ILLINOIS POLLUTION CONTROL BOARD
October 2, 2003

LOWE TRANSFER, INC. and MARSHALL LOWE,	)	
Petitioners,	)	
v.	)	PCB 03-221
	)	(Pollution Control Facility
COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS,	)	Siting Appeal)
Respondent.	)	

DAVID W. MCARDLE OF ZUKOWSKI, ROGERS, FLOOD & MCARDLE APPEARED ON BEHALF OF PETITIONERS; and

CHARLES F. HELSTEN OF HINSHAW & CULBERTSON APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

Marshall Lowe and Lowe Transfer, Inc. (petitioners) filed an appeal of a May 6, 2003 decision of County Board of McHenry County, Illinois (McHenry County) denying petitioners' application to site a waste transfer station. McHenry County found that the petitioners failed to demonstrate that the facility was designed and located in a manner that would meet the requirements of Section 39.2 of the Environmental Protection Act (Act) (415 ILCS 5/39.2(a) (2002)). As discussed below, the Board finds that the McHenry County decision was not against the manifest weight of the evidence. Therefore, McHenry County properly denied approval for the siting of the facility, and the Board affirms that denial.

PROCEDURAL HISTORY

On June 5, 2003, petitioners timely filed a petition (Pet.) asking the Board to review the May 6, 2003 decision of McHenry County. *See* 415 ILCS 5/40.1(a) (2002); 35 Ill. Adm. Code 107.204. McHenry County denied the petitioners' request for application to site a waste transfer station located on U.S. Route 14 in McHenry County. On June 19, 2003, the Board accepted the petition for hearing.

On July 2, 2003, McHenry County filed the record in this proceeding (C). A hearing was held before Board Hearing Officer Bradley Halloran on August 14, 2003. The parties simultaneously filed post-hearing briefs on August 22, 2003 (Pet. Br. and R.Br.) and response briefs on September 2, 2003 (Pet. Reply and R. Reply). In addition on August 25 and August 27, 2003, the Village of Cary (Village) filed *amicus curiae* briefs.

The Board has also received 49 public comments, including public comment number 1 which consists of 39 letters opposing the facility asking that the hearing be held in Cary. Of the 49 public comments, 48 oppose the siting of the transfer station. Public comment 44 is from the McHenry County Defenders, who clarify that they participated in the hearings below but did not object to the siting of the transfer station.

PRELIMINARY MATTERS

Before proceeding with the merits of this case, the Board will address four outstanding motions by the petitioners. On August 28, 2003, petitioners filed a motion seeking to strike the *amicus curiae* brief filed by the Village and asking for sanctions (Mot.1). On September 2, 2003, petitioners filed a motion to strike the Village's response to the motion to strike and asking for sanctions (Mot.2). On September 2, 2003, petitioners filed a motion to strike portions of the brief filed by McHenry County (Mot.3). On September 15, 2003 petitioners filed a motion to deem siting approved by operation of law (Mot.4). On September 26, 2003, petitioner filed another motion seeking to strike portions of McHenry County's response to the September 15, 2002 motion and a reply to the response. The Board will first address petitioners' motion to deem siting approved and the motion to strike and the reply, since granting that motion would moot the remaining issues. Next, the Board will address the motions regarding the *amicus curiae* brief and then address the motion to strike portions of McHenry County's brief.

Motion to Deem Siting Approved

Petitioners' Argument

On September 15, 2003, petitioners filed a motion to deem siting approved and a memorandum in support (Memo). On September 26, 2003, petitioners filed a reply to McHenry County's response to the motion. Petitioners did not file a motion seeking leave to file a reply and a reply is only allowed as permitted by the Board to prevent material prejudice. *See* 35 Ill. Adm. Code 101.500(e). The Board will allow the reply to ensure full consideration of the petitioners' arguments on this issue.

Petitioners assert that siting should be approved because the Board failed to comply with the publication and notice requirements of Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2002)). Mot.4 at 1. Section 40.1(a) of the Act in relevant part requires that the notice of the Board's hearing be published in "a newspaper of general circulation published in the county." 415 ILCS 5/40.1(a) (2002). Petitioners argue that the notice was neither published in a newspaper of general circulation nor was the paper published in McHenry County. Memo at 2.

Petitioners assert that the notice and publication requirements are jurisdictional and mandatory. Memo at 3, citing People v. Youngbey, 82 Ill. 2d 556, 413 N.E.2d 416 (1980). The notice and publication requirements are in place to protect the petitioners' right to a hearing with due process and the rights of the citizens of McHenry County to attend the hearing, argue the petitioners. Memo at 3. The petitioners maintain that administrative agencies such as the Board cannot disregard the prerequisites of the enabling statutes. Memo at 4.

