

ILLINOIS POLLUTION CONTROL BOARD
June 19, 2003

WASTE MANAGEMENT OF ILLINOIS, INC.,)	
)	
)	
Petitioner,)	
)	PCB 03-104
v.)	(Pollution Control Facility Siting
)	Appeal)
COUNTY BOARD OF KANE COUNTY, Illinois,)	
)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

On January 14, 2003, Waste Management of Illinois, Inc. (WMII) filed a petition to contest a siting decision made by the County Board of Kane County (Kane County Board or county board). The Kane County Board denied by resolution WMII's application to site a waste transfer facility within the boundaries of the existing Woodland Landfill in unincorporated Kane County.

A hearing was held in this matter before Hearing Officer Bradley Halloran at the Kane County Courthouse, 100 South Third Street, Geneva, on April 16, 2003. Approximately 20 members of the public attended the hearing.¹ Tr. at 7, 16. Mr. Derke Price presented public comment on behalf of the Village of South Elgin (South Elgin). Tr. at 16. Petitioner filed a post-hearing brief on April 30, 2003 (Supp. Br.). Kane County filed a post-hearing brief on May 12, 2003 (Resp.). The Village of South Elgin filed an *amicus curiae* brief (Am. Br.) on May 12, 2003. Twenty-two members of the public filed public comments supporting Kane County's decision to deny siting after the hearing.

For the reasons below, the Board affirms the Kane County Board's denial of WMII's application to construct a waste transfer facility at the Woodland Landfill site.

BACKGROUND

The Facility

Waste Management submitted a siting application with the Kane County Board requesting approval to site a waste transfer facility on the southeastern portion of the existing Woodland Landfill property. Supp. Br. at 2. The proposed site of the facility is located approximately 1,500 feet west/southwest of the intersection of Illinois Route 25 and Dunham

¹ References to the April 16, 2003 hearing will be cited as "Tr. at ___"

Road in unincorporated Kane County, Section 1, Township 40 N. Range 8 E. C004837. The property is 8.93 acres in size.

The proposed facility would have a footprint of 37,800 square feet, including a tipping area, offices and primary and auxiliary loading areas. C004837. The facility would be used for the consolidation and transfer of municipal solid waste, landscape waste and general construction and demolition debris from residential, commercial and industrial waste generators. Waste Management stated it would not receive special waste, soils, hazardous wastes, industrial process wastes, pollution control waste, sludge, potentially infectious medical waste, special waste, polychlorinated biphenyls, source, special, or by-product nuclear materials, radioactive waste, high level or low level radioactive waste, transuranic waste, lead acid batteries or bulk liquid waste or any liquid waste. C004838.

The facility would process an average of 2,000 tons per day (tpd) of waste materials, with a maximum processing capability of 2,640 tpd. The proposed duration of operation is indefinite. C004838.

Public Hearings

The Kane County Board held public hearings on September 17, 19, 24, 26, and 30 and October 1, 3, 9, and October 10, 2002. C004837. Hearing Officer Patrick Kinnally conducted a public informational meeting on September 12, 2002, to answer questions that citizens might have concerning the siting process. C003138.

Waste Management presented six witnesses at the public hearing. Ms. Sheryl Smith testified that the facility was necessary and was consistent with the Kane County solid waste management plan. Mr. Andrew Nickodem testified that criteria (iv), (vii), and (ix) are inapplicable to the facility. C004838-C004839. Mr. Nickodem also testified concerning criterion (ii) and (viii). *Id.* Mr. J. Christopher Lannert testified that the facility was compatible with the character of the surrounding area. Ms. Patricia Beaver-McGarr testified that the facility was located so as to minimize any effect on the value of the surrounding property. Mr. Dale Koekstra testified that criteria (ii) and (v) were met. Mr. David Miller testified that the traffic patterns to and from the facility minimized impact on existing traffic flows. C004851-C004852.

Members of the public were allowed to participate by way of asking questions or making an oral statement. C003165. Mr. Joseph Cluchey testified on behalf of the South Elgin Countryside Fire Protection District regarding criteria (v) and (vi). His testimony neither supported nor opposed the application. C004161. Mr. Daniel Lynch, on behalf of the Village of Wayne, presented testimony against the application regarding criterion (vi). C004209. Eight members of the general public made oral statements and/or submitted various documents that were admitted into the record at hearing. C004490. The municipalities of St. Charles, South Elgin, Bartlett, and Wayne oppose the application. C004840.

