Br. at __.), (City Br. at __.) and (Runyon Br. at __.). Public Hearing transcripts will be referenced by date, volume and page (__/__/02 Vol. __, Tr. at __.). IPCB hearings will be referenced by date and page (IPCB __/__/03, Tr. at __.). The Application and specific criterion will be identified as (App. at Crit.__, p. __.). The Host Agreement, found in the Application at Additional Information, Tab C, will be identified as (Host Agreement, p. __.)

p. 1-1.) In accordance with the County Board conditioned approval, the vertical overlay will not be developed. (see infra, p. 3.)

The Expansion will receive 500 tons per day ("tpd") of solid waste from Kankakee County and 3,500 tpd of out-of-county waste. (11/20/02 Vol. 9, Tr. at 88.) In accordance with the Amended and Restated Host Community Agreement ("Host Agreement"), the Expansion may not accept more than 7,000 tons of out-of-county waste on any given day, and, for any year, no more than 987,000 tons. (11/20/02 Vol. 9, Tr. at 88-90; Host Agreement, p. 7.) The latter amount will proportionately decrease as the amount of Kankakee County waste increases to ensure that WMII meets the disposal capacity guarantee. (Host Agreement, p.7.) There is no daily or annual limit on the disposal of waste generated in Kankakee County. The Expansion will provide disposal capacity for 27 years. (App. at Executive Summary, p. ES-1.)

2. January 31, 2003 County Board Approval

On January 31, 2003, the County Board granted site location approval for the Expansion in its "Decision Regarding the Application of Waste Management of Illinois, Inc. For Local Siting Approval of an Expansion of the Existing Kankakee Landfill" ("County Approval."). The County Approval included conditions, among which were a prohibition on the vertical overlay, limitations on the potential for, and management of, leachate recirculation, implementation of a radiation detector at the scale house, and use of automatic leachate level monitoring devices. (County Approval, pp. 2-4.) Despite the conditions imposed by the County Board, Petitioners argue technical issues which have become moot by the very conditions imposed by the County Board.

3. Existing Facility

Petitioners Watson, Karlock and City rely extensively on the existing facility to support many of their fundamental fairness and technical arguments. However, an expansion must be

considered separate and distinct from an existing facility in considering whether it meets the statutory criteria. When a request for local siting approval concerns the expansion of an existing facility, as in the instant case, it is well-settled that the relevant inquiry is whether the proposed expansion, as opposed to the existing permitted facility, satisfies the nine (9) statutory criteria. See American Bottom Conservancy v. Village of Fairmont City, PCB 01-159, slip op. at 25, 27 (October 18, 2001) (not appropriate to review existing facility when focus of criteria is on the expansion); Hediger v. D&L Landfill, PCB 90-163, slip op. at 12-13 (December 20, 1990) (existing facility not probative in deciding whether expansion meets criterion two).

The nine (9) statutory criteria govern whether a request for local siting is approved or disapproved. Citizens Opposed to Additional Landfills v. Greater Egypt Regional Environmental Complex, PCB 97-29, slip op. at 31-32 (December 5, 1996) ("C.O.A.L."). Therefore, although Section 39.2 provides that the local governing body "may also consider the previous operating experience" of the applicant as part of its review, any such experience is nevertheless not probative of whether siting approval should be granted based on the applicant's ability to show, that its request satisfies the nine (9) statutory criteria. Gallatin National Co. v. Fulton County Board, PCB 91-256, slip op. at 27 (June 15, 1992); Waste Hauling v. Macon County Board, PCB 91-223, slip op. at 11-12 (May 7, 1992).

The IEPA maintains documents relating to the operation of the existing facility. No documents have been submitted to the IEPA "pertaining to the proposed facility." 415 ILCS 5/39.2(c). Nevertheless, WMII elected to provide the County Board with three copies of the IEPA operating record. (WMII Pub. Hrg. Ex. 2; C43-C44.)

4. Host Agreement

WMII and Kankakee County entered into the Host Agreement on December 21, 2001. (11/18/02 Vol. 2, Tr. at 9-10, 13-15; 11/21/02 Vol. 10, Tr. at 109-110; Host Agreement, pp. 1-2.)

The effective date of the Host Agreement was the date upon which Kankakee County amended its Kankakee County Solid Waste Management Plan ("County Plan") to rescind the restriction upon receipt of "out-of-county waste," which was March 12, 2002. (Host Agreement, p. 3.) The Host Agreement specifically provides:

1. "Nothing in this Agreement shall affect or obviate the County's obligation under 415 ILCS 5/39.2 to fairly and objectively review and decide the Siting Application to be filed by Waste Management." (Host Agreement, p. 2.)

2. "The County's Minimum Host Fee for each full calendar year following the Effective Date of this Agreement until the commencement of operations in the expansion area shall be five hundred thousand dollars ($500,000)." (Host Agreement, p. 5.) Thereafter, once operations in the expansion area commence, "any payment made by Waste Management pursuant to its annual minimum guaranteed payment shall be deducted from royalties to be paid..." (Host Agreement, p. 6.)

If siting approval is denied, there is no refund of this payment. No granting of siting approval is guaranteed. (Host Agreement, p. 1.) WMII was obligated under the terms of the Host Agreement to make the $500,000 payment in the calendar year following its effective date, whether or not siting approval was granted.

Included in the Host Agreement is WMII's proposed property value guaranty program and domestic water well protection plan for properties located within 1,500 feet of the Expansion. (11/21/02 Vol. 10, Tr. at 86-88; Host Agreement, pp. 15-16.) WMII will indemnify Kankakee County for any liability relating to the operation and closure of the Expansion. (Host Agreement, pp. 9-12.) WMII is obligated to provide closure and post-closure care for as long as determined necessary by the IEPA, and will provide financial assurance for such closure. (11/21/02 Vol. 12, Tr. at 55-56, 74-76; 11/22/02 Vol. 13, Tr. at 90-91; Host Agreement, pp. 17-18.) WMII has also agreed to maintain environmental impairment liability insurance with minimum limits of $25 million per occurrence. (Host Agreement, p. 18.)

B. Town & Country Kankakee Regional Landfill

Petitioner Karlock asks this Board to take judicial notice here of the arguments and record in County of Kankakee v. City of Kankakee, PCB 03-31, 03-33, 03-35 (cons.), (January 9, 2003), and argues that the Subject Site is "functionally the same as the one found unsafe" in County of Kankakee. However, the Application for the Expansion and the application for the new landfill in the City of Kankakee are fundamentally different.

Town & Country Utilities, Inc. (" Town & Country") filed its siting application for the Kankakee Regional Landfill, LLC with Petitioner City on March 13, 2002. ("T&C Application.") Town & Country received siting approval from the Kankakee City Council on August 19, 2002. The City Council decision was reversed by this Board on January 9, 2003.

In County of Kankakee, the Board found that "Town & Country's phase one assessment of the Silurian dolomite was outdated and inaccurate." County of Kankakee, slip op. at 26. The Town & Country hydrogeologic assessment included a total of 19 borings, of which all but one boring penetrated a depth no greater than 6 feet into bedrock. Relying upon the one boring that penetrated 54 feet into bedrock, Town & Country argued that the Silurian dolomite under its proposed landfill was an aquitard. (T&C App. at p. 10122, Appendix G-3, Boring Logs.) A total of 19 piezometers and monitoring wells were installed at 14 locations to evaluate groundwater flow. (T&C App. at p. 10114.) Town & Country identified the weathered portion of the dolomite (up to 10 feet below the top of bedrock) as the uppermost aquifer at its site. (T&C App. at p. 10127.)

In contrast, WMII's hydrogeologic investigation of the Expansion consisted of 74 borings and the installation/evaluation of 34 groundwater characterization wells at 19 different locations. (App. at Crit. 2, Appendices B and D, and Drawing No. 5; 11/25/02 Vol. 19, Tr. at 89.) WMII evaluated 28 boring locations where bedrock was penetrated up to a depth of 90.0 feet into

bedrock. At various locations (although this is not a complete listing), bedrock was cored to the following depths: B-101 (43.5 ft.); B-103Comp (90.0 ft.); B-106, B-124, and B-128 (11.0 ft.); B-115 (14.0 ft.); B-119 (12.0 ft.); B-137 and B-142 (42.5 ft.); B-140 (15.5 ft.); B-150 (46.8 ft.). (App. at Crit. 2, Appendix B; 11/25/02 Vol. 19, Tr. at 93.) In addition, 22 groundwater characterization wells at 18 different locations were utilized to evaluate bedrock flow characteristics. (App. at Crit. 2, Appendix D and Drawing No. 5; 11/25/02 Vol. 19, Tr. at 93.) The site-specific geology was depicted on 17 geologic cross-sections. (App. at Crit. 2, Drawing Nos. 5-16.) WMII also investigated the dolomite for the presence of secondary permeability features, utilizing geophysical logging techniques (natural gamma and caliper logging) at 11 well locations. (App. at Crit. 2, p. 2-9 and Appendix B; 11/25/02 Vol. 19, Tr. at 119.)

The conclusion of the site-specific hydrogeologic evaluation for the Expansion was that "(t)he succession of Quaternary-age sediments overlying Paleozoic-age bedrock is consistent with the regional stratigraphic succession developed by the ISGS in various investigations (*e.g.*, Hansel and Johnson, 1996; Willman et al., 1975; Willman and Frye, 1970)." Dr. Ardith Hansel of the Illinois State Geologic Survey ("ISGS") visited the Subject Site during the site-specific investigation and concurred with the geologic interpretation of the site. (App. at Crit. 2, p. 2-12 and Appendix F; 11/25/02 Vol. 19, Tr. at 89-90.) Further, the "bedrock underlying the Subject Site corresponds to regional units that extend across northeastern Illinois and northwestern Indiana," and "(t)hick Silurian-age dolomite underlies the Subject Site and is regionally extensive." (App. at Crit. 2, p. 2-20, 2-21.)

The dolomite bedrock (weathered and non-weathered) is defined as the uppermost aquifer at the Expansion. (App. at Crit. 2, p. 2-21; 11/25/02 Vol. 19, Tr. at 93.) WMII *did not define any part of the dolomite bedrock as an aquitard*, as did Town & Country. (T&C App. at p. 10122.)

WMII concluded that "(v)ertical gradients within the uppermost aquifer are also downward." (App. at Crit. 2, p. 2-23.) Unlike Town & Country, WMII included an evaluation of both horizontal and vertical gradients at the Subject Site, and incorporated these gradients in performing a groundwater impact assessment for the Expansion. (App. at Crit. 2, pp. 2-23 to 2-25; 1/25/02 Vol. 19, Tr. at 97.)

Unlike the Town & Country facility, the Expansion will be founded within the Wedron Group 3 Lemont Formation, Yorkville Member, which consists of fine-grained, relatively low-plasticity soils generally classified as lean clay (CL) or silty clay (CL-ML). The Wedron Group 3 varies from 8 to 38 feet thick at the site, and is typically thicker than 20 feet across most of the area. (App. at Crit. 2, pp. 2-16, 4-1, 4-2.) The Expansion will be constructed in the Wedron Group 3, *above the uppermost aquifer.* In-situ Wedron and Mason Group materials will exist below the base of the landfill, separating the landfill from the uppermost aquifer. (App. at Crit. 2, pp. 2-21, 2-22, 4-1, 4-2.) The composite liner will consist of 3-feet of compacted low permeability soil with a maximum hydraulic conductivity of $1x10^{-7}$ cm/sec and a 60-mil geomembrane liner. (App. at Crit. 2, p. 4-1.) An average of 16 feet of in-situ materials will exist between the bottom of the composite liner and the bedrock. (11/26/02 Vol. 20, Tr. at 63.)

Town & Country proposed to excavate and remove the weathered portion of the dolomite, grout any fractures observed on the surface of the Silurian dolomite, place an average thickness of 4.5 feet of structural fill material, and then construct the bottom composite liner (3-feet compacted soil liner and 60-mil geomembrane) "immediately above the competent Silurian dolomite bedrock," within the zone designated as the uppermost aquifer at the site, and keying the "landfill liner into the competent dolomite bedrock." (County of Kankakee, slip op. at 26-27; T&C App. at p. 10137.)

Petitioner Karlock argues that "it is impossible to escape the conclusion that WMII's proposed site is hydrogeologically the same as the site rejected by this Board in County of Kankakee vs. City of Kankakee." (Karlock Br. at 35.) Petitioner Karlock's argument is without merit because, unlike the location and design of the Expansion, Town & Country did not accurately characterize the geology or the hydrogeology of its site, did not properly identify the uppermost aquifer, and did not evaluate for vertical flow in its groundwater model. Moreover, unlike the Expansion, which will be founded in the unconsolidated glacial till above the Silurian dolomite aquifer, the Town & Country facility was proposed to be placed directly on, and within, the aquifer.

II. ARGUMENT

STANDARD OF REVIEW

Generally, the Board must confine itself to the record developed by the local siting authority. Land & Lakes Co. v. Pollution Control Board, 319 Ill. App. 3d 41, 743 N.E.2d 188, 194 (3d Dist. 2000). Findings of fact should not be disturbed unless such findings are against the manifest weight of the evidence. Id., 743 N.E.2d at 193. Therefore, the County Board's factual determinations regarding whether WMII effected service on record property owners and satisfied the statutory criteria may not be disturbed unless contrary to the manifest weight of the evidence. The Board may hear new evidence relevant to the fundamental fairness of the proceedings only where such evidence necessarily lies outside of the record. Id. Such review is *de novo*.

A. The County Board Had Jurisdiction to Decide WMII's Site Location Application

Petitioners City, Watson and Karlock contend that the County Board lacked jurisdiction to decide WMII's Application because certain property owners did not receive pre-filing notice

in accordance with Section 39.2(b) of the Act; namely, Petitioner Merlin Karlock, Richard Mehrer, and Robert and Brenda Keller. (City Br. at 2-4; Watson Br. at 4-14; Karlock Br. at 6-7.) In addition, Petitioner City argues that the County Board lacked jurisdiction because (i) the Application was not filed within the deadline set forth in the Host Agreement; (ii) WMII did not comply with Section 39.2(c) of the Act or with certain provisions of the Siting Ordinance. (City Br. at 4-8.)

Petitioners' jurisdictional arguments that WMII failed to satisfy the notice requirements of the Act must be rejected because, as established by the record, WMII accomplished actual notice on Petitioner Karlock, Mr. Mehrer and the Kellers, as well as constructive notice on Mr. Mehrer and the Kellers, in compliance with the Section 39.2(b). With respect to Petitioner City's additional jurisdictional arguments, they, too, must be rejected because (i) WMII filed the Application prior to June 1, 2002 in accordance with the Host Agreement; and (ii) lack of compliance with Section 39.2(c) of the Act or a local siting ordinance does not divest a local governing body of jurisdiction to decide a request for site location approval.

1. WMII Served Pre-Filing Notice on Merlin Karlock, Richard Mehrer, and Robert and Brenda Keller in Accordance with Section 39.2(b)

Section 39.2(b) requires applicants to serve written notice of a request for site location approval on the record owners of property within 250 feet of the subject property in person or by registered or certified mail, return receipt requested, no later than 14 days prior to the filing of said request. 415 ILCS 5/39.2(b); Ash v. Iroquois County Board, PCB 87-29, slip op. at 7 (July 16, 1987). Compliance with Section 39.2(b) notice requirements confers jurisdiction on the local governing body to decide a site location application. Ogle County Board v. Pollution Control Board, 272 Ill.App.3d 184, 649 N.E.2d 545, 551-52 (2d Dist. 1995); ESG Watts, Inc. v. Sangamon County Board, PCB 98-2, slip op. at 6 (June 17, 1999).