In essence, the petitioners argue that because the newspapers that the Board used to publish notice of the hearing are not physically printed in or first issued to the public in McHenry County, the newspapers are not "published in that county." Memo at 4-6; Reply at 2. Petitioners argue that long-established Illinois law holds that a newspaper is "published where it is first issued to the public" (O'Connell v. Read, 256 Ill. 408, 410 100 N.E. 230 (1912)). Memo at 6. Further, petitioners assert that a newspaper can have only one place of publication and the simultaneous circulation of a newspaper within several communities is not the equivalent of publication in each community. Memo at 6 (citations omitted). Specifically, petitioners contend that the newspapers used by the Board in this proceeding are printed, sorted, and bundled in Cook County and then sent by a private trucking company to five separate post offices for delivery. Reply at 2. Therefore, petitioners maintain that because the statutorily mandated public hearing notice was published outside McHenry County, the notice is jurisdictionally defective. Memo at 6.

The petitioners also argue that the newspaper notice was not published in a newspaper of general circulation because the newspaper subscribers in McHenry County are only 5,203. Memo at 7. Petitioners maintain that under the plain meaning of "newspaper of general circulation", the published notice does not satisfy the requirements of the Act and the notice was therefore defective. Memo at 8-9.

Petitioners assert that because the Board failed to comply with the notice and publication requirements of the Act, the Board cannot make a decision on the petition for review in the statutorily prescribed 120 days. Memo at 9-10, citing Illinois Power Co. v. PCB, 137 Ill. App. 3d 449 (4th Dist. 1985) and Marquette Cement Manufacturing Co. v. IEPA, 84 Ill. App. 3d 434 (3rd Dist. 1980). Pursuant to Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2002)), failure of the Board to make a decision within 120 days allows the petitioner to "deem the site location approved" argues petitioners. Memo at 11-12. Petitioners maintain that the Act requires both a public hearing and a final decision within 120 days and because the Board failed to hold a hearing, the Board cannot now render a decision within 120 days. Memo at 12. Therefore, petitioners assert the siting is approved by operation of law. *Id*.

Petitioners maintain that the circumstances in McHenry County Landfill v. IEPA, 154 Ill. App. 3d 89, 506 N.E.2d 376 (2nd Dist. 1987), relied upon by McHenry County are in direct opposition to the facts in this appeal. Reply at 7. Petitioners argue that the notice appearing only in the southeastern part of the county prejudiced petitioners. Reply at 8. Thus, the circumstances are different and the siting should be deemed approved. *Id*.

McHenry County's Argument

On September 18, 2003, McHenry County filed a response to the motion to deem siting approved (County Resp.2). McHenry County argues that the motion should be denied for three reasons. First, McHenry County argues that the Board did comply with the notice and publication requirements of Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2002)). County Resp.2 at 1. Second, McHenry County argues that the notice provisions of Section 40.1 of the Act are not jurisdictional. *Id*. And third, McHenry County asserts that the petitioners should not

be allowed to raise inadequate notice at this time because petitioners failed to raise the issue at the Board hearing. *Id*.

McHenry County argues that although no court has examined the notice provisions of Section 40.1(a) of the Act to determine the meaning of "published" the Board has addressed the issue in Clutts v. Beasley, PCB 87-49 (Aug. 6, 1987). County Resp.2 at 2. McHenry County points out that the Board found that the term "published" did not mean that the newspaper had to be printed and issued in the county, but simply required that the newspaper be regularly and generally distributed in the county. County Resp.2 at 3. McHenry County argues that like the newspaper in Clutts v. Beasley, the newspaper at issue in this case are not printed in McHenry County; however, five newspapers are regularly sold, distributed and circulated in McHenry County. *Id*. Therefore, McHenry County argues that the newspapers are "published in that county" (McHenry County). *Id*.

McHenry County notes that the Board in making the determination in Clutts v. Beasley relied on the Illinois Supreme Court's opinion in People *ex rel.* City of Chicago Heights v. Richton 43 Ill. 2d 267, 253 N.E.2d 403 (1969). County Resp.2 at 3. The Illinois Supreme Court in Richton refused to find that "published within such city" as used in the Election Code meant, "to print and issue within the city." County Resp.2 at 3, citing Richton. The court further noted that the primary meaning of "publish" is to make known and clearly the legislature did not mean to require publication in a newspaper printed in certain locations. *Id*. McHenry County argues that petitioners' contention that notice was not provided because the newspaper in which the notice appeared was published in Cook County is contrary to the finding in Richton. *Id*.