Ms. Jennifer Sackett Pohlenz represented Kane County. Kane County also retained Deigan & Associates, L.L.C. and CEMCON, Limited/Coulter Transportation Consulting, L.L.C. to perform reviews of the application. C004224, C004353. Mr. Gary Deigan testified on criteria

(ii) and (v). Mr. Brent Coulter testified on criterion (vi). C004224, C004353. Both Mr. Coulter and Mr. Deigan stated they were neutral towards Waste Management's application.

On November 19, 2002, the Kane County Board called a special meeting to begin discussions concerning Waste Management's siting application. C004546-C004639. On December 10, 2002, the Kane County Board deliberated and voted to deny Waste Management's siting application. C004642, C004826-4883. Twenty-three members of the Kane County Board voted in favor of Resolution 02-431 denying siting, and two members voted against that resolution.² The Kane County Board's written decision includes Resolution 02-431 and adopts the local hearing officer's findings of fact and conclusions of law to the extent they are inconsistent with a four-page memorandum prepared by county board member Dan Walter (Walter Memo). C004826-C004883. The written decision includes the four-page Walter Memo.

Hearing Officer Order

Hearing Officer Kinnally found that Waste Management's application met all of the criteria required by Section 39.2(a) of the Environmental Protection Act (Act) subject to certain conditions that he listed at the end of his findings and conclusions of law. 415 ILCS 5/39.2(a); C004846, C004848, C004850, C004854, C004855.

Walter Memo

The Walter Memo is a four-page document written by county board member Dan Walter to the members of the Kane County Board. In the memorandum, Mr. Walter explains why the county board should deny Waste Management's application to site a waste transfer facility at the Woodland Landfill site in Kane County. *See* C004883. Specifically, Mr. Walter discusses why the application does not satisfy siting criteria (ii), (iii), (vi), and (viii) of Section 39.2(a) of the Act. 415 ILCS 5/39.2(a). To support his arguments, Mr. Walter summarizes evidence presented at hearings and references Kane County's solid waste management plan, Kane County Ordinance 01-281 (Rules of Procedure for New Regional Pollution Control Facility Approval), the Kane County Solid Waste Transfer Facility Host Community Benefit Agreement (adopted by Resolution 02-05 on January 8, 2002), and the Kane County 2020 Plan.

MOTIONS RAISED IN POST HEARING BRIEFS

Motion for Leave to File Reply Brief Instanter

On May 20, 2003, Waste Management filed a motion to file a reply brief instanter. The Board grants Waste Management's motion and accepts the reply brief. Kane County did not respond to Waste Management's motion to file a reply.

Motion to Strike Portions of Waste Management's Post-hearing Brief

² *See* Kane County's responses to petitioner's requests to admit at page 1, filed April 7, 2003.

The Kane County Board urges the Board to strike portions of Waste Management's memorandum in support of the siting appeal that fall into one of the following categories: (1) statements of fact or law made without reference to the record or citation to caselaw; (2) statements of fact not contained in the record; and (3) inaccurate references to facts or legal authority. The Kane County Board cites State Security Ins. Co. v. Ramon Soto Burgos, et al, 145 Ill.2d 423, 430, 583 N.E.2d 587, 550 (S.Ct. 1991), for the principle that statements in a brief not supported by the record can be stricken.

While Kane County references several discrepancies between the parties' arguments, the Board will not strike any portion of Waste Management's post-hearing brief. The Board finds Waste Management has not made false allegations of the record or offered new evidence or arguments regarding matters not discussed in the respondent's post-hearing brief. Absent any false allegations or new nonresponsive evidence or arguments, the Board will not strike any portions of Waste Management's post-hearing brief.

STATUTORY BACKGROUND

An applicant for local siting must submit sufficient details describing the proposed facility and demonstrate how it will achieve compliance with the statutory criteria. Local siting approval will only be granted if the proposed facility meets all nine criteria listed in Section 39.2(a) of the Act. 415 ILCS 5/39.2(a) (2002). Here, Waste Management contends that the Kane County Board's determination that Waste Management did not satisfy criteria (ii), (iii), (vi), and (viii) was against the manifest weight of the evidence. Those criteria require the petitioner to show:

- (ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
 - (iii) the facility is so 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;
- * * *
- (vi) the traffic patterns to or from the facility are so designed to minimize the impact on existing traffic flows;
- * * *
- (viii) if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan. 415 ILCS 5/39.2(a)(ii), (iii), (vi), (viii) (2002).