WMII filed is Application on August 16, 2002. Therefore, pursuant to Section 39.2(b), WMII was required to serve notice on or before August 2, 2002. The record shows that WMII effected service on all record property owners in accordance with Section 39.2(b) of the Act. (App. at Additional Information, Tab A; WMII Pub. Hrg. Ex. 7A and 7B.) With respect to the property owners at issue, WMII effected service on them at their respective addresses as listed on the authentic tax records of Kankakee County as follows:

1. Merlin Karlock by certified mail, return receipt requested, and regular mail on July 25, 2002 (22 days before WMII filed its Application), and by personal service on July 29, 2002 (18 days before WMII filed its Application);

2. Richard Mehrer by certified mail, return receipt requested, and regular mail on July 25, 2002 (22 days before WMII filed its Application), and by posted service on July 31, 2002 (16 days before WMII filed its Application); and

3. Robert and Brenda Keller by certified mail, return receipt requested, and regular mail on July 25, 2002 (22 days before WMII filed its Application), and by posted service on August 1, 2002 (15 days before WMII filed its Application).

(a) Evidence Establishing Pre-Filing Service on Merlin Karlock

Petitioner City contends that notice to Petitioner Karlock was insufficient.[3] (City Br. at 3.) However, the record establishes that the certified mail receipt card was signed for by Mr. Randy L. Weger on July 27, 2002. (WMII Pub. Hrg. Ex. 7A.) It is well-settled that service is not defective where someone other than the addressee signed for and accepted the notice. DiMaggio v. Solid Waste Agency of Northern Cook County, PCB 89-138, slip op. at 9 (January 11, 1990); City of Columbia v. County of St. Clair, PCB 85-177, 85-220, 85-223 (cons.), slip op. at 13-14 (April 3, 1986). The original certified mailing slip and receipt card were tendered to,

[3] Petitioner Karlock does not make this claim.

and inspected by, Petitioner Karlock's attorney at the public hearing, who thereafter did not raise any further challenges concerning notice to Petitioner Karlock.

(b) Evidence Establishing Pre-Filing Service on Richard Mehrer

Petitioner City next argues that the record is bereft of evidence that WMII properly served notice on Mr. Mehrer, who was deceased at the time of service. (City Br. at 3-4.) Petitioner City appears to be arguing that unless WMII can prove that the deceased actually received the notice, presumably from the grave, Section 39.2(b) has not been satisfied and jurisdiction is not proper. However, at the risk of stating the obvious, it is a practical impossibility for a deceased person to accept service. Nevertheless, pursuant to the presumptions of law governing mailed service, notice was served on Mr. Mehrer in accordance with Section 39.2(b). The Illinois Supreme Court has determined that service via certified mail is presumed completed the date the notice is deposited in the mail. People ex rel. $30,700 U.S. Currency, 199 Ill. 2d 142, 766 N.E.2d 1084, 1090 (2002). Pursuant to Section 101.300(c) of the Board's Procedural Rules, service via regular mail is presumed completed four days after mailing. 35 Ill. Adm. Code, §101.300(c) (2003). Thus, the notice sent to Mr. Mehrer via certified mail on July 25, 2002 was completed on that day, and the notice sent via regular mail on July 25, 2002 was completed four days later on July 29, 2002. (App. at Additional Information, Tab A; WMII Pub. Hrg. Ex. 7A.)

(c) Evidence Establishing Pre-Filing Service on the Kellers

Petitioners City, Watson and Karlock argue that the Kellers did not receive notice because the certified mail receipt card was returned "unclaimed" and the Kellers did not accept personal service. (City Br. at 4; Watson Br. at 4-14; Karlock Br. at 6-7.) However, the evidence establishes that WMII effected notice on the Kellers by certified mail, regular mail and posted service. (App. at Additional Information Tab A; WMII Pub. Hrg. Ex. 7B.)

(i) Mailed Service Was Completed On The Kellers As Early As July 25, 2002

WMII sent notice to Robert Keller via certified mail on July 25, 2002.[4] (WMII Pub. Hrg. Ex. 7B.) WMII also sent separate notices to Robert Keller and Brenda Keller via regular mail on July 25, 2002. (WMII Pub. Hrg. Ex. 7B.) None of the regular mailings were returned undelivered, or undeliverable. (WMII Pub. Hrg. Ex. 7B.) Therefore, in accordance with the Board's Procedural Rule Section 101.300(c), service via regular mail was completed four days after mailing, that is, on July 29, 2002. Even though the certified mailing addressed to Robert Keller was returned "unclaimed" (WMII Pub. Hrg. Ex. 7B), the holding in People ex rel. $30,700 U.S. Currency establishes that service via certified mail was completed on July 25, 2002, the date of mailing.

(ii) Posted Service Was Effected On The Kellers On August 1, 2002

In addition to sending notice via certified and regular mailings, WMII hired a licensed process server (Mr. Ryan Jones) to personally serve notice on the Kellers. (App. at Additional Information, Tab A; WMII Pub. Hrg. Ex. 7B; 12/5/02 Vol. 28, Tr. at 5-6, 44, 46-47.) Between Monday, July 29, 2002, and Thursday, August 1, 2002, at various times throughout the day and evening, the process server made five separate attempts to personally serve the Kellers at their residence. (12/5/02 Vol. 28, Tr. at 7-15, 18, 21-23, 26-27, 35, 58-59.) On all but one of the five attempts, no one responded. On the third attempt, which occurred on the afternoon of Wednesday, July 31, 2002, a woman who refused to identify herself answered the Keller's door claiming that she was not Mrs. Keller and that the Kellers were not home. (12/5/02 Vol. 28, Tr.

[4] Contrary to Petitioner Watson's claims that there is no evidence identifying "from where they allegedly mailed the purported certified letter" and that there is no "actual evidence of ever being actually mailed" (Watson Br. at 11), WMII Public Hearing Exhibit 7B clearly demonstrates that the certified mailing was sent from Pedersen & Houpt by U.S. mail (post office zip code 60601), on July 25, 2002, and returned by U.S. mail on August 15, 2002.

at 10-11, 21-23, 26-27.) The process server attempted to leave the notice with the woman, but she refused to accept it. (12/5/02 Vol. 28, Tr. at 15, 22-23.) The process server told the woman that he would try back later and, indeed, returned to the Keller's home that same evening, but nobody answered the door. (12/5/02 Vol. 28, Tr. at 10-11, 35.) On the afternoon of Thursday, August 1, 2002, the process server made his fifth and final attempt to personally serve the Kellers at their residence. (12/15/02 Vol. 28, Tr. at 12-14.) Getting no response, the process server posted a copy of the notice on the door of the residence about five feet from the ground, securing the top and bottom of the notice with strips of 2 ¼ inch-wide packing tape. (12/5/02 Vol. 28, Tr. at 13-15.) The process server also sent separate notices to Robert and Brenda Keller via regular mail on that same date. (WMII Pub. Hrg. Ex. 7B.)

Prior to Mr. Jones' testimony, there was no evidence in the Application or in this record indicating that service on the Kellers was posted on their door. The affidavit of Mr. Jones only stated that notice was posted "in a conspicuous manner." (App. at Additional Information, Tab A.) However, Petitioner Watson's attorney knew it was posted on the door, because she asserted it in the "Motion to Declare WMII's Notice Insufficient to Provide the Kankakee County Board with Jurisdiction in This Matter." Notably, in the Motion, Petitioner Watson states that the Kellers did not observe the notice posted "on the door of the Keller's [sic] home." (See Motion, p. 2, C615.) The evidence strongly supports the conclusion that the Kellers saw the notice and conveyed that information to Petitioner Watson.

The Board has yet to address the issue of whether service by conspicuously posting notice to the record property address satisfies Section 39.2(b). However, the U.S. Supreme Court has recognized that posted notice is an acceptable form of service, particularly for proceedings that involve property. Greene v. Lindsey, 456 U.S. 444, 102 S. Ct. 1874 (1982.) In

discussing whether posted service is a reasonable manner of service for proceedings affecting property rights, the U.S. Supreme Court stated:

> The empirical basis of the presumption that notice posted upon property is adequate to alert the owner or occupant of property of the pendency of legal proceedings would appear to make the presumption particularly well founded where notice is posted at the residence. With respect to claims affecting the continued possession of that residence, the application of this presumption seems particularly apt: if the tenant has a continued interest in maintaining possession of the property for his use and occupancy, he might reasonably be expected to frequent the premises; if he no longer occupies the premises, then the injury that might result from his not having received actual notice as a consequence of the posted notice is reduced. Short of providing personal service, then, posting notice on the door of a person's home would, in many or perhaps most instances, constitute not only a constitutionally acceptable means of service, but indeed a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served through personal service is actually apprised of proceedings against him.

Id., at 453, 102 S. Ct. at 1879 (Emphasis added.)[5]

(iii) The Record Contains Sufficient And Reliable Evidence That The Kellers Received Notice Of WMII's Intent To File The Application, And The Kellers' Testimony To The Contrary Is Not Credible

Despite the evidence that WMII caused service of notice on the Kellers by certified mail, regular mail and posted service, the Kellers testified at the hearing that they did not receive notice by any manner of service. The Kellers' claims must be analyzed in the context of their relationship with Petitioner Watson, the evidence in the record that Petitioner Watson influenced the Kellers to claim they did not receive notice, and the blatant discrepancies in the Kellers' testimony.

Brenda testified at the public hearing that she and her husband do not receive regular mail at their home address. (12/5/02 Vol. 28, Tr. at 62.) Robert contradicted this statement and

[5] The Greene Court ultimately held that, under the particular circumstances of that case, merely posting notice in a low-income housing project where "process servers were well aware, notices posted on apartment doors in the area where these tenants lived were 'not infrequently' removed by children and other tenants before they could have their intended effect" could not be considered a reliable means of notice. Greene, 456 U.S. at 453-54, 102 S. Ct. at 1879-80.

admitted that the Kellers did, in fact, receive regular mail at their residence. (12/5/02 Vol. 28, Tr. at 85, 106-108, 130.) In fact, Robert testified at the public hearing that the Kellers received notice by certified mail of WMII's March 2002 application, which Robert knew had been withdrawn. (12/5/02 Vol. 28, Tr. at 62, 85, 106-108, 130-132.) Robert also testified that he was personally served at his residence in connection with the March 2002 application. (12/5/02 Vol. 28, Tr. at 107.) Robert admitted that after receiving notice of WMII's March 2002 application, Robert never picked up any other certified letters. (12/5/02 Vol. 28, Tr. at 132.)

The Kellers denied that they saw the posted notice on August 1, 2002, despite the fact that the notice had been securely and conspicuously affixed to the door of their residence since 12:19 p.m. that day. (12/5/02 Vol. 28, Tr. at 12-15.) Brenda testified that she came home on August 1 at around 4:00 p.m. and that she entered the home using the door on which the notice was posted. (12/5/02 Vol. 28, Tr. at 73-74.) However, she failed to provide any explanation as to how the posted notice disappeared from the door or came to be removed.

The Kellers admitted that they are personal friends of Petitioner Watson, and that Robert works for him. (12/5/02 Vol. 28, Tr. at 63-64, 104-105.) Robert began transporting waste for Petitioner Watson, without compensation, coincident with the start of the public hearing. (12/5/02 Vol. 28, Tr. at 63-64, 104-105.) Robert also admitted that two Saturdays before the public hearing began, he and Petitioner Watson developed a plan for the Kellers to sign affidavits that they never received notice. (12/5/02 Vol. 28, Tr. at 77-82, 111-112, 118, 121-124.) Petitioner Watson had affidavits prepared, but Robert and Brenda did not provide any information to the individual who prepared the affidavits, and in fact, did not even know who prepared them. (12/5/02 Vol. 28, Tr. at 78-83, 90, 95-97, 119-124.) Nor did the Kellers ever talk with anyone to verify the accuracy of the statements contained in the affidavits prior to signing them. (12/5/02 Vol. 28, Tr. at 78-83, 90, 95-97, 119-124.) Brenda testified that she

signed her affidavit without having received any explanation as to its content, and signed it only because Petitioner Watson asked her to. (12/5/02 Vol. 28, Tr. at 78-80, 90, 95-96.)

The Kellers again gave conflicting testimony about the circumstances surrounding the affidavits. Brenda's testimony that she did not speak to anyone about signing an affidavit was directly contradicted by Robert who testified that he had talked to Brenda about signing an affidavit during a conversation they had sometime between November 9th and November 18th. (12/5/02 Vol. 28, Tr. at 78-83, 90, 95-97, 123-124.)

In Ogle County and ESG Watts, cases where the applicant was found not to have complied with the notice requirements of Section 39.2(b), there was no evidence that the property owners knew of the contents of the notice and purposefully refused delivery or avoided personal service. By contrast, the record here contains substantial evidence that the Kellers knew the contents of the notice (they received notice of WMII's March 2002 application) and conveniently made themselves unavailable to be served, in person or via certified mail, with notice of WMII's August 2002 application. This case, unlike Ogle County and ESG Watts, also presents evidence of bias given the friendship and business relationship between Petitioner Watson, who is objecting to the Application, and the Kellers.

The evidence introduced at the public hearing established that the Kellers received notice by mail and posting. Their denials were not credible, in no small measure due to their relationship with Petitioner Watson, their contradictory statements about where they receive their mail, the preparation of their affidavits, and their inability to explain how they never received four regular mailings, a posting to the door of their residence and a notice of certified mailing from the U.S. Post Office. Despite the Kellers' denials, the County Board found that they received sufficient notice.

2. In Addition to Actual Notice, Section 39.2(b) of the Act Can be Satisfied by Constructive Notice

Even if, assuming *arguendo*, one were to conclude that Mr. Mehrer or the Kellers did not receive actual notice, 39.2(b) may be satisfied by constructive notice. A long line of Board decisions has held that actual receipt of notice is not required by Section 39.2(b). ESG Watts, slip op. at 9; DiMaggio, slip op. at 10; Waste Management of Illinois, Inc. v. Village of Bensenville, PCB 89-28, slip op. at 6 (August 10, 1989); City of Columbia, slip op. at 13. This principle applies regardless of whether a property owner refuses, avoids, or is simply unavailable to accept, attempts at service. ESG Watts, slip op. at 9; DiMaggio, slip op. at 10; Village of Bensenville, slip op. at 6; City of Columbia, slip op. at 13.

In City of Columbia, several property owners received notice after the pre-filing deadline whereas others did not receive notice at all. Id., slip op. at 13. In rejecting the petitioner's argument that jurisdiction was lacking because the applicant could not prove that notice was received by all property owners, the Board stated:

> The Board will not, at this time, construe the "cause to be served" language of Section 39.2 of the Act as absolutely requiring that notice be received by all parties 14 days prior to an application's filing. To so hold could, as a practical matter, prevent or greatly delay an application being considered by a county because of an applicant's inability to perfect notice: an opposing landowner could frustrate, or cause endless renoticing of, the filing of an application by refusing to receive or pick up mail, or by evading personal service.

Id.

DiMaggio and Village of Bensenville established that the principle articulated in City of Columbia was not limited to cases of refusal or deliberate avoidance of service, but also applied to cases where, despite the applicant's timely and diligent efforts to serve notice pursuant to Section 39.2(b), the intended recipient was simply absent or inadvertently unavailable to receive notice. In DiMaggio, the Board held that the applicant's inability to serve notice on a property

owner who "moved left no forwarding address" and another property owner who's certified mail was returned "unclaimed" did not deprive the local governing body of jurisdiction in light of the applicant's timely and diligent attempts to obtain service of notice. DiMaggio, slip op. at 10. Likewise, in Village of Bensenville, the Board held that a property owner's absence due to vacation would not frustrate jurisdiction where the applicant attempted to serve notice via certified mail seven days before the 14-day deadline and via personal service two days before the 14-day deadline. Village of Bensenville, slip op. at 6

Petitioners argue that the principle established in City of Columbia was overruled by the Ogle County decision, which held that the "return receipt requested" provision of Section 39.2(b) of the Act reflects the legislature's intent to require actual receipt of notice. Ogle County, 649 N.E.2d at 554. However, Petitioners' reliance on Ogle County is misplaced. The Ogle County court relied upon the case of Avdich v. Kleinert, 69 Ill. 2d 1, 370 N.E.2d 504 (1977), in holding that Section 39.2(b) of the Act required actual receipt of notice. However, the statute at issue in Avdich required "a *returned* receipt", as opposed to "returned receipt *requested.*" The Illinois Supreme Court's recent decision in People ex rel. $30,700 U.S. Currency, scrutinized Avdich and found that its analysis was not applicable to a statutory notice provision that required "return receipt requested." Id., 766 N.E.2d at 1090-91 The Illinois Supreme Court explained that while a statute requiring service by "a returned receipt" demands proof of actual receipt, a statutory requirement that mailed service be accompanied by a "return receipt requested" only demands proof that the request was made. Id.