McHenry County acknowledges that no court has directly addressed "newspaper of general circulation" under Section 40.1(a) of the Act. However, the Illinois Supreme Court has addressed the meaning of "newspaper of general circulation" and consistently found that the only requirement is that the newspaper is available to all classes of people. County Resp.2 at 6 (citations omitted). McHenry County argues that the courts throughout the State have refused to read "general circulation" in the narrow manner set forth by petitioners. *Id*. Furthermore, McHenry County asserts that the Illinois Supreme Court has also held that the number of subscribers does not determine the circulation of the newspaper but rather the diversity of subscribers. County Resp.2 at 8, citing Eisenberg v. Wabash, 355 Ill. 495, 189 N.E.2d 301 (1934).

McHenry County also argues that the notice and publication requirements are not jurisdictional and therefore the petitioners' argument must fail. County Resp.2 at 9. In support of this assertion, McHenry County points to McHenry County Landfill v. IEPA, 154 Ill. App. 3d 89, 506 N.E.2d 376 (2nd Dist. 1987). County Resp.2 at 9. McHenry County argues that the cases relied on by petitioners for the proposition that Section 40.1 notice is jurisdictional are easily distinguishable as both cases are interpreting Section 40 of the Act not Section 40.1. County Resp.2 at 10. Furthermore, McHenry County argues that the Board has repeatedly relied on McHenry County for the proposition that Section 40.1 notice is not jurisdictional. County Resp.2 at 12 (citations omitted).

Finally, McHenry County argues that the petitioners should not be allowed to raise the argument that notice was inadequate because petitioners have waived the argument. County Resp.2 at 13.

Board Discussion

Before dealing with the substance of petitioners' motion to deem siting approved filed on September 15, 2003, the Board will address petitioners' motion to strike a part of McHenry County's response to petitioners' motion. First, due to the time constraints involved in this appeal, the Board cannot allow McHenry County time to respond to the motion because material prejudice would result if the Board waited 14 days because the statutory deadline for the Board's decision in this case is October 3, 2003 (s*ee* 35 Ill. Adm. Code 101.500(d) and 415 ILCS 5/40.1(a) (2002)). Petitioners argue that the response contains misstatements which "will mislead" the Board. The Board is not misled by the arguments presented in the response. Therefore, the motion to strike a portion of McHenry County's response is denied.

Petitioners present two arguments for the Board's consideration in the motion to deem siting approved. The first is whether the Board followed the requirements of Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2002)) and, second, whether the requirements of Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2002)) are jurisdictional. The record clearly establishes that the Board did meet the requirements of Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2002)). Equally clear is that the case law interpreting Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2002)) has found that the hearing notice requirements are not jurisdictional. Therefore, the motion to deem siting approved is denied for the reasons discussed in the following paragraphs.

Section 40.1 of the Act requires publication in relevant part: "[t]he Board shall publish 21 day notice of the hearing on the appeal in a newspaper of general circulation published in that county." 415 ILCS 5/40.1(a) (2002). The Board has interpreted this provision of the Act in the past and found that a newspaper circulated in the county meets the requirements of general circulation. Concerned Citizens of Williamson County *et al.* v. Bill Kibler *et al.*, PCB 96-60 (Feb. 15, 1996), citing Village of LaGrange *et al.* v. McCook Cogeneration Station *et al.*, PCB 96-41 (Dec. 7, 1995). The Board finds nothing in petitioners' arguments to persuade the Board to alter the previous decisions.

The Board is also not persuaded by petitioners' argument that the newspaper must actually be printed, bundled and sorted in McHenry County. The case cited by petitioners for this proposition, Read, is distinguishable from this case as the statute in question included language addressing how publication occurs if there is no newspaper printed in the city or village. Read at 256 Ill. 408, 410. The Board finds that Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2002)) is more analogous to Richton, wherein the statute refers to publication in a newspaper published within the city. In that case, the court found that the newspaper need not be printed in the city and we agree with the Richton court's reasoning here. The Board's hearing notice in this case complied with that Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2002).

Finally, the petitioners argue that the notice of hearing requirements of Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2002)) are jurisdictional. The court in McHenry County Landfill,

however, clearly found that the requirements of Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2002)) were not jurisdictional and distinguished Illinois Power, one case relied upon by petitioners. McHenry County Landfill 154 Ill. App. 3d 89, 96-97. The Board finds nothing in petitioners' arguments that would persuade the Board that the McHenry County Landfill holding on jurisdiction was in error. Further, the Board is not convinced by petitioners' assertion of prejudice at the public hearing before the Board. Because the only challenges to the McHenry County decision involve the criteria found at Section 39.2 of the Act (415 ILCS 5/39.2 (2002)), the Board's decision is based on the record before McHenry County. 415 ILCS 5/40.1(a) (2002). The public hearing before the Board does not include new evidence and where attempts by the public were made to introduce evidence, petitioners' attorney objected. The Board finds that pursuant to McHenry County Landfill, the Section 40.1(a) notice of hearing is not jurisdictional. The Board also finds that the notice in this case was sufficient and no prejudice to petitioners resulted.