No later than 120 days after receiving an application for siting of a pollution control facility, the county board must hold at least one public hearing. 415 ILCS 5/39.2(d) (2002). The procedures followed in that hearing must have been fundamentally fair. 415 ILCS 5/40.1(b) (2002).

Section 40.1(a) of the Act provides:

If the county board . . . refuses to grant . . . approval under Section 39.2 of this Act, the applicant may, within 35 days after the date on which the local siting authority disapproved . . . siting, petition for a hearing before the Board to contest the decision of the county board . . . 415 ILCS 5/40.1(a) (2002).

The petitioner has the burden of proof. 415 ILCS 5/40.1(a).

DISCUSSION

The Board will now assess the merits of the parties' arguments.

Fundamental Fairness

The Board must determine whether the Kane County Board proceeding was fundamentally fair under Section 40.1 of the Act. 415 ILCS 5/40.1. Proceedings at the local level must comport with due process standards of fundamental fairness. Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 1036, 530 N.E.2d 682, 693 (2nd Dist. 1988); Sierra Club v. PCB 99-136; 99-139 slip op. at 5 (Sept. 23, 1999); citing E & E Hauling, Inc. v. PCB, 116 Ill App. 3d at 596, 451 N.E.2d at 564.

Waste Management argues the county board's December 10, 2002 decision to deny siting was the result of a fundamentally unfair procedure. Waste Management claims the procedures were fundamentally unfair for the following three reasons: (1) because the county board considered the Walter Memo, the siting decision was legislative, not adjudicative; (2) the Walter Memo made inaccurate legal conclusions; and (3) the Walter Memo improperly considered facts outside the record. The Board addresses each argument in turn.

Siting Decision: Legislative vs. Adjudicative

Waste Management argues that the county board's consideration of the Walter Memo rendered the county board's decision legislative rather than adjudicative, and thus, fundamentally unfair. Waste Management claims that siting proceedings under the Act are adjudicatory in nature. Pet. Br. at 6; citing Land & Lakes Co. v. PCB, 245 Ill. App.3d 631, 616 N.E.2d 349, 354 (3rd Dist. 1993). Waste Management states that in adjudicatory proceedings, decisions must be made only on the evidence presented in the record. Alternatively, in legislative proceedings, a local government may craft rules of general application based upon facts and considerations that may not have been presented at hearing, but are known to the decision-maker outside the hearing process. Pet. Br. at 6; citing People ex. rel. Klaeren v. Village of Lisle, 202, Ill. 2d 164, 781 N.E.2d 223, 228-29 (2002).

Waste Management argues that the Walter Memo misapplied the law and misstated facts. Pet. Br. at 7. Waste Management argues that the inaccurate facts and erroneous conclusions in the Walter memo rendered the Kane County Board's decision fundamentally unfair particularly because the county board gave Waste Management no opportunity to respond to the memo. *Id.*

Waste Management contends these legal and factual errors rendered the county board's decision legislative rather than adjudicative, and thus, violated Waste Management's right to a fundamentally fair decision. *Id.*

Kane County argues that Mr. Walter is a member of the Kane County Board, and the memo was a summary of his conclusions and opinions regarding the evidence. Kane County argues Waste Management has no right to respond to Mr. Walter's memo. Rather Waste Management's right to respond arises only during its statutory right to appeal the decision of the local government. Resp. at 5. Kane County argues that absent a statute granting an applicant a right to respond, no such right exists. Resp. at 8.

Kane County argues that even assuming the Board considers the Walter Memo evidence, Waste Management waived any right to respond when Waste Management failed to object at the December 10, 2002 Kane County Board meeting. *Id.* Kane County cites the Illinois Supreme Court for the proposition that failure to object at the original proceeding constitutes a waiver of the right to raise the issue on appeal. Resp. at 10; citing People v. Carlson, 79 Ill. 2d 564, 576-77, 404 N.E.2d 233, 238-39 (1980). Kane County argues that Waste Management was present at the December 10, 2002 meeting at which Member Walter read portions of his memorandum into the record, yet did not object. Kane County contends that by failing to object, it follows that Waste Management waived its right to respond to the memo altogether. Resp. at 11.