The Board's consistent refusal to construe the "return receipt requested" language of Section 39.2(b) of the Act as requiring proof of actual receipt is in accordance with the holding in People ex rel. $30,700 U.S. Currency. Therefore, to the extent Ogle County relied upon

Avdich in holding that the language "return receipt requested" in Section 39.2(b) of the Act requires actual receipt of notice, it should not be followed.

Moreover, the Ogle County court explicitly stated that it was expressing "no opinion whether a potential recipient who refuses to sign a receipt of notice may be held to be in constructive receipt of the notice for purposes of the statute." Ogle County, 649 N.E.2d at 554. The Board in ESG Watts, however, directly addressed this issue and held that "the requirements of Section 39.2(b) can be met through constructive receipt." ESG Watts, slip op. at 9. The Board held:

> If a property owner does not receive the notice on time, he or she nonetheless may be deemed to be in constructive receipt of notice if the property owner refuses service before the deadline. Otherwise, a recalcitrant property owner could forever frustrate attempts to obtain a hearing on a request for siting approval. The Board finds that such a result is not consistent with Section 39.2.

Id. The Board ultimately found that the property owners were not in constructive receipt of the notice because the attempts at personal service were initiated on the day of the pre-filing deadline and afterwards, and there was no evidence that the property owners refused service. Id., slip op. at 10.

Thus, as the foregoing analysis makes clear, it is the applicant's timely and diligent efforts at serving notice, not the actual receipt of notice, that is determinative of whether Section 39.2(b) of the Act has been satisfied. Analyzed under this standard, there can be no question that WMII complied with Section 39.2(b).

(a) WMII Served Pre-Filing Constructive Notice on Richard Mehrer, Deceased, in Accordance with Section 39.2(b) of the Act

WMII initiated attempts to serve notice on Mr. Mehrer via certified and regular mail on July 25, 2002. (App. at Additional Information, Tab A; WMII Pub. Hrg. Ex. 7A.) WMII initiated attempts to personally serve Mr. Mehrer on July 29, 2002. In addition, service was

attempted on his wife, Frances Smet-Mehrer (even though she is not a record property owner) personally on July 29, 30, and 31, 2002, and via certified and regular mailings on July 26, 2002. (App. at Additional Information, Tab A; WMII Pub. Hrg. Ex. 7A.) On July 31, 2002, during a subsequent attempt at personal service, the process server learned through neighbors that Mr. Mehrer was deceased and his wife was in an undisclosed nursing home. (App. at Additional Information, Tab A; WMII Pub. Hrg. Ex. 7A.) At that time, the process server posted notice in a conspicuous manner on the property and mailed a copy of said notice to Mr. Mehrer at the record property address. (App. at Additional Information, Tab A; WMII Pub. Hrg. Ex. 7A.)

Thus, the record plainly establishes that WMII made timely and diligent efforts to serve notice on the deceased via certified and regular mail, and personal service. WMII's efforts were made sufficiently in advance of the 14-day deadline to satisfy Section 39.2(b) of the Act.

(b) WMII Served Pre-Filing Constructive Notice on the Kellers in Accordance with Section 39.2(b) of the Act

Petitioner Watson argues that WMII's attempts to serve the Kellers were not diligent or timely. However, WMII's repeated efforts to serve the Kellers through a variety of reliable means initiated 22 days before filing is sufficient to comply with Section 39.2(b).

(i) WMII's Attempts To Serve The Kellers Via Personal, Mailed And Posted Service Were Diligent

The Board has found that attempts to serve a property owner through both personal service and mailed service are sufficiently diligent to satisfy Section 39.2(b). DiMaggio, slip op. at 9-10. In this case, WMII made multiple attempts to serve the Kellers personally, by mail and by posting notice.

The process server made five separate attempts over four days to serve the Kellers. When the process server encountered someone other than the Kellers on the third attempt, he described the contents of the notice and stated that he would return that evening to serve the

Kellers. The Kellers either chose not to be at home in order to accept service, or were at home and evaded service by refusing to answer the door. Contrary to Petitioner Watson's statement, the process server was not required to contact the Kellers by telephone, seek out their neighbors in order to investigate their whereabouts, or run the license plate on the car that was parked outside of the Keller's residence. (Watson Br. at 11.) Given the evidence that indicates the Kellers were avoiding service, these suggested extra steps would not have assisted the process server in serving the Kellers.

WMII sent notices via certified mail to Robert, and via regular mail to Robert and Brenda. The process server also sent notices to both Kellers via regular mail. Thus, a total of five separate mailings were sent to the Kellers.

In total, 10 notices were sent or delivered to the Kellers.

(ii) WMII Initiated The Mailings And Personal Service In A Timely Manner

In order to be timely, attempts to serve notice must also be initiated sufficiently in advance to reasonably expect receipt by the 14-day pre-filing deadline. City of Columbia, slip op. at 13. Petitioner Watson's contention that WMII's efforts at initiating personal service 18 days before the filing and mailed service 22 days before the filing were untimely is simply wrong and contrary to Board decisions. In Village of Bensenville, the Board held that initiating service via certified mail 21 days in advance of filing constitutes a timely attempt to effect notice. Village of Bensenville, slip op. at 6. Moreover, Petitioner Watson has not cited to any case law that holds initiating personal service four days in advance of the 14-day deadline is not timely. Despite Watson's misreading of ESG Watts, the Board in that case did *not* hold that attempts at personal service four days before the 14-day deadline were unreasonable. Rather, the Board found that attempts to personally serve property owners on the deadline and afterwards was

untimely. ESG Watts, slip op. at 10. Although the applicant initiated certified mailings four days before the deadline, the Board did not render an opinion as to whether that was sufficiently timely. Therefore, Petitioner Watson's assertion that ESG Watts stands for the principle that initiating attempts at service four days before the 14-day deadline is erroneous. Notably, the Board has had the opportunity to hold that attempts at personal service two days before the 14-day deadline were not timely, but declined to do so. Village of Bensenville, slip op. at 3, 5.

In sum, the evidence established that WMII initiated significant efforts to serve notice on the Kellers sufficiently in advance of the filing to satisfy the notice requirements of Section 39.2(b). Thus, the County Board had jurisdiction to approve the Application.

3. The County Board Did Not Lack Jurisdiction as a Result of Any Alleged Failure to File the Application Before the Expiration of the Host Agreement

The City's next jurisdictional argument is that the County Board lacked jurisdiction due to WMII's alleged failure to file the Application prior to June 1, 2002 pursuant to the Host Agreement. WMII filed its Application on March 29, 2002. The City's contention that the Application was not submitted until August 16, 2002 is false. Due to the lack of pre-filing notice on certain property owners, the March 29th Application was re-submitted with additional materials on August 16th. (WMII Pub. Hrg. Ex. 2, C43-C44.) However, the August 16th submission of additional materials does not alter the fact that the Application was originally filed on March 29th, well in advance of the June 1st date.

Even if WMII had failed to file the Application within the time specified in the Host Agreement, the City has not cited any legal authority to support its proposition that such a failure would deprive the County Board of its jurisdiction. Compliance with a host agreement is not one of the criteria enumerated in Section 39.2(a) of the Act that must be met in order to confer

jurisdiction on the local governing body. Therefore, whether the Application was filed within the time set forth in the Host Agreement does not raise a jurisdictional issue.

4. The County Board Did Not Lack Jurisdiction as a Result of Any Alleged Failure to Comply with Section 39.2(c) of the Act, the Kankakee County Local Siting Ordinance or the Host Agreement

The City's final jurisdictional arguments are that the County Board lacked jurisdiction due to WMII's alleged failure to submit the IEPA operating record with the Application and failure to comply with certain provisions of the Siting Ordinance. However, the requirements of Section 39.2(c) of the Act are procedural, not jurisdictional. Tate v. Pollution Control Board, 188 Ill.App.3d 994, 544 N.E.2d 1176, 1191 (4th Dist. 1989). Rather, compliance with Section 39.2(c) of the Act, as well as with local siting ordinances, are issues of fundamental fairness. Id.; Waste Management of Illinois v. Illinois Pollution Control Board, 175 Ill. App. 3d 1023, 530 N.E.2d 682, 693 (2nd Dist. 1988); Daly v. Village of Robbins, Nos. PCB 93-52, 93-54 (cons.), slip op. at p. 6 (July 1, 1993). As such, these jurisdictional arguments raised by the City are contrary to well-established principles of law, and therefore, cannot succeed.

B. The Local Siting Procedures Were Fundamentally Fair

Petitioners argue that the County Board's local siting proceedings were fundamentally unfair due to (i) WMII's alleged failure to comply with Section 39.2(c); (ii) the County Board and WMII's alleged failure to comply with certain provisions of the Siting Ordinance; (iii) the alleged perjury of Patricia Beaver-McGarr; (iv) alleged improper *ex parte* contacts between the attorneys for the County Board and WMII; and (v) the County Board's alleged prejudgment of the Application.

While fundamental principles of due process apply to local siting procedures, such procedures are not required to comply with constitutional guarantees of due process. Daly v. Pollution Control Board, 264 Ill. App. 3d, 968, 637 N.E.2d 1153, 1155 (1st Dist. 1994). To

comport with fundamental due process, local siting proceedings must include the opportunity to be heard, a fair opportunity to present evidence, object to evidence and cross-examine witnesses, and impartial rulings on the evidence. T.O.T.A.L. v. City of Salem, 288 Ill.App.3d 565, 573-74, 680 N.E.2d 810, 818 (5th Dist. 1997); Daly, 637 N.E.2d at 1155.

Despite the arguments raised by Petitioners, they have presented no proof that the County Board's local siting procedures were in any way fundamentally unfair by failing to accord the requisite due process to Petitioners, other participants or the public, or that they, other participants or the public were prejudiced as a result of any unfairness.

1. The Proceedings Were Not Fundamentally Unfair Because WMII Complied with Section 39.2(c) of the Act, and to the Extent Certain Information Was Not Accessible, Petitioners Have Failed to Demonstrate Any Prejudice

The plain language of Section 39.2(c) requires applications to include: "all documents, if any, submitted as of that date to the Agency *pertaining to the proposed facility* ..." 415 ILCS 5/39.2(c) (emphasis added). As of August 16, 2002, there were no documents submitted to the IEPA pertaining to the Expansion, Indeed, there is no evidence establishing that the contents of the operating record of the existing landfill pertains to the Expansion. Thus, there were no IEPA documents that had to be filed with the Application.

Although there were no documents submitted to the IEPA pursuant to Section 39.2(c), WMII submitted the IEPA operating record of the existing facility with the Application on August 16, 2002. (WMII Pub. Hrg. Ex. 2; 11/18/02 Vol. 1, Tr. at 41-43; C2371-C2372.) In addition to being on file with the County Clerk's Office, the IEPA operating record was also available for public inspection prior to the commencement of the public hearing at the IEPA, Kankakee Library, Bourbonnais Library, Hoppel Central Library, and Bradley Library. (11/18/02 Vol. 1, Tr. at 43; IPCB 5/6/03, Tr. at 26-27, 33-34.) Although Petitioners admit that

the operating record, or at least portions of it, was available for public inspection with the County Clerk's Office, the IEPA and other public locations, they claim that the operating record was not *easily* accessible because portions of it were on microfiche, and the potential inability to read the microfiche rendered the proceedings fundamentally unfair. (City Br. at 5-7; Watson Br. at 17-21; Karlock Br. at 9-10.)

Even if it were true that the individuals identified by Petitioners experienced difficulty in obtaining the operating record, Petitioners are still required to show actual, resulting prejudice in order to succeed in their argument that the process was fundamentally unfair. Tate, 544 N.E.2d at 1191. In Tate, the applicant failed to attach certain IEPA documents to the application. Tate, 544 N.E.2d at 1191. The missing documents were on file with the IEPA and the petitioners knew the documents were available at that location. Id. In rejecting the petitioners' fundamental fairness argument, the court held that, because the petitioners and the public had the opportunity to review the documents before the proceedings, the petitioners could not demonstrate any prejudice as a result of the applicant's failure to comply with Section 39.2(c) of the Act. Id. The court reasoned that "any error which may have occurred [as a result of the applicant's failure to file the IEPA documents with the application] is harmless at best." Id.

As was the case in Tate, Petitioners here cannot dispute that the operating record was available for public inspection at various public locations before the public hearing began. If the operating record was not readily accessible at the County Clerk's Office prior to the hearing, it was certainly on file with the IEPA. Furthermore, by Petitioners' own admissions, the operating record was available for review at the County Clerk's Office by at least the first day of the hearing. (City Br. at 10; Watson Br. at 20; Karlock Br. at 10; IPCB 5/6/03, Tr. at 33-34.)

Petitioners cannot show any prejudice resulting from the alleged difficulties in reviewing the operating record. First, there has been no claim by any member of the public or the County

Board that they suffered prejudice as a result of not being able to access the operating record. (IPCB 5/6/03, Tr. at 35.) Second, Petitioners were given ample opportunity to evaluate the information in the operating record. Mr. Norris spent at least ten days extensively reviewing the operating record several weeks prior to testifying at the public hearing. (IPCB 5/6/03, Tr. at 35-36.) At the hearing, he provided his opinions about the significance of the information contained in the operating record and how that information related to the criteria. As Petitioner City acknowledged, "much of the substantive testimony at the siting hearing concerned the hydro-geologic characterization and monitoring of the existing facility as well as groundwater contamination originating in the existing facility." (City Br. at 7.)

In addition, Mr. Christopher Rubak, a licensed civil engineer employed by WMII, was made available for questioning by the participants and the public concerning the operating record. (11/25/02 Vol. 18, Tr. at 58-117; 11/25/02 Vol. 19, Tr. at 4-77.) Attorneys for Petitioners, in addition to various County Board members and other participants, engaged in significant cross-examination of Mr. Rubak on the contents of the operating record. (11/25/02 Vol. 18, Tr. at 60-117; 11/25/02 Vol. 19, Tr. at 4-80.)

The City contends that prior access to the operating record was necessary to resolve the "hotly debated" issue between the IEPA and WMII as to whether monitoring well exceedences at the existing facility constitute contamination. (City Br. at 7.) Of course, this issue is not relevant to whether the Expansion meets criterion two. Hediger, slip op. at 12-13. In addition, the purported "debate" between the IEPA and WMII concerning the existing facility is not relevant to WMII's Application for an expansion. Gallatin National, slip op. at 27. Nonetheless, there was not an issue between IEPA and WMII regarding monitoring well exceedences.

Because the operating record was available at various locations prior to the commencement of the hearing, and because the participants at the hearing had a fair opportunity

during the 13 days of public hearing to inspect the operating record, present witnesses and cross-examine witnesses concerning the operating record, any claimed prejudice to Petitioners or the public was cured. County of Kankakee, slip op. at 21-25.

2. Petitioners Have Failed to Demonstrate How the County Board and WMII's Alleged Failure to Comply with the Siting Ordinance Rendered the Proceedings Fundamentally Unfair

Petitioners City and Karlock next argue that the County Board's failure to issue a certification of completeness with respect to the Application in compliance with Subsection E of the Siting Ordinance, coupled with WMII's failure to provide detail regarding its closed facilities as requested by Subsections H(2)(c) and (d) of the Siting Ordinance, rendered the proceedings fundamentally unfair. Petitioners fail to mention that WMII provided information concerning closed facilities in the Application to satisfy Subsections H(2)(c) and (d) of the Siting Ordinance, and that WMII offered to provide additional information, which no one at the hearing requested. (11/25/02 Vol. 18, Tr. at 60, 100-101.) In any event, Petitioners' argument fails.