Kane County also argues the proper standard of review applied to the Kane County Board's decision is a review based on the manifest weight of the evidence. Kane County argues that even if the Board applies the *de novo* standard, there are no inaccuracies of fact or law as Waste Management claims. Finally, Kane County contends that "reversal" of the Kane County Board's decision is not the proper remedy under a fundamental fairness argument. Rather the remedy for a lack of fundamental fairness is a remand to the Kane County Board to correct the problem or hold additional hearings. Resp. at 28; citing Land and Lakes Co., 245 Ill. App.3d at 644; City of Rockford v. Winnebago County Board, PCB 87-92 slip op. at 203 (Nov. 19, 1987); McLean County Disposal Co. Inc. v. County of McLean, PCB 89-108 slip op. at 5 (Nov. 15, 1989).

Legal Conclusions

Waste Management contends that the Walter Memo misstated the evidence relating to criteria (ii), (iii), (vi), and (viii). Supp. Br. at 13-14. Waste Management argues these mischaracterizations are fundamentally unfair because the county board relied on them in deciding to deny Waste Management's application. Kane County contends Waste Management fails to reference a legal standard or incorrectly cites the one used by the Kane County Board in presenting this argument. Resp. at 15.

Facts Outside the Record

Waste Management claims the Walter Memo relied on information not in the record in arriving at certain conclusions. Resp. at 21. Waste Management concludes that this as well made the Walter Memo fundamentally unfair. Resp. at 24. Kane County argues that whether or

not the Walter Memo contains inaccuracies does not matter because the Board must consider the entire record, not just the written decision, when reviewing a local siting authority's rulings. Kane County states that here the record supports the Kane County Board's decision. Resp. at 17.

Board Analysis

Waste Management challenges the fundamental fairness of the Kane County Board proceedings based on the Walter Memo. Waste Management claims that: (1) the Walter Memo made inaccurate legal conclusions; (2) misstated facts; and (3) because the county board considered the Walter Memo, the siting decision was legislative, not adjudicative. For all of these reasons, Waste Management claims the proceedings were fundamentally unfair. As discussed below, the Board finds the Kane County Board siting proceedings were fundamentally fair.

Waste Management claims the hearing officer *recommended* that the county board grant local siting approval subject to certain conditions. However, the Board finds this is untrue. The hearing officer may only make findings of fact or law, or both, and provide one of three conclusions for the county board to consider: (1) approve the application as submitted; (2) approve it with conditions; (3) or deny it. C004836-C004837.

Opportunity to Respond. The Board finds that the Kane County Board proceedings were not made fundamentally unfair because Waste Management did not have an opportunity to respond to the Walter Memo. Parties to a siting approval proceeding do not have a right to submit public comment or respond to filings more than thirty days after the end of the public hearing. 415 ILCS 5/39.2(c). In Land & Lakes the court held that in the "site approval process mandated by 39.2 of the Act, the public hearing is the only opportunity for public comment in the entire administrative process." Land & Lakes, 245 Ill. App. 3d at 642. Thus, Waste Management's "right to present its case (see Reply at 4)" ended 30 days after the end of the public hearings before the county board.

Walter Memo. The Board is also unpersuaded that the Walter Memo is evidence that may have tainted the Kane County Board proceedings. The Walter Memo is a summary of the testimony and evidence presented at the public hearings and in public comments, and the recommendations of Mr. Walter. "[T]he decision of a local siting authority is not tainted merely because it adopts the findings and recommendations of persons who may have some bias concerning the merits of the siting application." Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 743 N.E.2d 188 (3rd App. Dist. 2000) (Land and Lakes II). The county board was free to reject or disagree with the Walter Memo's findings and recommendations.

Nature of Kane County Board Proceedings. It is a well-established principle that the local siting authority's role in the siting approval process is both quasi-legislative and quasi-adjudicative. Land and Lakes II, 743 N.E.2d at 193; citing Southwest Energy Corp. v. PCB, 275 Ill. App. 3d 84, 655 N.E.2d 304 (1995).

Waiver. Kane County argues that even if the Board finds that Waste Management should have had an opportunity to respond to the Walter Memo, Waste Management waived that

right. Kane County contends that Waste Management heard Mr. Walter read portions of the Walter Memo into the record at the county board's December 10, 2002 deliberations, yet did not object. Kane County states that a failure to object at the original proceeding generally constitutes a waiver of the right to object to that issue on appeal. Resp. at 10; citing Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 545, 555 N.E.2d 1178, 1180-81 (3rd Dist. 1990).

Waste Management states that a waiver is only effective if it is a clear and knowing waiver. Reply at 6; citing Fairview, 555 N.E.2d at 1180-81. Neither party disputes that the Walter Memo was presented to the county board on December 10, 2003. However, Waste Management claims the record lacks evidence that Waste Management ever received, reviewed, or heard any portion of the Walter Memo at the meeting. Reply at 7. Waste Management alleges Kane County cannot prove that Waste Management knew of the Walter Memo or its contents, and therefore, Kane County cannot successfully establish waiver. Reply at 7.

Conclusion. The Board finds that the Walter Memo did not render the Kane County Board proceedings fundamentally unfair. Mr. Walter's memorandum is his summary of the evidence and his recommendations, but is not evidence itself. The siting application, public comments submitted to the county clerk, and testimony at the public hearings are all evidence in the Kane County Board proceedings. The Walter Memo need not adhere to the same rules required to enter evidence into the record. Accordingly, the Board need not discuss the factual or legal errors that Waste Management alleges the Walter Memo contains.

Also, the Board finds that siting approval proceedings are both quasi-adjudicative and quasi-legislative, rather than purely adjudicative proceedings as Waste Management argues. Therefore, the county board's consideration of the Walter Memo did not render the proceedings fundamentally unfair. Finally, Waste Management was not denied an opportunity to respond to the Walter Memo, as no right to respond to the memo arose. Waste Management was afforded an opportunity to be heard, to cross-examine adverse witnesses, and to submit comments during the statutory period. The Board finds the proceedings before the Kane County Board were fundamentally fair.

Section 39.2(a) Criteria

The Act requires a party seeking siting approval for a pollution control facility to submit sufficient details of the proposed facility to meet each of nine statutory criteria. 415 ILCS 5/39.2(a) (2002); Land & Lakes II, 319 Ill. App. at 45, 743 N.E.2d at 191. The local siting authority considers the evidence presented and must determine by a preponderance of the evidence that the application satisfies all applicable criteria before granting approval. Sierra Club v. Will County Board, PCB 99-136 and Land and Lakes Co. v. Will County Board, 99-139 slip op. at 3 (consolidated) (Aug. 5, 1999); affirmed by Land and Lakes II, 743 N.E.2d 188. (2000).

When reviewing a local siting authority decision regarding the Section 39.2(a) criteria, the Board must determine whether the local siting decision is against the manifest weight of the evidence. Sierra Club, PCB 99-136; 99-139 at 3. A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, plain or indisputable. Land and

Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197. All of the statutory criteria must be satisfied before siting can be granted, and the manifest weight of the evidence standard applies to each criterion on review. Concerned Adjoining Owners, et al. v PCB, 288 Ill. App. 3d 565, 576, 680 N.E.2d 810, 818 (5th Dist. 1997).

Waste Management argues that the county board's failure to find that criteria (ii), (iii), (vi) and (viii) were met was against the manifest weight of the evidence because the Walter Memo misapplied the law and misstated evidence. The Kane County Board's decision to deny Waste Management's application, with respect to meeting these criteria, will not be overturned unless the decision is contrary to the manifest weight of the evidence.

Several of the statutory criteria are inapplicable to Waste Management's siting application. Because the proposed facility is not located within a 100-year flood plain, criterion (iv) is inapplicable. C004839. Criterion (vii) is inapplicable because the facility will not be treating, storing, or disposing of hazardous wastes. C004839. Criterion (ix) is also inapplicable to this facility because it is not located within a regulated recharge area. C004839.

Waste Management does not contest criteria (i) or (v). Kane County contends that because the hearing officer found that the criteria were only met when subject to certain conditions, the hearing officer actually found the criteria were not met. Kane County asserts it follows, therefore, that based on criteria (i) and (v), the Kane County Board decision should be affirmed on its face. Resp. at 2. However, the Board has held that an approval with conditions is a definitive approval. Land and Lakes v. Randolph County Board, PCB 99-69, slip op. at 58 (Sept. 21, 2000). Because the Kane County Board adopted the hearing officer's findings to the extent they are inconsistent with the Walter Memo, and the Walter Memo does not discuss criteria (i) and (v), the Board finds the hearing officer's findings constitute a definitive approval of those two criteria.