First, the Board has recognized that it is the exclusive province of the local governing body to compel compliance with its local siting ordinance. Daly, slip op. at 11; Smith v. City of Champaign, PCB 92-55, slip op. at 4-5 (August 13, 1992). The County Board reviewed the Application and determined that the Application complied with the Siting Ordinance, regardless of whether a certificate of completeness was issued.

Second, Petitioners have again failed to demonstrate how they were prejudiced by the County Board and WMII's alleged failure to strictly comply with the Siting Ordinance. See Waste Management, 530 N.E.2d at 693; Citizens For Controlled Landfills v. Laidlaw Waste Systems, Inc. ("Laidlaw"), PCB 91-89 and 91-90 (September 26, 1991). Petitioner Karlock asserts that prejudice resulted from the public not being able to inquire about the information that

was not furnished. (Karlock Br. at 12.) However, that argument was raised and rejected in Laidlaw.

In Laidlaw, there was no dispute that the application failed to supply certain information required by the local siting ordinance. Laidlaw, slip op. at 4. The petitioners argued that the absence of the required information prejudiced the county board, the public and the objectors by depriving them of a fair opportunity to prepare for the public hearing. Laidlaw, slip op. at 7. The Board disagreed, holding that such allegations, without more, were not sufficient to satisfy the actual prejudice standard of a fundamental fairness argument. Id. In light of Laidlaw, it is clear that Karlock's conclusory statement that "the [County Board's] acquiesce [sic] to the omission of information suggests a lack of interest that could only result from the fact that the ultimate issue was pre-decided," is insufficient to establish prejudice.

3. Ms. Beaver-McGarr Did Not Commit Perjury, and Petitioners Were Not Prejudiced by The Failure to Produce Ms. Beaver-McGarr For Further Questioning

Petitioners Watson and City argue that the decision of the County Board and the public hearings were fundamentally unfair because (1) the County Board relied on the "perjured" testimony of Ms. Patricia Beaver-McGarr; (2) WMII failed to produce Ms. Beaver-McGarr's diploma, and (3) WMII failed to produce Ms. Beaver-McGarr for further questioning. (Watson Br. at 21-26; City Br. at 23-24.) Petitioners' argument is without merit.

First, Petitioners allege that Ms. Beaver-McGarr "perjured" herself without providing the definition of perjury under Illinois law. Ms. Beaver-McGarr did not commit perjury. Second, Petitioners have not shown that they have been prejudiced by the failure to produce the diploma or Ms. Beaver-McGarr for further questioning. Petitioners argued these facts to the County Board, and sought to persuade the County Board that they were probative of Ms. Beaver-McGarr's credibility. (12/06/02 Vol. 29, Tr. at 12-45.) That the County Board rejected

Petitioners' argument is not evidence of fundamental unfairness but, rather, of the County Board's proper consideration of Petitioners' claims and assessment of witness credibility.

(a) Petitioners Failed To Establish That Ms. Beaver-McGarr's Testimony Constituted Perjury

A person commits perjury when, under oath or affirmation, in a proceeding where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true. 720 ILCS 5/32-2 (2000). A person does not commit perjury if he honestly believes the statements made, even if the statements are untrue. Holton v. Memorial Hospital, 176 Ill.2d 95, 126 (1997).

Ms. Beaver-McGarr repeatedly and consistently maintained that she received an associate's degree from Daley College. (11/19/02 Vol.6, Tr. at 37-38; App. at Crit. 3, pp. 19, 45.) Upon being confronted with the fact that her transcript from Daley College did not indicate that a degree was awarded, she asserted that she earned the requisite number of credits and was awarded the degree. (11/19/02 Vol. 6, Tr. at 35-38.) Ms. Beaver-McGarr truly and honestly believed that she received an associate's degree from Daley College.

Petitioners have failed to offer evidence that Ms. Beaver-McGarr actually knew or believed that she had not earned a degree from Daley College. They have not conclusively established that the records of Daley College are complete and accurate. (WMII Pub. Hrg. Ex. 26.) Indeed, Ms. Beaver-McGarr has maintained that her records are incorrect in that the grades she received in two courses were never properly changed. Thus, Ms. Beaver-McGarr did not knowingly and willfully provide false testimony.

Perjury also requires that false testimony be intentionally provided on a material matter. Ms. Beaver McGarr is a professional real estate appraiser and consultant. Her qualifications and expertise are based on her 18 years of experience as a real estate appraiser, and her MAI

designation. (11/19/02 Vol. 6, Tr. at 6, 9.) Her expert testimony in this proceeding involved real estate impact evaluation and analysis, and was based on her 18 years of experience as a real estate consultant, not on her associate's degree. Thus, whether or not Ms. Beaver-McGarr earned an associate's degree is not material with respect to her qualifications as a real estate appraiser and consultant.

(b) Petitioner Failed to Establish That Petitioner Was Prejudiced By The Failure To Produce A Diploma And Ms. Beaver-McGarr For Further Questioning

Petitioner Watson argues that the public hearings were fundamentally unfair due to the Hearing Officer's denial of Petitioner Watson's request for Ms. Beaver-McGarr to re-take the stand after a certified copy of a degree from Daley College was not produced. He further argues that WMII's "retraction of its representation" that it would provide either the certified degree or Ms. Beaver McGarr resulted in the premature termination of Ms. Beaver-McGarr as a witness, and therefore deprived him of the right to further question Ms. Beaver-McGarr regarding her qualifications. (Watson Br. at 25-26.)

In Concerned Adjoing Owners v. Pollution Control Board, the petitioners argued that the decision granting site approval should be reversed because their inability to cross examine a witness was fundamentally unfair. 288 Ill. App. 3d 565, 680 N.E.2d 810, 817-818 (5th Dist. 1997). The court held that "parties before a local governing body in a siting proceeding must be given the opportunity to present evidence and object to evidence presented, but they need not be given the opportunity to cross-examine opposing parties' witnesses." 680 N.E.2d at 818.

Here, Petitioners were afforded the opportunity to cross-examine Ms. Beaver-McGarr regarding her Daley College degree. (11/18/02 Vol. 6, Tr. at 35-38.) She maintained that she received the degree, and denied that the records of Daley College indicating otherwise were accurate. Petitioner Watson submitted evidence regarding the Daley College records. (Watson

Pub. Hrg. Ex. 8.) Petitioners had the opportunity to, and did in fact argue, that Ms. Beaver-McGarr lacked a degree from Daley College, and that this affected her credibility. Thus, Petitioners were not prejudiced by the failure to produce Ms. Beaver-McGarr for further questioning. The fact that the County Board rejected Petitioners' arguments concerning Ms. Beaver-McGarr's credibility is not the type of prejudice required to show fundamental unfairness.

4. Petitioners Have Failed to Establish Improper *Ex Parte* Contacts Between the Attorneys for the County Board and WMII, or that the Decision Making Process was Irrevocably Tainted as a Result

In determining whether improper *ex parte* contacts rendered the local siting proceedings fundamentally unfair, this Board must decide two issues: (i) whether improper *ex parte* contacts actually occurred; and (ii) if so, whether those contacts resulted in any prejudice. Greater Egypt, slip op. at 13-14.

Petitioners City and Watson contend that the attorneys for the County Board and WMII engaged in improper *ex parte* contacts. (City Br. at 9-10; Watson Br. at 29-31.) As its sole support, Petitioner City cites the April 29, 2003 deposition testimony of County Board member Leonard Martin, wherein Mr. Martin "believed" that, an attorney for the County Board, "had contact" with WMII's attorney, between August 16, 2002 and January 31, 2003. (City Br. at 9.) Petitioner Watson also cites Mr. Martin's deposition testimony concerning his speculation about the contact between attorneys for the County and WMII. (Watson Br. at 30.)

These vague and non-specific allegations of *ex parte* contacts between attorneys for the County Board and WMII are simply insufficient to establish that the contacts occurred. While it is possible for attorneys to engage in improper *ex parte* contacts, establishing such contacts requires more than simple speculation that attorneys for the decision maker and the applicant had contacts after the close of the public comment period and before the decision.

Not only have Petitioners City and Watson failed to submit reliable evidence that any improper *ex parte* contacts occurred, they have neglected to articulate how the hearing process was irrevocably tainted as a result of the alleged improper *ex parte* contacts. In C.O.A.L., the Board found that the *ex parte* contacts in that case harmed the excluded party because the decision maker apparently felt it was necessary to have the applicant answer certain questions prior to making its decision. C.O.A.L., slip op. at 36-37. Here, Petitioners City and Watson do not even make the effort to claim that they or the public were in some way harmed. They simply conclude that the alleged *ex parte* contacts violated fundamental fairness. (City Br. at 10; Watson Br. at 31.) However, the Board has held that: "[t]he mere occurrence of *ex parte* contacts does not, by itself, mandate automatic reversal. It must be shown that the *ex parte* contacts caused some harm to the complaining party." Residents Against A Pollution Environment ("Residents") v. County of LaSalle, PCB 96-243, slip op. at 21 (September 19, 1996).

5. Petitioners Have Failed to Establish Prejudgment

Because the local siting authority's role in the siting approval process is quasi-adjudicative, prejudgment of the merits of the application in advance of the hearing is fundamentally unfair. Waste Management, 530 N.E.2d at 695-96. However, there is a strong presumption that the decision maker is unbiased, which can only be overcome upon a showing that members of the local governing body actually prejudged the adjudicative facts, *i.e.*, facts pertaining to the statutory criteria of Section 39.2(a). Fairview Area Citizens Taskforce v. Pollution Control Board, 198 Ill. App. 3d 541, 555 N.E.2d 1178, 1182 (3d Dist. 1990).

Petitioners City, Watson and Karlock argue that certain terms of the County Plan and the Host Agreement are dispositive evidence that the County Board predetermined the Application. (City Br. at 9-10; Watson Br. at 26-28; Karlock Br. at 13-16.) Specifically, Petitioners point to

the language in the County Plan that an expansion of the existing Kankakee Landfill would satisfy the Kankakee County's waste disposal needs for at least an additional 20 years, and that in the event the Kankakee Landfill is expanded, no new facilities would be necessary. In addition, Petitioners cite the accelerated payments from WMII to Kankakee County under the Host Agreement.

Similar fundamental fairness arguments concerning solid waste management plans and host agreements have been rejected by the Board because contacts between an applicant and the decision maker prior to the filing of the application are permissible, and therefore irrelevant to the question of whether the local siting proceedings were fundamentally unfair. Residents, slip op. at 41-42. In Residents, the Board made clear that "allegations concerning the adoption of the county's Solid Waste Management Plan are not proper allegations for Board consideration in a Section 40.1 pollution control facility siting appeal." Id.

It is also well-settled that negotiating a host agreement is a purely legislative function and, therefore, carries no indication of prejudgment or bias in a local siting proceeding. Residents, slip op. at 43 (applicant's status as exclusive vendor for the county was not evidence of inherent bias which rendered the siting proceeding fundamentally unfair). Likewise, the fact that the County Board received payments under the Host Agreement is not indicative of predisposition. E&E Hauling, Inc. v. Pollution Control Board, 107 Ill. 2d 33, 451 N.E.2d 664, 667-68 (1985) (county's receipt of $30,000 per month in revenue from landfill was not evidence of county board's interest in approving site location application). County Board officials routinely make decisions that affect their revenues, and therefore must be deemed to make decisions for the general welfare, not for financial gain. E&E Hauling, 451 N.E.2d at 667-68.

C. The Decision Granting Siting Approval Is Supported By The Manifest Weight Of The Evidence

Petitioners contend that the County Board's findings on criteria one, two, three, five, six, seven and eight were against the manifest weight of the evidence. However, other than the witnesses presented by WMII and Mr. Norris, no other expert witness testified regarding the Application or statutory criteria. There was no relevant or probative evidence offered that controverted WMII's prima facie case. The case presented by WMII established the statutory criteria by clear and convincing evidence. Accordingly, the decision granting siting approval is supported by the manifest weight of the evidence and should be affirmed.

A decision of a local siting body regarding compliance with the statutory siting criteria will not be disturbed unless the decision is contrary to the manifest weight of the evidence. Land and Lakes, 743 N.E.2d at 197. A decision is against the manifest eight of the evidence only if the opposite conclusion is clearly evident and indisputable. Turlek v. Pollution Control Board, 274 Ill. App. 3d 244, 653 N.E.2d 1288 (1st Dist. 1995).

The province of the County Board is to weigh the evidence, resolve conflicts in testimony, and determine the credibility of witnesses. Environmentally Concerned Citizens Organization v. Landfill L.L.C., PCB 98-98, slip op. at 3 (May 7, 1998). Merely because there may be some evidence which, if accepted, would have supported a contrary conclusion, does not mean that this Board may reweigh the evidence and substitute its judgment for that of the County Board. Tate, 544 N.E.2d at 1197. This Board is not free to reverse merely because the County Board credited WMII's witnesses and did not credit Mr. Norris. Landfill 33, Ltd. v. Effingham County Board, PCB 3-43 and 3-52 (cons.), slip op. at 3 (February 20, 2003).

If there is any evidence which supports the County Board decision, and this Board finds that the County Board could have reasonably reached its conclusion, the decision must be

affirmed. File v. D & L Landfill, PCB 9-94, slip op. at 3 (August 30, 1990). That a different decision might also be reasonable is insufficient for reversal. The opposite conclusion must be clear and indisputable. Willowbrook Motel v. Pollution Control Board, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985).

Petitioners failed to present any evidence to establish that the County Board's findings on criteria one, two, three, five, six, seven and eight were clearly and indisputably wrong. Other than Mr. Norris, they presented no evidence at all. Petitioners' arguments are based on factual misstatements, distortions of the record, and speculation. WMII will now address, in the order of the criteria, the more notable of these misstatements, inaccuracies and conjecture.

1. Criterion 1: The Expansion Is Necessary To Accommodate The Waste Needs Of The Area It Is Intended to Serve

Petitioner Watson argues that the Expansion is not necessary to accommodate the waste needs of the area it is intended to serve. (Watson Br. at 31-38.) He claims that WMII did not provide sufficient and clear evidence establishing need. (Watson Br. at 31-32.) Need is established where an applicant shows that a proposed facility is reasonably required by the disposal needs of the service area, taking into account the waste production and waste disposal capacity of the area. Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, 112 Ill.App.3d 639, 461 N.E.2d 542, 546 (3rd Dist. 1984). Petitioner Watson, however, offered no facts or data that contradicted or impeached WMII's evidence that the Expansion is necessary.

Petitioner Watson contends that Ms. Sheryl Smith's testimony and report used inconsistent and incorrect recycling data, and left out several permitted facilities, so that need was overstated. (Watson Br. at 34-37.) However, Petitioner Watson mischaracterizes Ms. Smith's testimony and presents incorrect information. Petitioner Watson's errors and

inaccuracies are not sufficient to establish that the County Board's finding of need was plainly and indisputably wrong.

Petitioner Watson alleges that Ms. Smith understated the amount of recycling, and hence understated waste generation in the service area. (Watson Br. at 35.) Petitioner Watson's allegation is mere conjecture. He points to no facts that support his claimed analysis. In contrast, Ms. Smith explained the facts supporting the recycling rates she utilized and her analysis. (11/20/02 Vol. 9, Tr. at 47-54.) He asserts that the recycling rate for the City of Chicago should be 48%, not the 40% value used by Ms. Smith. However, as Ms. Smith testified, while the City of Chicago reported a 48% recycling rate in 2000, the rate dropped to 44% in 2001. (11/20/02 Vol. 9, Tr. at 49-50.) In addition, the rate reported by the City of Chicago did not necessarily include industrial or commercial waste. (11/20/02 Vol. 9, Tr. at 48.) Similar reductions would result in a 40% recycling goal in 2003, which is the number used by Ms. Smith.[6]

Petitioner Watson further argues that waste generation was overstated based on Ms. Smith's use of 49% as the Suburban Cook County recycling goals for the year 2010 and thereafter. (Watson Br. at 36.) The 49% rate was a reasonable estimate of the recycling to be achieved in seven years. No evidence was presented establishing that the estimate was unfounded or unreasonable. Petitioner Watson's argument that Ms. Smith's calculations and

[6] Petitioner Watson made a computational error in arguing that the 48% recycling goal should apply. If that goal was used, he contends that waste generation in the City of Chicago would decrease by 8,449,945 tons. (Watson Br. at 35.) In fact, the reduction would be 5,914,962 tons. Petitioner Watson makes a similar error in arguing that a higher recycling rate applied to Kankakee County would reduce waste generation there by 875,117 tons. (Watson Br. at 35.) In fact, the higher recycling rate urged by Petitioner Watson would result in a reduction of 525,406 tons.

estimates are strained and inaccurate (Watson Br. at 36) is an attack on her credibility, and not on the facts and evidence establishing need.[7]

Petitioner Watson next argues that Ms. Smith understated available capacity for the service area by ignoring "numerous permitted sites." (Watson Br. at 37.) These sites were Forest Lawn Landfill, Pheasant Run RDF, Brickyard Landfill, Kestrel Hawk Park Landfill and Spoon Ridge Landfill. (Watson Br. at 37.) Again, Petitioner Watson has misstated the facts and mischaracterized Ms. Smith's testimony.

Ms. Smith considered each of the facilities named by Petitioner Watson. (11/20/02 Vol. 9, Tr. at 13-14, 21; App. at Crit. 1, pp. 16-30.) In determining the disposal capacity available to the service area, one properly considers the landfills that receive waste from the service area. If a landfill does not receive waste from the service area, that landfill is not reasonably considered to be available capacity for the service area. (App. at Crit. 1, pp. 16-24.) As Brickyard Disposal does not receive waste from the service area, it is not properly included in the disposal capacity available to the service area.

Similarly, if only a portion of a landfill's capacity is available to dispose of waste from the service area, it is only that capacity which may be considered reasonably available to the service area. Thus, the amount of service area waste received by the Pheasant Run RDF and Kestrel Hawk Park Landfill determined the percentage of the disposal capacity of these facilities which was available to the service area and considered by Ms. Smith. (App. at Crit. 1, p. 24, Table 3.)

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[7] Rather than Ms. Smith's calculations and estimates, it is Petitioner Watson's argument that is strained and inaccurate. Petitioner Watson's mathematical errors are described in footnote 6 above. In addition, Petitioner Watson argues that Ms. Smith agreed (1) that the long holding trend has been for increased recycling, and (2) that the recycling trend in more than 50% of the Counties in the service area is to increase. (Watson Br. at 36.) Ms. Smith made no such statements.

In his written comment, Petitioner Watson alleges that Forest Lawn Landfill, by virtue of a July 30, 2002 permit, adds 7,700,000 tons of capacity. (Watson Br. at 37.) WMII had no opportunity to respond to this allegation, which is inaccurate.[8] Nevertheless, Ms. Smith considered this landfill. (App. at Crit. 1, pp. 25-26.) Its additional capacity does not significantly decrease the capacity shortfall in the service area.

Finally, Petitioner Watson mischaracterizes the testimony regarding the Spoon Ridge Landfill. The service area for this inactive landfill no longer includes Northeastern Illinois, but instead is focused on New York City. (11/20/02 Vol. 9, Tr. at 22, 135.) At no point does Ms. Smith state that the economics might change to make Spoon Ridge a viable option. (Watson Br. at 37.)

In contending that the capacity shortfall is overstated by 15 million tons and will not occur until 2028, Petitioner Watson simply disagrees with Ms. Smith's methodology and conclusion. However, he provides no facts or information that support his own flawed methodology and conclusion. Petitioner Watson seeks to evaluate available disposal capacity as of January 1, 2001, rather than January 1, 2004, the date the Expansion may open. He includes all capacity from facilities, ignoring whether or not that capacity *is even available* to the service area. He includes capacity from facilities that have not been permitted, and from facilities that are not serving the service area. He neglects three years of waste generation data which would reduce the allegedly overstated shortfall. He does not explain or justify this methodology, which is fundamentally erroneous because it simply inflates the available capacity and hence,

[8] In the event this Board would permit WMII to respond to this claim, WMII states that the Michigan Department of Environmental Quality issued a permit to Forest Lawn Landfill on July 30, 2002, for 4,200,000 cubic yards of airspace. With 15% of this capacity used for daily and intermediate cover, this leaves a waste disposal capacity of 3,570,000 cubic yards or 2,499,000 tons (assuming 1400 lbs/yd^3 in-place density). Of this capacity, 55% (1,374,450 tons) is available to the service area, based on waste receipts from the service area in 2000. (App. at Crit. 1, pp. 23-24.)

understates the shortfall. His quibble with Ms. Smith's methodology is unfounded, and should be rejected.

Petitioner Watson's attempts to increase the disposal capacity in the service area by mischaracterizing Ms. Smith's testimony, ignoring the actual disposal capacity available to the service area and misstating the facts concerning the Forest Lawn and Spoon Ridge Landfills, are baseless attacks on the County Board's finding of need. Petitioner Watson presents no facts or information that refutes the County Board's findings that there is a significant capacity shortfall over the 27 year operating life of the Expansion, and thus a need for this facility.

WMII is not required to show absolute necessity to satisfy criterion one. Landfill 33, slip op. at 26. WMII has presented credible evidence and expert opinion establishing that the Expansion is necessary to accommodate the waste needs of the area it is intended to serve. No credible contrary evidence was admitted or offered. Industrial Fuels & Resources v. Pollution Control Board, 227 Ill. App. 3d 533, 592 N.E.2d 148, 156 (1st Dist. 1992). There is ample evidence supporting the County Board's finding of need and therefore, the decision of the County Board is not against the manifest weight of the evidence. Tate, 544 N.E.2d at 1195-96; Fairview 555 N.E.2d at 1184-85; Landfill 33, slip op. at 26.

2. Criterion 2: The Expansion Is Located and Proposed To Be Operated That The Public Health, Safety and Welfare Will Be Protected

The second criterion to be established is that the Expansion is so designed, located and proposed to be operated that the public health, safety and welfare will be protected. This criterion requires a demonstration that the proposed facility does not pose an unacceptable risk to the public health and safety. Industrial Fuels, 592 N.E.2d at 157. It does not, however, require a guarantee against any risk or problem. Clutts v. Beasley, 185 Ill. App. 3d 543, 541 N.E.2d 844, 846 (5th Dist. 1989).

Petitioners did not present or offer any evidence to demonstrate that the design of the Expansion is flawed from a public safety standpoint or that its proposed operation poses an unacceptable risk to public health or safety. Petitioners argue that WMII has failed to prove that all three elements of this criterion have been met. However, Petitioners have not established by any evidence, how a particular design or operating feature of the Expansion might increase risk of harm to the public, or that the Application ignored or violated any applicable government regulations. Where, as in these proceedings, no such showings were made, the prima facie case stands unrebutted and criterion two has been satisfied. Industrial Fuels, 592 N.E.2d at 157.

(a) Location (Geology and Hydrogeology)

Petitioner Karlock argues WMII failed to demonstrate that it met its burden of proof regarding the suitability of the location of the Expansion, in that it is situated hydrogeologically the same as the Town & Country facility. (Karlock Br., pp. 2, 5, and 34-36.) He criticizes WMII's characterization of the Silurian dolomite as an aquifer. However, the two sites were not evaluated to the same extent and the conclusions rendered regarding the hydrogeologic conditions were not the same. (see supra, p. 6-9.) There is no question that the Silurian dolomite is an aquifer below 10 feet from the top of bedrock. Unlike the Town & Country facility, WMII based the design of the Expansion on an accurate characterization of the Silurian dolomite.

Petitioner Karlock incorrectly states that WMII had previously characterized the Silurian dolomite aquifer "as being only ten feet deep and referred to the portion of the bedrock above (sic-below) the top ten feet as the 'lower confining unit.'" (Karlock Br. at 16-17.) Petitioner Karlock is wrong and mischaracterizes Ms. Underwood's testimony. Ms. Underwood testified that the uppermost aquifer at the site was previously identified as the top ten feet of bedrock and the bedrock below identified as the lower confining unit "for use in the groundwater model" to

provide a conservative model and "overpredict potential impacts from the site." (11/25/02 Vol. 19, Tr. at 128-130.)

(i) In-Situ Materials Provide An Effective Barrier Between The Waste And The Silurian Dolomite Aquifer

Petitioners Karlock and City claim that "the fine-grained materials on which the Applicant relies to provide an effective natural barrier between the waste and the major regional aquifer do not have the quality and do not exist in the quantity which the Applicant's (sic) represents." (Karlock Br. at 21, City Br. at 12.) Mr. Nickodem testified that the presence of the in-situ materials was not a design component of the landfill, but provided an additional safeguard of protection for the underlying aquifer. (11/22/02 Vol. 13, Tr. at 80; 11/22/02 Vol. 15, Tr. at 30, 36-37.)

Petitioners Karlock and City provide an inaccurate description of the fine-grained materials of the Wedron till, suggesting that the Wedron is "interspersed with many discontinuities and sand," and that they increase at depth. (Karlock Br. at 21, City Br. at 12.) However, Petitioners provide no citation to the record for these erroneous descriptions. The Wedron deposits are glacial clays, and are generally classified as lean clay (CL), lean clay with sand, sandy lean clay, silty clay and sandy silty clay. WMII acknowledges and identifies the presence of "discontinuous lenses of stratified deposits within the Wedron Group 3" and silt/silty sand lenses within the Wedron Group 4. All of the Wedron Group 4 materials will be excavated and removed for construction of the landfill. (11/22/02 Tr. at 30; App. at Crit. 2, pp. 2-16, 2-19.)

Petitioners Karlock and City further claim that the Wedron till has matrix permeabilities. (Karlock Br. at 22, City Br. at 12.) This is wrong. Matrix permeability is a term applied to the dolomite bedrock beneath the site, not to the glacial till. (11/25/02 Vol. 19, Tr. at 118-120.) Petitioner Karlock misstates Ms. Underwood's testimony about the Wedron till slug test results,

stating that the results were "consistent with what one would expect from an unconsolidated, discontinuous and heterogeneous glacial till." (Karlock Br. at 22, City Br. at 12.) However, Ms. Underwood testified that the slug test results Petitioners were referring to were actually in Table E-1 of the Application. There was no testimony about the consistency of the results with unconsolidated, discontinuous and heterogeneous glacial tills. (11/26/02 Vol. 20, Tr. at 70.)

Petitioner Karlock contends that the slug test permeabilities performed at the site were "more accurate" than laboratory test results, which "underestimate actual permeability." (Karlock Br. at 22.) However, the contention is misleading. Ms. Underwood testified that there is a lower vertical permeability in the glacial materials because they are laid down horizontally. (11/25/02 Tr. Vol. 19 at 122.) Ms. Underwood testified that laboratory permeabilities are used for unconsolidated materials where vertical flow predominates and are used to represent vertical hydraulic conductivities. Slug tests are more representative of horizontal permeability and were used for the aquifer where horizontal flow predominates. (App. at Crit. 2, p. 2-22; 11/26 Tr. Vol. 20 at 70-71.) She testified that the glacial materials at the site have an inherently lower vertical permeability because of the way they were deposited, and have the same or lower permeability than the proposed clay portion of the composite liner. (11/25/02 Vol. 19, Tr. at 105, 112, 123-124.)

Petitioner Karlock alleges that the slug tests were performed in the till in areas identified as pure clay and that "(l)ittle, if any, pure clay exists in the lower portion of the Till." (Karlock Br. at 22.) Use of the term "pure clay" is undefined by Petitioner Karlock and misused because of his lack of understanding of how smaller grained particles are classified. (11/26/02 Vol. 26, Tr. at 77.) Materials classified as clay are not based on grain size, but on the material properties of particles of clay and silt size. (11/26/02 Vol. 20, Tr. at 74-77.) These materials contain a

mixture of clay and silt size particles. (11/26/02 Vol. 26, Tr. at 75.) In addition, the clays and silts at the site are comparable from a permeability standpoint, and that mixtures of particles result in lower permeabilities. (11/26 Vol. 26. Tr. at 73-74, 94.)

Petitioners Karlock and City further allege that "the soil boring logs uniformly reflect less material recovery closer to the bedrock interface." (Karlock Br. at 22, City Br. at 13.) Petitioner Karlock claims that "(p)oor recoveries can only be associated with less cohesive material such as sand or gravel or with less reliable soil classifications." (Karlock Br. at 22.) This is false. Ms. Underwood testified that there was a variety of reasons, other then the presence of coarse sand and gravel, that can result in poor recovery in a split spoon sampler. (11/26/02 Vol. 20, Tr. at 86-88, 90.)

Petitioner Karlock claims, without support, that there really isn't any difference in the vertical and horizontal permeabilities of the unconsolidated material because the "churned up glacial materials are too heterogeneous to have inherent differences between horizontal and vertical permeability." (Karlock Br. at 22.) However, Ms. Underwood testified to the contrary, and stated that the glacial tills are deposited beneath the glaciers and tend to be "dropped out," not "churned up." (11/25/02 Vol. 19, Tr. at 123-124.) Petitioner Karlock's desire to connect various sand units further illustrates that he expects these geologic materials to be deposited in layers. (11/26/02 Vol. 26, Tr. at 103.) This layer causes the difference in horizontal and vertical permeability.

Petitioners Karlock and City claim that WMII "grossly overestimated" the amount of fine-grained material at the site, when Ms. Underwood testified that there was an average of 16-feet of fine-grained material beneath the base grade. (Karlock Br. at 23, City Br. at 13; 11/26/02 Vol. 20, Tr. at 63.) However, Petitioners argue this from four boring locations, including B-111,

B-141, B-120 and B-132. (Karlock Br. at 23, City Br. at 13.) A review of the geologic cross-sections and borings in the Application indicates that Petitioners are wrong and were selective in making their argument. It further demonstrates that Petitioners simply ignored and did not consider all fine-grained material from various units, including the Wedron Groups 1, 2 and 3, and Mason Groups 1 and 2. (App. at Crit. 2, p. 2-22, 2-23; Drawing Nos. 6-16.)

Petitioners Karlock and City suggest that Ms. Underwood and Mr. Nickodem presented contradictory testimony regarding the thickness of in-situ fine-grained materials. (Karlock Br. at 23-24, City Br. at 13.) This is not true. Mr. Nickodem testified that the "least amount" of in situ clay that he believed was beneath the bottom of the liner was "on the order of eight feet or so." (11/22/02 Vol. 13, Tr. at 54.) Ms. Underwood's testimony was that "the average amount of fine-grain material beneath the base grade" was sixteen feet. (11/26/02 Vol. 20, Tr. at 63.) The two witnesses were asked about *different thicknesses of in-situ material*, not the same thickness. There is no contradiction in testimony given between Mr. Nickodem and Ms. Underwood.

Petitioners Karlock and City imply that these materials and thicknesses are critical to the ability of the Expansion to be protective of the public health, safety, and welfare. As stated previously, the presence of these materials were an added safeguard and not an absolute requirement for a safe and protective landfill.

To support their argument, Petitioners Karlock and City cite to Ms. Underwood's testimony related to borings B-111, B-141, B-120 and "B-312" (sic), and provides the thickness of the clay above the bedrock. (Karlock Br. at 23.) However, this is not indicative of the thickness of the in situ materials between the bottom of the liner and the top of bedrock, or the thickness of in situ fine-grained low permeability material. As previously discussed, Petitioner Karlock does not understand the difference between the properties of various fine-grained

materials or their permeability. For example, in B-132, Petitioner Karlock uses the elevation of the proposed sump located approximately 350 feet southwest of the boring location to support his argument that the thickness of the in situ clay at B-132 is only 2 to 3 feet. This, however, is an incorrect assumption of the elevation of the bottom of the liner at B-132[9].