As stated above, the Board reviews the Kane County Board decision to determine if the decision is against the manifest weight of the evidence. The Board is not in a position to reweigh the evidence. Fairview, 555 N.E.2d 1178. Therefore, the Board must decide if the evidence in the record supports the Kane County Board decision that Waste Management failed to meet criteria (ii), (iii), (vi), and (viii). Based on a review of the record and for the following reasons, the Board finds that the record supports the Kane County Board's findings on these criteria.

Criterion (ii)

Criterion (ii) of Section 39.2(a) of the Act requires the applicant to show "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii) (2002). The Board finds that the Kane County Board's decision that waste transfer facility will not protect the public health, safety and welfare is not against the manifest weight of the evidence.

Waste Management claims that no qualified witnesses testified that the design of the facility is flawed as related to public health or safety. Supp. Br. at 25. The Walter Memo stated that criterion 2 was not met because Waste Management's application did not consider a traffic

study, did not consider the end use plan, a condition of the 1988 siting approval of the Woodland Landfill, or the travel of trucks moving in and out of the facility. Supp. Br. at 26. Waste Management contends, however, that the Walter Memo is not supported by the evidence in the record. *Id.*

Kane County provides several reasons why Waste Management's application did not meet criterion (ii). Some of the reasons are as follows: (1) Waste Management's proposed air ventilation and carbon monoxide monitoring systems are at conceptual stages of design (C003519-003521, C003557-003558); (2) Waste Management made no accommodation in the building to attenuate noise (C003586-003587) and made no study to show whether the screening it does propose would reduce noise (C003587); and (3) Waste Management did not address existing off-site areas in its design of the stormwater management system. C003614, C003617. Additionally, Kane County contends a letter Waste Management submitted from the Department of Conservation stating there exist no sensitive resources in the immediate vicinity of the site that is nearly ten years old. Resp. at 33; C00196-C00198.

In response, Waste Management claims the Kane County Board's decision on this criterion is against the manifest weight of the evidence because the Kane County Board relies on an environmental consultant who lacks experience in the design and operation of waste transfer stations. Reply at 26. Additionally, Waste Management contends the testimony of Mr. Nickodem shows that Waste Management's application complied with the Kane County stormwater ordinance. Reply at 27; citing C003615. Waste Management also claims there are no wetlands on the facility property, so it need not show compliance with wetland provisions of the Kane County Solid Waste Management Ordinance. Reply at 27.

The Board notes that Waste Management failed to respond to several of the Kane County Board's reasons for finding that the application did not meet criterion (ii). Additionally, as discussed above, the Board finds that the Kane County Board did not rely solely on the Walter Memo in making its decision to deny siting, but considered all of the evidence in the record including the hearing officer's findings to the extent they are inconsistent with the Walter Memo. See Resp. at 29-30. The Board finds, therefore, that the Kane County Board's decision regarding criterion (ii) was not against the manifest weight of the evidence.

Criterion (iii)

Criterion (iii) of Section 39.2(a) of the Act requires the applicant to show "the facility is so located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect of the value of the surrounding property." 415 ILCS 5/39.2(a)(iii) (2002).

The Walter Memo stated the application failed to meet criterion (iii) for three reasons: (1) the application ignored conditions imposed by the Kane County Board in 1988, specifically the implementation of the end use plan for the Woodland Landfill site which consisted of a park and recreation areas; (2) the facility drive will conflict with the future planned use as a park; (3) Waste Management only evaluated a 1-mile radius around the facility rather than a 5-mile radius.

Waste Management presented two witnesses who testified regarding criterion (iii). Mr. Lannert testified regarding the character of the surrounding area and minimizing incompatibility with the surrounding area. Supp. Br. at 28. Ms. Patricia McGarr testified on the impact on surrounding property values. *Id.* Mr. Lannert testified that the facility is compatible with the surrounding area because of the existing industrial and business uses adjacent to the site, either zoned industrial or B-3, that agricultural and open space is predominant in the area at issue, and that screenings and buffers will improve compatibility. Supp. Br. at 29; C003244. Mr. Lannert testified that the proposed end use will still be a passive recreational area and open space.