Petitioner Karlock alleges a variety of "other readily available site data" that challenges WMII's conclusions about the presence of the impermeable till beneath the Expansion. (Karlock Br. at 24, City Br. at 13.) Petitioner Karlock completely misstates Ms. Underwood's testimony regarding vertical gradients at the southern end of the site, stating that Ms. Underwood conceded that "such minimal vertical gradients" were "consistent with good flow or good hydraulic connection between the two units." (Karlock Br. at 24.) This is wrong. In response to a question about very small vertical gradients between different geologic units being consistent with good hydraulic communication between the units, Ms. Underwood stated, "No. It wouldn't necessarily mean that that's what's going on." (11/26/02 Vol. 20, Tr. at 79.) She further testified that "you can't make an assessment [of hydraulic communication] just on that piece of information."[10] (11/26 Vol. 20. Tr. at 79-80.)

Petitioners Karlock and City argue that "time series head data" in the new soil borings and observations wells would have allowed a determination of whether or not deep wells show

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9 The bottom of the liner is at approximate elevation 605 MSL, for a difference in elevation of 9.3 feet and a fine-grained thickness of approximately 6 feet. The entire thickness is a low permeability material. (11/26/02 Vol. 20, Tr. at 85; Crit. 2, Drawing Nos. 5-18.) At B-120, there is approximately 10 feet of in situ materials beneath the bottom of the liner and the top of bedrock. While there is only 3 feet of clay above the top of bedrock in B-141, it is not a fair assumption to use this boring as representative of the thickness of clay above the top of bedrock because it is located approximately 100 feet south of the limits of waste and nearly 200 feet south of the toe of the landfill sideslope within the limits of waste. (App. at Crit. 2, Drawing No. 18.) At B-135, approximately 600 feet north of B-141, the elevation of the bottom of the liner is 611 MSL and the elevation of the top of bedrock is approximately 594 MSL, resulting in a difference of 17 feet of in situ materials between the two surfaces and 14 feet of which is fine-grained. (App. at Crit. 2, Drawing No. 18.)

10 It should be noted that Petitioner Karlock did not ask for her opinion regarding the cause of the low vertical gradient in that area. Vertical gradients were considered in the assessment of flow conditions both between the surficial aquitard and uppermost aquifer and within the uppermost aquifer, as demonstrated in the Application. These calculations clearly show vertical gradients are much lower in the aquifer, thus confirming that horizontal flow is dominant in the aquifer. (App. at Crit. 2, pages 2-22, 2-23 and Appendix E.)

seasonal variation, evidencing hydraulic connection to surficial units. (Karlock Br. at 24, City Br. at 14.) This data was not required, as it is an IEPA permitting requirement. Petitioners allege that seasonal water level data from the existing facility confirms direct and rapid hydraulic communication between the shallow and deep water zones. (Karlock Br. at 24, City Br. at 14; 12/02/02 Vol. 23, Tr. at 80-81.) However, Mr. Norris did not testify to this conclusion. He stated that the data "confirms the idea that there is the concept" that there is connection. But Mr. Norris never testified that *the units were hydraulically connected,* or that there was any "rapid" hydraulic connection between them. (12/02/02 Vol. 23, Tr. at 80-81.)

Petitioners Karlock and City offer Mr. Norris' review to explain releases from the existing facility, and Petitioner Karlock opines that this "serves to demonstrate that the glacial tills underneath the site do not act as an effective barrier to contaminant migration." (Karlock Br. at 25, City Br. at 14.) First, this is an attempt to link the existing facility to the Expansion, which are separate and distinct units. Second, the contention is mere speculation. There is no evidence establishing the source of the gas found at B-205, much less that it migrated horizontally from the waste mass of the existing facility through 25 feet of glacial material. (See, 12/04/02 Vol. 26, Tr. at 78-85, 110-111.)

(ii) The Inward Hydraulic Gradient Is Sufficiently Established

Petitioners Karlock and City claim that the inward gradient at the site is "not well understood" and that the "assumption that the gradient can be maintained on a long term basis is entirely dubious, at best." (Karlock Br. at 26, City Br. at 16-17.) Petitioners attempt to demonstrate that the inward gradient is misunderstood at the Expansion by alleging a conflict in the testimony of Ms. Underwood and Mr. Nickodem. This conflict does not exist.

Groundwater gradients at the site are important to understand for numerous analyses completed during the site evaluation. Water levels are important for understanding the difference between the leachate level and groundwater levels outside the landfill (inward gradient as described by Ms. Underwood) and the potential for hydrostatic uplift (as described by Mr. Nickodem).

The inward gradient is based on the consideration of all site water level information. (11/26/02 Vol. 20, Tr. at 11-13.) Ms. Underwood considered the water table level together with any potential effects of the piezometric surface for evaluating and maintaining the inward gradient. (11/26/02 Vol. 20, Tr. at 13.) The ability of the design to maintain an inward hydraulic gradient was based on the hydrogeologic conditions at the site and their relationship to the design. (11/25/02 Vol. 19, Tr. at 105-106; App. at Crit. 2, Section 2.) This evaluation included considering the top of liner grades in relationship to the different geologic units, the location of the uppermost aquifer to the top of liner grades, and the potential to maintain an inward hydraulic gradient, or a groundwater pressure towards the landfill as opposed to away from the landfill. The safeguards associated with an inward gradient maintained by the design of the landfill is based on both the piezometric surface and the water-table elevations. (11/25/02 Vol. 19, Tr. at 105-106; 11/26/02 Vol. 20, Tr. at 12-13.) An analysis of the inward gradient was based upon water level data collected in February 2002, when water levels would be lower and therefore more conservative to the site model, because of low recharge during the winter months. (11/2/026 Vol. 20, Tr. at 67-68.)

On the other hand, the hydrostatic uplift analysis completed by Mr. Nickodem is dependent on piezometric head in the aquifer. (11/2 Tr. Vol. 12 at 44-45.) Ms. Underwood concurred that this was the appropriate water level for the hydrostatic uplift analysis, because

hydrostatic uplift must consider the confining pressures of the clay unit underneath the liner. The confined pressure is the piezometric surface of the uppermost aquifer. (11/26/02 Vol. 20, Tr. at 15.) This analysis is based on having an inward gradient and further supports that an inward gradient will be maintained at the site. Contrary to Petitioner Watson's claims, Mr. Nickodem considered the location of the Expansion with regard to the hydrogeology, because the base grades in the southwest corner of the Expansion were lowered to maintain the inward gradient condition. (Watson Br. at 39; 11/21/02 Vol. 12, Tr. at 43.)

Petitioners' claim that Mr. Nickodem's uplift analysis is "counter-intuitive" is wrong. (Karlock Br. at 26, City Br. at 17.) Mr. Nickodem and Ms. Underwood did not contradict each other. There is no evidence in this record to indicate that they disagree on the inward gradient at the site.

Petitioner Karlock claims that maintaining the inward gradient at the site is speculative. (Karlock Br. at 27.) He says the Application is flawed because a potentiometric map of the water table was not included. This argument ignores the fact that the data was included in the Application to prepare such a map. Ms. Underwood did not deem it necessary for her analysis. (11/26/02 Vol. 20, Tr. at 13-17.)

Mr. Norris used a water balance in an effort to justify the interconnection of the bedrock and unconsolidated units, and inappropriately related it to inward gradient. His water balance analysis did not accurately reflect recharge conditions at the site and was flawed for several reasons. (12/04/02 Vol. 27, Tr. at 27-33.) These include:

- It was based only on the site data and ignored regional information concerning groundwater flow in the aquifer. (12/04/02 Vol. 27, Tr. at 27.)
- Regional information showed that the vast majority of the recharge to the aquifer occurs within an area mapped by the Illinois State Water Survey that covers approximately three-quarters of the County outside of the site area. (12/04/02 Vol. 27, Tr. at 32.)

- Calculated flow rates through the glacial materials would be insufficient to supply enough water to fill up the aquifer beneath the site. (12/04/02 Vol. 27, Tr. at 32.)
- The vertical gradients indicate that the flow volume is very small at the site because a high vertical gradient is necessary to try to push water through the low permeability clays. (12/04/02 Vol. 24, Tr. at 33.)
- The groundwater chemistry on the shallow and deeper unconsolidated wells indicates that the areas are not well connected. (12/04/02 Vol. 27, Tr. at 34.)

Mr. Norris provided contradictory testimony concerning flow in the aquifer from west of the site. During cross-examination, he stated that there is no flow moving from the west beneath the site. (12/04/02 Vol. 24, Tr. at 49-50.) He later modified his testimony to say that there may be some flow moving from the west beneath the site. (12/04/02 Vol. 25, Tr. at 24-26.)

The inaccuracies, inconsistencies and contradictions in Mr. Norris' testimony undermined his credibility. The County Board properly did not credit his testimony on water balance and the inward gradient.

(iii) The Groundwater Monitoring Program Is Based Upon A Complete And Accurate Understanding Of Groundwater Flow At The Site

Petitioners Karlock and City claim the groundwater monitoring program proposed for the Expansion is incomplete and based on a flawed understanding of groundwater flow. (Karlock Br. at 28, City Br. at 18.) The claim is meritless. The groundwater monitoring program is based on both data collected during the site investigation and on historical information. Historic water level information was used to supplement existing data to provide a more complete groundwater flow map for the uppermost aquifer.

WMII proposes to install 24 new monitoring wells, of which 22 will monitor the uppermost aquifer of the site, and 2 will monitor the sandy deposits of the Mason Group 2 Henry Formation deposits in the vicinity of borings B-112 and B-141. The monitoring zone for the uppermost aquifer consists of the upper 15 feet of Silurian dolomite and/or Mason Groups 1 and

2 Henry Formation sands. The monitoring wells will be placed both upgradient and downgradient from the Expansion, and are spaced 300 feet apart. (App. at Crit. 2, p. 9-1; Crit. 2 Drawing No. 25.)[11]

Petitioners Karlock and City attempt to discredit Ms. Underwood's interpretation of existing data by mischaracterizing her testimony and suggesting that her reliance on 7 year-old water level information from two wells was inappropriate. (Karlock Br. at 29, City Br. at 19; 11/26/03 Vol. 20, Tr. at 31.) A fair reading of the notes on Criterion 2, Drawing No. 17, Note No. 4, indicates that the data from these monitoring wells (28D and 29D) indicate that this information was "extrapolated" from prior data and is consistent with the water levels and piezometric surface as presented on Drawing No. 17. The remaining 16 points utilized to construct the piezometric surface map were based on current water levels taken in February 2002. (App. at Crit. 2, Drawing No. 17.)

Petitioners Karlock and City then criticize the location of two downgradient monitoring wells being 1500 feet apart, claiming that the "sudden and unexpected discontinuities and sand bodies encountered at the site and the possibility of solution channels," makes this interval too great. (Karlock Br. at 30; City Br. at 20.) This argument is baseless. First, the hydrogeologic program for this site included 74 borings across the site. A number of these borings were specifically placed to identify the extent of "unexpected" sand seams (particularly on the east side of the site), which were discontinuous. (App. at Crit. 2, Drawing No.5; 11/25/02 Vol. 19, Tr. at 103-105.) Second, the 17 geologic cross-sections clearly define the geologic stratigraphy

[11] Petitioner Karlock claims that Ms. Underwood "intentionally chose to exclude data from pre-existing dolomite monitoring wells" when developing the potentiometric map of the uppermost aquifer. (Karlock Br. at 29.) Ms. Underwood repeatedly testified that her review of the existing well data for wells G10D, G12D, and G26D included looking at different geologic units, how the wells were constructed, and then determined whether they were representative of the water levels in the uppermost aquifer, and that she was not involved in previous presentations of the piezometric surface for the existing facility. (11/26/02 Vol. 20, Tr. at 20-24.)

of the site, and refutes Petitioners' argument that the appearance of "sudden and unexpected" sand bodies might occur at the site. (App. at Crit. 2, Drawing Nos. 6-16.) Third, the two wells in question are located "along essentially the same flow path." (11/26/02 Vol. 21, Tr. at 42.) It was not necessary to have more groundwater monitoring wells located along the eastern portion of the landfill because the area is parallel to groundwater flow, meaning that multiple wells would essentially monitor the same groundwater and be redundant. (11/26/02 Vol. 21, Tr. at 42.)

Petitioners Karlock and City next claim that WMII did not consider the downward gradient where shallow and deep wells were installed in the uppermost aquifer. (Karlock Br. at 30, City Br. at 20.) This is not true. Ms. Underwood testified to the evaluation of the horizontal and vertical gradients between shallow and deep wells installed in the bedrock, and concluded that "a very low vertical gradient would say that horizontal flow would predominate in that unit." (11/25/02 Vol. 19, Tr. at 134.) The monitoring system is designed to monitor the uppermost aquifer and that layer where flow is encountered first in more permeable material. This is either sand on top of bedrock or the upper, more weathered portion of the dolomite. Flow in the bedrock, and the sands that overlie the bedrock, is predominantly horizontal as evidenced by the low vertical gradient. (11/25/02 Vol. 19, Tr. at 134; 12/04/02 Vol. 24, Tr. at 33.) Contrary to Petitioners' speculation, WMII considered the vertical gradients of the Silurian dolomite.

Based upon "all of the available monitoring data from the existing facility,"[12] Petitioner Karlock suggests strong, localized groundwater flow at the existing facility. (Karlock Br. at 30.) Mr. Norris speculated that a possible explanation for the channelized flow is that a solution cavity collapsed within the dolomite and was filled with the Pennsylvanian rock. (12/2/02Vol.

[12] Petitioners City, Karlock and Watson claim elsewhere that this operating record information was not properly available. (City Br. at 5-7; Karlock Br. at 9-11; Watson Br. at 16-21.)

23, Tr. at 36.) In fact, this speculation indicates that there would no longer be a cavity, even considering the "possibility" of dissolution millions of years ago.

Ms. Underwood provided an explanation by describing the contour of the bedrock surface, the age of the formation, how the rocks were deposited and eroded away, the effects of the glaciers on the surface of the bedrock, and the potential for the conditions to exist that would cause dissolution of the dolomite currently. (12/4/02 Vol. 27, Tr. at 17-21.) Through this analysis, Ms. Underwood concluded that the potential for solution features does not exist and would not be a concern beneath the site. (12/4/02 Vol. 27, Tr. at 20-21.)

(iv) The Groundwater Impact Assessment Is Based On Appropriate Assumptions

Petitioners Karlock and City claim that the groundwater impact assessment performed by Ms. Underwood is of no value. (Karlock Br. at 31, City Br. at 15.) However, they adduce no evidence to support their claim that the model assumptions are in error, and that Ms. Underwood and Mr. Nickodem utilized inappropriate values for liner permeability.

The relationship of the design and the hydrogeology was evaluated through the application of a generally accepted and well-documented groundwater model, called POLLUTE. (11/25/02 Vol. 19, Tr. at 109; 11/26/02 Vol. 21, Tr. at 28.) For purposes of applying the model, it was assumed that an average thickness of approximately 16 feet of fine-grained materials exist beneath the Expansion. (11/26/02 Vol. 21, Tr. at 29.) This thickness was the thinnest average thickness. (11/26/02 Vol. 21, Tr. at 29.) Petitioners neglected to point out that Ms. Underwood included in her model three feet of course grained materials beneath the liner, so as to provide a conservative, "worst case" scenario for analysis, causing the model to overpredict potential impacts from the Expansion.

Permeabilities representative of both the geomembrane liner and the clay liner were used in the model. (11/26/02 Vol. 20, Tr. at 31.) Combining the permeability of the geomembrane and the clay liner resulted in assigning a much higher permeability to the geomembrane then it actually has and a lower value to the clay. (11/26/02 Vol. 21, Tr. at 31.) These permeabilities control advective groundwater flow. As the Expansion is an inward gradient landfill, advective flow does not move constituents away from the landfill. (11/26/02 Vol. 21, Tr. at 33-34.) All of the inputs into the groundwater model are clearly presented by WMII in Table 2-2 of Criterion 2.

The results of the groundwater model show that there would be no impacts to groundwater. (11/25/02 Vol. 19, Tr. at 109.) A sensitivity analysis of the groundwater model evaluating conditions other than the average conditions was completed and also considered. (11/25/02 Vol. 21, Tr. at 96.)

(v) WMII's Approach To Monitoring Well Exceedences At The Existing Facility Were In Full Compliance With Illinois Law

Petitioner Karlock alleges that WMII's approach to monitoring well exceedences at the existing facility negatively affects its credibility. (Karlock Br. at 33-34.) In fact, WMII's approach was fully compliant with Illinois law and regulations. (12/04/02 Vol. 26, Tr. at 64-76.) No assessment monitoring resulted in any required corrective action at the existing facility. (12/04/02 Vol. 26, Tr. at 76.)

Compliance with applicable law is not an act that undermines credibility. To the contrary, compliance tends to support or enhance credibility.

(b) Design and Operation

(i) Location Standards

Petitioner Watson makes the speculative and inconsistent claim that while WMII "did not adequately investigate and failed to address the location of the proposed expansion," WMII "designed the landfill expansion to meet only the minimum Illinois State standards for landfills." (Watson Br. at 39.) This speculation and inconsistency is common in Petitioner Watson's argument.

Petitioner Watson mischaracterizes Mr. Nickodem's testimony in claiming that he did not consider the location of the facility "as a factor of design." (Watson Br. at 39; 11/21/02 Vol. 11, Tr. at 60-61.) Mr. Nickodem specifically considered the geology, hydrogeology and proposed location in designing the Expansion. (11/22/02 Vol. 14, Tr. at 11-17.) He also considered all of the location standards required by the Siting Ordinance, including water supply wells, surrounding land use, floodplains, sole source aquifers, regulated recharge areas, airports, fault area, seismic impact zones, and unstable areas. (11/22/02 Vol. 14, Tr. at 11-13; App. at Crit. 2, p. 3-2, 3-3.) Petitioner Watson's mischaracterization of Mr. Nickodem's testimony simply ignores the in-depth evaluation, design and analysis of the Expansion and the suitability of the Expansion at the proposed location. (App. at Criterion 2.)

(ii) Siting Ordinance Responses

Petitioner Watson alleges that Mr. Nickodem failed to provide "substantive or meaningful responses to many portions" of the Siting Ordinance, including the request for information relating to whether pollution will result from the Expansion. (Watson Br. at 39.) The argument is disingenuous. Mr. Nickodem testified at length regarding the responses to the Siting Ordinance contained in the Application, and stated that the engineered systems provided

for in the design of the Expansion will not result in pollution. Hence, he did not provide any additional information about "pollution" that is not expected to occur. (11/25/02 Vol. 17, Tr. at 14-22.) There was no reason to provide "scenarios" that are not likely to occur. (11/25/02 Vol. 17, Tr. at 14.)

(iii) Hydrogeologic and Geologic Design Considerations

Petitioner Watson claims that Mr. Nickodem could not have taken into consideration the results of the hydrogeologic investigation in preparing his design because he concluded his design of the depth and liner for the Expansion prior to the hydrogeologic investigation being completed. (Watson Br. at 40.) This is speculative and inconsistent with the facts. Mr. Nickodem testified that "we completed the main portions of the base grades and final grades design ....early in 2002." (11/21/02 Vol. 12, Tr. at 10.) He did not testify to that being done in January 2002, as Petitioner Watson alleges. (Watson Br. at 40.) A simple review of the boring logs identified by Petitioner Watson indicates that the borings were performed between December 14, 2001 and February 9, 2002. (App. at Crit. 2, Appendix B-1.) This is *completely consistent* with Mr. Nickodem's testimony, which was that he completed the design of the excavation and final grades first, which are the basis for all the other design elements. (11/21/02 Vol. 12, Tr. at 10.)

(iv) Water Supply Wells

Petitioner Watson claims that Mr. Nickodem did not investigate whether a potable well existed on the East side of the Expansion property. (Watson Br. at 40.) Mr. Nickodem testified that he relied upon a public records search on water supply wells within 200 feet of the Expansion. (11/22/02 Vol. 14, Tr. at 27-28.) He testified that he was "aware that there is something over there," but that he had "not seen any documentation of it," had not seen any

survey data regarding it, nor was he saying that "they're wells because I don't know." (11/22/02 Vol. 14, Tr. at 27-28.) A review of the Illinois State Water Survey Private Well Data Base was performed on Monday, January 7, 2002 and Friday, March 15, 2002, to assess what wells had been placed as of the filing of the Application on March 29, 2002. (App. at Crit. 2, Appendix A.) No wells had been registered to that property as of March 15. Further, the Application filed on August 16 was the same Application filed March 29. No evidence was presented during the public hearings to contradict Mr. Nickodem's testimony, or to establish that any type of well had been registered with the Illinois State Water Survey after March 15, 2002.[13]

Petitioner Watson claims that Mr. Nickodem did not consider the location of the nearest water supply well when he designed the Expansion. (Watson Br. at 40.) Again, the claim is disingenuous. Mr. Nickodem considered the nearest municipal well intake, but needed additional information to respond to Petitioner Watson's counsel's specific questions. (11/22/02 Vol. 14, Tr. at 30-31.) He offered to obtain the information so that he could respond to Petitioner Watson's questions, but counsel never asked him to do so. (11/22/02 Vol. 14, Tr. at 31.)

Petitioner Watson claims that Mr. Nickodem's information was either "inaccurate or, at the very least, was not complete." (Watson Br. at 40.) In support of his claim, Petitioner Watson cites to a public comment exhibit (Watson Public Comment, Exhibit C), which includes a letter from the IEPA, allegedly identifying the nearest public water intake. However, this letter was never introduced during the hearing and was filed as a public comment on January 6, 2003. Mr. Nickodem was never in a position to respond to it. The letter indicates that Mr. Daniel Hartweg submitted a Freedom of Information Act request to the IEPA on December 12, 2002, *after the completion of the public hearings,* requesting information on the "water intakes located along the

[13] In the event the Expansion is permitted, the design will incorporate the appropriate changes to the limits of waste to reflect the appropriate setbacks from all applicable water supply wells that are so designated by the State of Illinois.

Iroquois River and 7-10 miles downstream from the Kankakee Landfill in Kankakee County". Petitioner Watson inaccurately conveys the information provided in the "source water fact sheet for Kankakee," included with the letter, claiming that the nearest water supply intake is "7 miles downstream of the proposed facility." (Watson Br. at 40.) However, Exhibit C never states where the intake is located, other than it is within 7-10 miles downstream. (Watson Public Comment, Exhibit C.) Further, Mr. Nickodem considered the hydrogeologic evaluation in his design, which would include Ms. Underwood's knowledge that localized sand bodies do not extend to the Iroquois River. (11/25/02 Vol. 19, Tr. at 103-104.)

(v) USEPA Report

Petitioner Watson next claims that the suitability of the "existing landfill has been previously seriously questioned by personal (sic) from or working for the State of Illinois and the U.S. Environmental Protection Agency (USEPA)." (Watson Public Comment, Exhibit D; Watson Br. at 40.) Of course, the suitability of the existing facility is not relevant to whether the Expansion satisfies criterion two. Hediger, slip op. at 12-13; Gallatin National, slip op. at 29. Nevertheless, Petitioners continue to urge that alleged problems at the existing facility demonstrate that the County Board's decision is against the manifest weight of the evidence. WMII will accurately describe Exhibit D.

Exhibit D is a report prepared for the USEPA, dated July 18, 1995, which was part of a larger USEPA program to evaluate focused site inspections. (Watson Public Comment, Exhibit D, p. 1.) The report indicates that the existing facility was initially assessed in February 1983, with further investigation performed in 1984. The report indicates that "(n)otice of an apparent need for emergency action" was found "not applicable" to the existing facility. (Watson Public Comment, Ex. D, Appendix A.)

The report does not indicate any activity between 1984 and January 1995. In January 1995, an ARCS contractor began reviewing background data for the site and interviewed an IEPA inspector responsible for the existing facility. The IEPA inspector told USEPA that "the facility has a history of compliance and is generally well run." (Watson Public Comment, Ex. D, pp. 2-5.) The IEPA inspector's documented comments were that "there was a leachate/seep erosion problem *once* and a litter problem *once, but operators are very responsive.*" (Watson Public Comment, Ex. D, p. Appendix A.) (emphasis added) The conclusion of the report was that "landfill wastes *constitute a possible source of contamination,* ... however, according to the IEPA, the landfill is regularly inspected. If ...problems occur, landfill operators are responsive with resolving problems and mitigating contaminant migration." Based on the 1995 review, no reconnaissance was conducted and no samples were collected. (Watson Public Comment, Ex. D, p. 8.) (emphasis added) Corrective action has never been issued for the existing facility by IEPA, and there is no evidence from any completed assessment monitoring that the existing facility has caused groundwater contamination. (12/04/02 Vol. 26, Tr. at 76-77.)

(vi) Existing Facility Leachate Levels

Petitioner Watson next alleges that there are three problems regarding WMII's ability to maintain a leachate depth under one foot within the Expansion. (Watson Br. p. 41.) First, Petitioner Watson claims that the existing facility "has never been able to maintain leachate at two feet or under" in accordance with its then two-foot leachate level requirement, citing to an IEPA document, dated February 5, 1990, included in its public comment. (Watson Br. at 41; Watson Public Comment, Ex. B.) Watson's claim is false. The document refers to a leachate management requirement in the existing facility's 1987 permit. No where in the February 1990 document does IEPA state that "WMII has never been able to maintain leachate at two feet or

under at the existing site." To the contrary, it states that this requirement "has not yet been met," indicating that the leachate removal is a continuing process. (Watson Public Comment, Ex. B.) The existing facility now operates under a completely different permit, and no documentation has been provided by Petitioner Watson to indicate that the recommendations made by IEPA in the February 5, 1990 letter were never met. (App. at Crit. 2, p. 1-1.)

Second, Petitioner Watson claims "WMII presented no evidence that ... it would be able to maintain an even lower depth, one foot, at the expansion." (Watson Br. at 41.) The claim is baseless. The leachate management system for the Expansion is designed in accordance with the current regulations required by IEPA, namely 35 Ill. Adm. Code 811–814. The leachate management systems for the existing facility and the Expansion are each designed to a different standard. By regulation, the Expansion *must maintain* a leachate level of one-foot or lower. In its Application, WMII presented an extensive analysis of the leachate management system design for open, intermediate and closed conditions, in order to develop a design which would limit the leachate head buildup on the liner to less than one-foot. The results indicated a maximum leachate head buildup on the liner, during open conditions, of 2.11 inches, based on average monthly values from the HELP analysis output. (App. at Crit. 2, p. 5-4, and Appendix K-1, p. 8.) As stated in the Application, "due to leachate management practices during operations,...leachate will not be allowed to accumulate on the liner." (App. at Crit. 2, p. 5-4.)

Third, Petitioner Watson claims that WMII's testimony with respect to "depth of leachate is confusing and inconsistent, as the liner itself has a 12-14 foot difference in height, so from where will the one-foot depth of leachate be measured?" (Watson Br. p. 41.) This is a specious claim, because it ignores the very fact that *the liner is sloped,* which creates the flow to the sumps where leachate is collected and removed. The only party in this case "confused" about

leachate management is Petitioner Watson. The uncontroverted testimony and evidence in this record is that leachate will be managed such that it will not exceed one-foot on the liner.

(vii) Leachate Recirculation

Petitioner Watson next alleges that WMII "proposes to make the expansion into a bioreactor." (Watson Br. at 41.) This mischaracterizes Mr. Nickodem's testimony. Mr. Nickodem testified that the operator intended to recirculate leachate, and that the term "bioreactor" is a "fairly new term for some what of an old technology," that being the introduction of leachate back into waste mass, which has been going on at sites for many years. (11/21/02 Vol. 12, Tr. at 50-51.) Interestingly, Petitioner Watson makes no specific claims against the recirculation of leachate, nor what potential environmental issue it creates. Instead, Petitioner Watson attempts to discredit Mr. Nickodem's experience with regard to the subject. (Watson Br. p. 41.)

Leachate recirculation is an accepted practice, as it is allowed by 35 IAC 811. WMII *proposes* to recirculate leachate, and provides two alternative conceptual designs as to how it could be performed. The analysis included an evaluation of the impact of recirculation on leachate head, such that the leachate collection system could accommodate leachate recirculation and maintain a leachate head level below one-foot. (11/21/02 Vol. 12, Tr. at 50; App. at Crit. 2, p. 5-9.)[14]

(viii) Daily Cover Soil Balance

Petitioner Watson next claims that "testimony was inconsistent and no plan exists...as to how six million cubic yards of excess soil...will be managed at the site, if daily cover other than

[14] The County Board imposed conditions on the implementation of recirculation at the Expansion, indicating that it could start no sooner than four years after the receipt of the operating permit, and that it would require petitioning of the County Board for approval to do so, including a review of the proposal by an independent technical expert to evaluate safety and appropriateness. (County Approval, p. 3.)

soil is utilized." (Watson Br. at 41-42.) Petitioner Watson also makes the incorrect assertion that:

> "alternative daily cover (i.e., non-soil cover) is preferred to soil cover, as it conserves airspace in the landfill and allows leachate to flow through the landfill, rather than potentially buldge up through the final cover, there appears to be strong preferences for use of non-soil covers, which leaves a greater potential of a six million cubic yards (sic) problem at the site." (Watson Br. at 42.)

Petitioner Watson failed to review the Application, as it is noted in the Application that *the required volume of daily cover* (not daily cover soil surplus) is 6,691,400 cubic yards. (App. at Crit. 2, Table 3-1; Appendix I, p. 3.) Mr. Nickodem testified that this volume is based upon a need for soil and alternative daily covers, equivalent to approximately 12% of the in-place volume, to meet and provide for daily and intermediate cover requirements at the Expansion. (11/22/02 Vol. 14, Tr. at 45.) This material *will not be excavated all at one time, nor stockpiled all at one time,* but will be excavated as construction occurs, and stored in the future adjacent cell. (11/22/02 Vol. 14, Tr. at 48.) (emphasis added)

Petitioner Watson errs in stating that "alternative daily cover...is preferred to soil cover." (Watson Br. at 42.) Mr. Nickodem never testified that it was "preferable" to soil cover. (11/22/02 Vol. 14, Tr. at 46-47.) In fact, it is stated in the Application that "(t)he ADC [alternate daily cover] is proposed *as a supplement to, and not a complete replacement for,* earthen daily cover. ADC will not be a replacement for soil daily cover..." Further, all intermediate cover needs will be addressed with one-foot of soil material. (App. at Crit. 2, p. 11-4, 11-5.)

(ix) Past Notices of Violation – Existing Facility

Lastly, Petitioner Watson claims that Mr. Nickodem "assumed" that WMII "had no past notices of or actual violations at the existing landfill." (Watson Br. p. 42; 11/23/02 Vol. 16, Tr. at 16.) However, Petitioner Watson has simply "made up" this conclusion. Mr. Nickodem never

testified that he "assumed" that there had been no violations. In fact, he testified that he had reviewed the "Regulatory Agency Actions" section of the Application (although he had not personally prepared it), and was willing to respond to any questions that might be raised about it. (11/23/02 Vol. 16, Tr. at 14-15.)

Petitioner Watson alleges "there are actually, at least, 21 notices of violation sent to WMII concerning the existing site." (Watson Br. at 42; Watson Pub. Hrg. Ex. 3.) Mr. Rubak testified in response to questions relating to these notices. Watson Pub. Hrg. Ex. 3 contained microfiche copies of letters *from the operating record of the existing facility*, which was on file with the County Clerk's office and four local libraries. (11/18/02 Vol. 1, Tr. at 43, 97.) The letters presented were issued between September 28, 1977 and May 14, 1991. All but four of the letters preceded 1989. (Watson Pub. Hrg. Ex. 3.)