Waste Management claims no witnesses testified against criterion (iii). Additionally, Waste Management claims no evidence supports the assertion in the Walter Memo that the planned use of the property and the surrounding area will be “forcibly altered” if the facility were approved. Supp. Br. at 31; citing Walter Memo at 4.

Regarding the size of the area evaluated, Waste Management contends that Mr. Lannert’s evaluation of the area within a 1-mile radius of the facility is adequate because the Act does not require a five-mile radius evaluation. Supp. Br. at 32.

Kane County contends the Kane County Board had ample reason to deny Waste Management’s application based on criterion (iii). Among those reasons, Kane County asserts that berming and fencing around the facility are important tools in minimizing incompatibility. However, Kane County states Waste Management proposed no buffer on two sides of the facility including the portion of the facility that would be adjacent to the Woodland Landfill recreational end-use. Resp. at 37; citing C004481. Kane County also claims that Waste Management did not propose an undulating berm, which Mr. Lannert described as “appropriate” and that “it just looks better.” Resp. at 37; C003308.

Kane County also maintains that a county ordinance requires Waste Management to study and submit information relevant to criterion (iii) on all property within a 5-mile radius of the proposed site. South Elgin notes in its *amicus curiae* brief that Section 11-102 of the Kane County Code petitions for siting new pollution control facilities and subsection 28(a)(4) of that Section contains the 5-mile radius requirement. Am. Br. at 5. South Elgin alleges that Waste Management noted this requirement in its petition, but Mr. Lannert testified that the report he prepared for Waste Management studied only a 1-mile radius. *Id.*

Finally, Kane County argues that according to a 1988 siting approval of the Woodland Landfill, Waste Management agreed that the end use plan of the Woodland site, adjacent to the proposed waste transfer facility location, would entail a passive recreation area with trails and open space. Kane County asserts that the waste transfer station would be incompatible with the end use of the adjacent Woodland Landfill site. Resp. at 36.

In response, Waste Management contends it must only do what is reasonably feasible to minimize incompatibility under criterion (iii). Reply at 28; citing File v. D&L Landfill, 219 Ill. App. 3d 897, 579 N.E.2d 1228 (5th Dist. 1991). The applicant need not take all actions necessary to guarantee that no impact or incompatibility occurs. Reply at 28; citing Clutts v. Beasley, 185 Ill.App.3d 543, 541 N.E.2d 844, 846 (5th Dist. 1989). Finally, Waste Management

argues that where, as here, the undisputed evidence shows the facility is compatible with the surrounding area, there is no need to propose measures to minimize incompatibility. Reply at 28; citing Tate v. PCB, 188 Ill. App. 3d 994, 544 N.E.2d 1176, 1197 (4th Dist. 1989).

The Board finds Waste Management's use of Clutts is misplaced since the cited principle does not refer to criterion (iii) of Section 39.2 of the Act. Additionally, Tate is unpersuasive because here the parties dispute that the facility is compatible with the surrounding area.

The Board finds that the record supports the Kane County Board decision regarding this criterion. Mr. Deigan, an environmental consulting engineer, testified that he has designed a transfer station with a screening wall on all four sides of the facility. C004481. Waste Management has proposed berming or fencing on only two of the four sides. Additionally, Kane County presented evidence that a waste transfer facility is not compatible with a passive recreation area or open space that Waste Management states it will implement on adjacent property at the Woodland Landfill site (*see* Supp. Br. at 31). The Board finds that the record supports the Kane County Board's denial regarding criterion (iii).

Criterion (vi)

Under criterion (vi) of Section 39.2(a) of the Act, the applicant must show "the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows." 415 ILCS 5/39.2(a)(vi) (2002). Mr. Miller testified regarding criterion (vi) on behalf of Waste Management and Mr. Coulter testified for the county. Both experts rendered opinions on the impact of the facility on traffic flows. Supp. Br. at 33-34. The possible traffic patterns discussed during testimony were: (1) Rte. 25 south to Rte. 64 east to Rte. 59 south; (2) Rte. 25 north to Dunham/Kirk, south on Rte. 64, east to Rte. 59; (3) Rte. 25 north to Dunham Road south, to Stearns east to Rte. 59, and (4) Rte. 25 north to West Bartlett Road east to Rte. 59. C004851.

Waste Management contends that under this criterion, the issue is not whether there is any acceptable route or no negative impact, but whether any impact on traffic flow has been minimized. Supp. Br. at 33; citing Fairview, 555 N.E.2d at 1187. Mr. Miller's preferred route is one where trucks exit the facility and travel south on Rte. 25 to Illinois Rte. 64 and then travel east to Illinois Rte. 59 (south route). Waste Management emphasizes that this eliminates the need for trucks to turn left out of the facility and through the busy Rte. 25/Dunham Road intersection. However, Waste Management stated Mr. Miller was not against the north route either. Supp. Br. at 38.

Kane County sets forth several reasons why Waste Management's application did not meet criterion (iv). Kane County notes that hearing officer Kinnally, in the very first condition listed on which approval of the application would be contingent, states "[t]he facility will not open for waste transfer until the first of the following events occur: (1) July 1, 2006; or (2) the realignment of the Dunham-Stearns corridor." Resp. at 41; citing C004856. Therefore, Kane County contends, the evidence does not support a single proposed route for transfer trailers other than corridor realignment, an option that did not exist at the time of the hearings. Resp. at 41.

Kane County also cites testimony demonstrating why Waste Management's preferred route, the south route, does not meet criterion (iv). First, the alignment of Rte. 25 is curvy, rolling, and hilly; it is a residential street with individual driveways entering and exiting directly from Rte. 25; there is a tight turning radius at Rte. 25 and 64 and a downgrade slope on the southern approach to that intersection. Kane County also notes that Waste Management stated it would send most transfer trailers out over off-street peak hours, but did not provide traffic counts for off-street peak hours at Rte. 25 and Dunham. Resp. at 40.

Criterion (vi) requires the applicant to show the traffic patterns are designed to minimize impacts on existing traffic flows. Waste Management has failed to provide traffic volume information on a critical intersection, Rte. 25 and Dunham. The record either lacks information on traffic patterns or shows the traffic patterns are not designed to minimize impacts on current traffic flows. The hearing officer did not find that either the south or the north routes proposed met criteria (vi). Rather, the hearing officer found the facility should not open until 2006, or realignment of the Stearns-Dunham corridor. The Board finds that the record supports the Kane County Board's determination on criterion (vi) of Section 39.2 of the Act.

Criterion (viii)

Under criterion (viii), the applicant must show the facility is consistent with the county board's adopted solid waste management plan. 415 ILCS 5/39.2(a)(viii) (2002).

Waste Management claims that strict compliance with the county board's plan is not necessary. Supp. Br. at 38-39; citing City of Geneva v. Waste Management of Illinois, Inc. v. PCB 94058, slip op. at 22 (July 21, 1994). The Walter Memo stated that Waste Management's application did not meet criterion (viii) because Waste Management did not address one item of the plan requiring the applicant to develop traffic characteristics of future growth. Waste Management asserts that Ms. Sheryl Smith was the only witness who testified regarding criterion (viii) and she testified that the application was not inconsistent with the county's plan. Supp. Br. at 39-40.

Waste Management contends that it substantially complied with the county's plan and that is all that is necessary. Waste Management claims it did not develop traffic characteristics of future growth, but that this information is not required by statute and is arbitrary. Therefore, failure to provide the traffic characteristics does not make Waste Management's application inconsistent with the plan. Supp. Br. at 40.

Kane County argues that requesting information from an applicant is certainly within a local government's authority under Section 39.2 of the Act. Kane County contends that not only has Waste Management failed to produce the traffic characteristics of future growth, but it has also failed to provide accident histories, as required by Chapter 6, Figure 6.2, Item VI.E of the Solid Waste Management Plan Five Year Update, for two critical intersections. Resp. at 45.

Neither party disputes that Waste Management failed to provide traffic characteristics of future growth, required by Kane County's solid waste management plan. The record supports the Kane County Board's decision regarding criterion (viii).

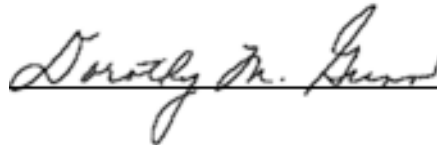
CONCLUSION

The Board finds the Kane County Board proceedings regarding Waste Management's application to site a waste transfer facility on the Woodland Landfill site in Kane County were fundamentally fair. The Board also finds that Kane County's decision to deny siting was not against the manifest weight of the evidence presented at those proceedings.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 19, 2003, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board