While Petitioner Watson apparently argues that the operating history of the existing facility is suspect by reviewing selected portions of these letters, a detailed review of Watson Public Hearing Exhibit No. 3 provides the following information:

1. Five of the letters do not even identify the apparent violation.
2. Eleven of the letters address violations related to inadequate daily or intermediate cover, windblown litter, and two notices of leachate ponding in the active fill area.
3. Two of the letters are duplicates (December 14, 1989) and address elevated levels of vinyl chloride noted in the groundwater analysis reports in December 1989.
4. One letter (dated April 9, 1990) is from IEPA confirming their receipt of a requested response from WMII regarding the December 14, 1989 letter, which indicated that WMII correctly interpreted IEPA concerns and was pursuing an IEPA response.

Mr. Rubak testified that none of the alleged violations are outstanding and that they have all been resolved. (11/25/02 Vol. 19, Tr. at 30.) He testified that there were no lawsuits or enforcement actions ever filed against WMII and that there were no pending notices of violations for the existing facility. (11/25/02 Vol. 19, Tr. at 39; 11/25/02 Vol. 18, Tr. at 67.)

(c) Summary

Petitioner's contentions regarding criterion two are based on the (1) observations expressed by Mr. Norris, (2) speculation offered by Petitioners City, Karlock and Watson concerning alternative geologic, hydrogeologic and design scenarios, and (3) the operating history of the existing facility. However, these objections are factually unsupported, and rely upon conjecture and mischaracterization. Hence, the objections are sufficient to establish that the County Board finding on criterion two is against the manifest weight of the evidence. This is especially true where, as here, the County Board determined that WMII's witnesses were credible and should be believed over the testimony of Mr. Norris. File, 579 N.E.2d at 1236 (determination of criterion two purely a matter of assessing credibility of expert witnesses and where applicant's witnesses are found credible, appellate body may not reverse).

The record contains substantial and persuasive evidence that the Expansion has been designed, located and proposed to be operated to protect the public health, safety and welfare. No evidence was presented that even suggested that the design is flawed from a public safety standpoint or that its proposed operation poses an unacceptable risk to public health. The County Board decision should be affirmed.

3. Criterion 3: The Expansion Is Located So As To Minimize Incompatibility With The Character Of The Surrounding Area And To Minimize The Effect On The Value Of The Surrounding Property

Petitioners contend that the County Board's decision on criterion three was against the manifest weight of the evidence. (City Br. at 20-24; Watson Br. at 42-45.) Their contentions are baseless. Petitioner City alleges that Mr. Lannert's testimony was not relevant to criterion three because he did not testify that the Expansion was incompatible with the character of the surrounding area. (City Br. at 21.) As a result, he was unable to testify that incompatibility was

minimized, as required by criterion three. Petitioner City's argument is wrong. Criterion three does not require that a proposed facility be incompatible with its surrounding area. It requires that an applicant take reasonable steps to minimize any incompatibility that is shown to exist. File, 579 N.E.2d at 1236. Where there is no incompatibility, however, minimization is not required. Tate, 544 N.E.2d at 1197.

Mr. Lannert testified that the Expansion is compatible with the character of the surrounding area. (11/18/02 Vol. 3, Tr. at 72.) No one contradicted or refuted this conclusion. Mr. Lannert's testimony satisfied the first part of criterion three and did not require any steps to minimize what did not exist. Nevertheless, WMII presented a landscape screening plan to minimize any impact on adjacent properties. (11/18/02 Vol. 3, Tr. at 69-70.) As the screening plan was not required for an Expansion that is compatible with the surrounding area, Petitioner City may not argue that the plan is evidence of incompatibility so that Mr. Lannert's testimony did not satisfy criterion three, or that landscaping was required on all four sides of the proposed facility to minimize incompatibility. (Watson Br. at 43..) The testimony properly established that the Expansion was compatible and satisfied criterion three. Petitioner City simply misconstrued the statutory language by claiming that meeting criterion three requires a showing of incompatibility that must be minimized.

Petitioners contend that the second part of criterion three (minimization of effect on property value) was not met because of Ms. Beaver-McGarr's alleged perjury and her incomplete and inaccurate data. (City Br. at 21-24; Watson Br. at 44-45.) As explained above (see supra pp.29-32), Ms. Beaver-McGarr did not commit perjury. Petitioners' argument that her testimony about Richard J. Daley College was untruthful is an argument that criterion three was not met because this witness was not credible. This is an insufficient basis on which to reverse a finding

that the criterion was satisfied. Landfill 33, slip op. at 3. Petitioners' argument was made to and considered by the County Board. The County Board made its own determination concerning Ms. Beaver-McGarr's credibility on this and other matters involving her testimony. As this Board may not reweigh the testimony or make its own determination of credibility, Petitioners' claim that criterion three was not met because Ms. Beaver-McGarr allegedly testified untruthfully is legally insufficient and should be rejected.

Similarly, Petitioners' contention that Ms. Beaver-McGarr's analysis was flawed because of the quantity and quality of her data is an argument going to the credibility of her testimony not to the fact of whether any property value impact has been minimized. No other expert witness testified, nor was any evidence presented, that even suggested a negative effect on the value of surrounding property. The credibility of a witness is not a proper basis on which this Board may find that the County Board's finding on criterion three was against the manifest weight of the evidence. Landfill 33, slip op. at 3. There is no evidence in this record establishing that the County Board's finding on criterion three is clearly and indisputably wrong.

To the contrary, there is ample and persuasive evidence in the record to support the County Board's finding that the Expansion satisfies criterion three. Landfill L.L.C., slip op. at 10; File, 579 N.E.2d at 1236; Fairview, 555 N.E.2d at 1186. The Board cannot reweigh the evidence, and a careful review of the evidence on this criterion does not indicate that the opposite ruling is clearly evident or indisputable. Landfill L.L.C., slip op. at 10. Thus, the Board should affirm the County Board's decision on criterion three.

4. Criterion 5: The Plan Of Operations For The Expansion Is Designed To Minimize The Danger To The Surrounding Area From Fire, Spills, Or Other Operational Accidents

Petitioners argue that the County Board's decision on criterion five is against the manifest weight of the evidence. (City Br. at 24; Watson Br. at 38-42.) The argument is unsupported.

The issue here is one of safety, with the emphasis on planning to avoid or minimize the damage from catastrophic accidents. Industrial Fuels, 592 N.E.2d at 157. The standard is not the guarantee of an accident-proof facility, but the minimization of potential danger. ID at 157-58.

Mr. Nickodem testified that the plan of operation for the Expansion has been designed to minimize the danger to the surrounding area from fire, spills or other operational accidents. (11/22/02 Vol. 15, Tr. at 101-106.) No other witnesses testified on criterion five.

Petitioner City alleges that the proposed operation does not include radiation monitoring. (City Br. at 24.) While there was no evidence presented justifying the need for radiation detectors, the County Board included a condition that such detectors be installed. (County Approval, paragraph 2(o).) Petitioner Watson alleges there is no plan to deal with excessive levels of landfill gas (if they occur), and that Mr. Nickodem was unaware of notices of violation at the existing landfill. (Watson Br. at 42.) In fact, Mr. Nickodem described the response and notification plan in the event of excess landfill gas. (11/22/02 Vol. 14, Tr. at 56-60.) The notices of violation at the existing facility, none more recent than 1991, are irrelevant to the plan of operations for the Expansion. (see supra, pp. 63-64, 68-69.)

There is sufficient evidence in the record to support the County Board's finding that the Expansion satisfies criterion five. County of Kankakee, slip op. at 28. Petitioners have

presented no evidence demonstrating that the plan is inadequate. Id. Thus, the Board should affirm the County Board's decision on criterion five.

5. Criterion 6: Traffic Patterns To Or From The Expansion Are Designed To Minimize Impact On Existing Traffic Flows

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

Petitioners contend that the County Board's finding on criterion six is against the manifest weight of the evidence. (City Br. at 24-25; Watson Br. at 45-46.) Petitioners adduce no evidence establishing that impact on traffic was not minimized. Id at 1186. Instead, they argue that the amount of data relied upon by WMII was insufficient and that WMII failed to perform an adequate traffic study. (City Br. at 25; Watson Br. at 45-46.)

These matters relate to the weight or credibility of the evidence presented by WMII, and not to the substance of the evidence establishing that impact was minimized. The County Board has determined to credit this evidence over the speculation and argument of Petitioners.

Petitioners have presented no evidence demonstrating that impact on existing traffic flows have not been minimized. The County Board's finding, based upon the uncontradicted evidence presented by WMII, is supported by the manifest weight of the evidence and should be affirmed.

6. Criterion 7: Criterion 7 is Inapplicable As The Expansion Will Not Accept Hazardous Waste

Petitioner Watson argues that the County Board's decision on criterion seven is against the manifest weight of the evidence because leachate generated at the existing landfill was not confirmed to be non-hazardous. (Watson Br. at 46-47.) Petitioner's argument is fatuous. There is no evidence suggesting, much less establishes, that leachate at the exiting facility was a hazardous waste. Even if it were deemed a hazardous waste, there is no evidence that it would be treated, stored or disposed of at the Expansion. The evidence is undisputed that the Expansion will not treat, store or dispose of hazardous waste, and criterion seven does not apply.

7. Criterion 8: The Expansion Is Consistent With The Kankakee County Solid Waste Management Plan

Criterion eight is met if the Expansion is shown to be consistent with the County Plan and its amendments. Such consistency is determined by reviewing the Plan language. Land and Lakes v. Randolph County, PCB 99-59, slip op. at 31-32. (September 21, 2000). Consistency is shown by demonstrating agreement or harmony with the purposes and principles of the County Plan. Strict compliance with each provision of the County Plan is not required. City of Geneva v. Waste Management of Illinois, Inc., PCB 94-58, slip op. at 22 (July 21, 1994). The County Board has wide discretion in determining consistency with the County Plan, and its approval may not be reversed unless it patently contradicts or violates a fundamental objective or requirement of the Plan. City of Geneva, slip op. at 22.

Petitioners argue that the Expansion is not consistent with the County Plan because it fails to strictly comply with certain Plan provisions. (Karlock Br. at 36-37; Runyon Br. at 3-22;

Watson Br. at 47-49.) Their arguments are based on a misreading of the County Plan and are therefore without merit.

The first contention is that the County Plan prohibits siting a landfill above a heavily utilized water supply aquifer. (Karlock Br. at 36; Runyon Br. at 5-9.) The County Plan contains no such prohibition. The language of the Plan states that "(a) site should not be located above or near a groundwater recharge zone or a heavily utilized water supply aquifer." (Offer of Proof, Watson IPCB Hearing Exhibit 7, p. 300.) (emphasis added) The word "should" does not mean "must." This Board has held that the use of "should" in the County Plan does not establish a mandate or requirement. County of Kankakee, slip op. at 29-30. Hence, the quoted Plan language is advisory, not mandatory, and does not prohibit the siting of a landfill above or near an aquifer.

This meaning is consistent with the County Plan. If the "heavily utilized water supply aquifer" includes the regional Silurian dolomite aquifer that underlies the Expansion[15], and "should" means "must," then the County Plan would prohibit any landfill in Kankakee County, because the Silurian dolomite aquifer underlies the entire County. The County Plan's extensive discussion of landfills and the need for landfill disposal in Kankakee County belies any assertion that the it would prohibit landfilling in Kankakee County.

Petitioners next contend that the County Plan requires public involvement throughout the landfill site selection process, and that WMII failed to conduct and facilitate such involvement. (Runyon Br. at 9-15.) The contention is meritless. The County Plan does not require public involvement. The relevant language is that public involvement "should be solicited" and local

[15] The County Plan does not define a "heavily utilized water supply aquifer." There is serious doubt whether the Silurian dolomite aquifer underlying the Expansion is properly considered a heavily utilized water supply aquifer as the term is used in the Plan. Petitioners merely assumed the point, and provided no evidence in support.

site selection criteria "should be developed." (Runyon Br. at 10.) "Should" does not mean "is required to be." County of Kankakee, slip op. at 29-30.

In addition, the County Plan does not suggest, much less require, that a siting applicant solicit public involvement during the initial stages of the site selection process or organize advisory committees and hold public hearings to develop local siting criteria. The County Plan recommends that these steps be taken by local government, not a siting applicant, to allow for public input during the site selection, not the local siting, process.

Petitioners next argue that the County Plan required a valid Host Agreement, and there was no valid Host Agreement in effect on August 16, 2002. (Runyon Br. at 15-20.) The argument is groundless. The County Plan states that a host community agreement "should be signed prior to submitting a siting application..." (Runyon Br. at 15.) This language does not require that an applicant enter into a host agreement with the County. County of Kankakee, slip op. at 29-30. Although the County Plan did not require one, a valid Host Agreement was entered into by WMII and the County.[16]

Petitioners claim that the property value guarantee program provided by WMII was insufficient because there was no evidence that it was "prepared by an independent entity satisfactory to the County." (Karlock Br. at 37; Runyon Br. at 20-22; Watson Br. at 48.) However, Petitioners ignore that the property value guarantee program was made a part of the Host Agreement agreed to by the County. By entering into the Agreement, the County preliminarily accepted the proposed property value guarantee program. Moreover, in granting

[16] Petitioner Runyon makes the additional claim that there was no valid host agreement in effect on August 16, 2002. (Runyon Br. at 15-20.) The claim is frivolous. It is based on language in the Host Agreement which provided that if WMII did not file its siting application on or before June 1, 2002, the Agreement would be void. WMII filed its Application March 29, 2002. Petitioner Runyon charges that since certain notice defects resulting in the Application being refiled on August 16, 2002, the Application filed March 29 was void and thus there was no Application filed on or before June 1. However, the notice defects did not change the fact that WMII filed its Application on March 29. The March 29 Application was simply refiled August 16. Neither WMII nor the County viewed these facts as terminating the Agreement. (11/18/02 Vol. 2, Tr. at pp. 9-10, 13, 15.)

siting approval, the County Board has determined that the guarantee program is satisfactory. Petitioners' argument is hypertechnical and ignores the undisputed fact of the County Board's acceptance of the program.

Petitioners Karlock and Watson make the puzzling argument that the evidence did not establish that WMII satisfied the Plan language calling for an environmental contingency escrow fund or environmental impairment insurance acceptable to the County. (Karlock Br. at 37; Watson Br. at 48.) This argument is puzzling because the Host Agreement plainly provides for such financial assurance. (Host Agreement, pp. 17-18.)

Petitioners next contend that the County Plan requires an applicant to comply with the local Siting Ordinance. (City Br. at 25; Watson Br. at 48.) Petitioners offer no support for this contention. Indeed, the County Plan contains no statements or requirements concerning compliance with the local Siting Ordinance. The only reference to the Siting Ordinance is the recommendation that it be reviewed and updated if necessary. (Plan, p. 407.)

Finally, Petitioner Watson alleges that the County Plan requires strict compliance with various locational standards set forth in Title 35 IAC 811. (Watson Br. at 48-49.) The County Plan contains no such requirements. The County Plan refers to the provisions of 35 IAC 811, and suggest their regulation by the IEPA, not by the Plan.

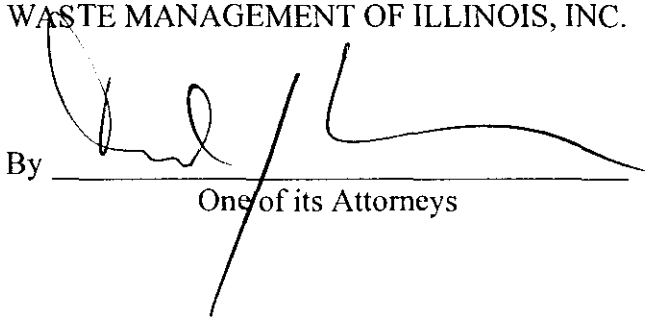
The County Board determined that the Expansion was consistent with the County Plan. Petitioners point to no evidence that plainly and indisputably demonstrates that the Expansion contradicts or violates any objective or principle of the County Plan. Therefore, the County Board's finding on criterion eight is not against the manifest weight of the evidence and should be affirmed. Landfill 33, slip op. at 29-30.

III. CONCLUSION

For the reasons set forth above, the County Board decision granting siting approval for the Expansion should be affirmed.

Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.



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