Motions to Strike *Amicus Curiae* Brief and Response

The petitioners ask that the Board strike the *amicus curiae* brief because the 56-page brief is in direct violation of the Board's procedural rules at 35 Ill. Adm. Code 101.302(k). Mot.1 at 1. Petitioners argue that neither the Board nor the hearing officer received a request to file the brief in excess of the 20-page limit for an *amicus curiae* brief. *Id*. Petitioners assert that the attorney for the Village has extensive experience before the Board, and that the Village has already been reprimanded by the Board for rules violations. Mot.1 at 2. For these reasons, the petitioners argue that the *amicus curiae* brief should be stricken and sanctions imposed.

The Village on August 27, 2003, filed a response to the motion (V.Resp.) and asked that the Village be allowed to respond. The Board agrees that the Village should be allowed to respond to the motion and the Board will consider the response. In the response, the Village indicates that the hearing officer did not discuss the length of the briefs when setting the briefing schedule. V.Resp. at 2. The Village points out that the record in this proceeding is quite lengthy and the petitioners' briefs may encompass 100 pages. V.Resp. at 1-2. The Village argues that it is very difficult to deal with the lengthy record and multiple issues in 20 pages. V.Resp. at 3. The Village has provided the Board with a revised brief of 32 pages and asserts that the revised brief contains no new information. V.Resp. at 4. The Village asks that the Board either accept the 56-page brief filed on August 25, 2003, or in the alternative accept the revised brief filed on August 27, 2003. *Id*.

Before addressing the petitioners' August 28, 2003 motion, the Board must first address the September 2, 2003 motion to strike the response filed by the Village. In the September 2, 2003 motion, petitioners argue that because the Village is not a party the Village cannot file a response. Mot.2 at 1. The petitioners cite to prior Board orders in this proceeding to support petitioners' arguments. *Id*. The Board agrees that a non-party cannot generally participate in motions practice before the Board. *See* 35 Ill. Adm. Code 101.500(a) and (d). However, because the petitioners' August 28, 2003 motion addresses the Village's filing and only the Village's filing, the Board will accept the Village's response. Therefore, the September 2, 2003 motion to strike the response and for sanctions is denied.

Regarding the petitioners' August 28, 2003 motion, the Board will grant the motion in part. The Board will strike the *amicus curiae* brief filed on August 25, 2003, by the Village. The Village's argument that the hearing officer did not state the length of briefs in the hearing officer's order is without merit. The Board's rules clearly set forth the length of all briefs to be filed; it is not the hearing officer's responsibility to recite all of the Board's procedural rules to parties before the Board. Therefore, the August 25, 2003 *amicus curiae* brief is stricken. The Board will not impose additional sanctions on the Village; therefore, the request for sanction is denied.

Furthermore, the Board will accept the *amicus curiae* brief filed on August 27, 2003, by the Village (Village Br.). The Board understands that the record in this case is substantial and the *amicus curiae* brief will be helpful in addressing the issues. Therefore, the Board accepts the Village's *amicus curiae* brief filed on August 27, 2003.

Motion to Strike Portions of McHenry County's Brief

The petitioners also filed a motion on September 2, 2003, asking the Board to strike portions of the McHenry County Brief. The petitioners argue that certain statements made in the brief were misrepresentations. Mot.3 at 6-7. Specifically, the petitioners ask the Board to strike "misrepresentations" of: the "McHenry County Defenders as objectors;" the credentials of two experts; the finding of credibility of witnesses by McHenry County; and all references to Lowe's lack of experience. *Id.*

On September 15, 2003, McHenry County filed a response to the motion (County Resp.). McHenry County argues that the motion to strike is inappropriate because the motion generally consists of arguments and disagreements with McHenry County's brief. County Resp. at 1. McHenry County asserts that a motion to strike is appropriate when a pleading is insufficient in law or contains immaterial matter. *Id.* McHenry maintains that the matters raised in the motion are more appropriately included in a response brief. *Id.*

The Board declines to strike any portion of McHenry County's brief. The Board will review the record before McHenry County including the transcripts of hearing and the credentials of the witnesses. Further, the Board will review the relevant law and the Board will make a decision based on all that information. If there are any misrepresentations in the briefs filed by either party in this case, the Board will recognize such misrepresentations as argument and not fact on which to base the Board's decision. Therefore, the Board denies the motion to strike portions of McHenry County's brief.

STATUTORY BACKGROUND

Section 3.330 of the Act defines a pollution control facility as "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator." 415 ILCS 5/3.330 (2002).

Section 39.2(a) of the Act requires that an applicant seeking approval for siting a pollution control facility must provide evidence demonstrating that the nine criteria listed in

subsections (i) through (ix) are met. 415 ILCS 5/39.2(a) (2002). The specific criteria at issue in this proceeding are criteria (ii), (iii), and (v), which provide:

> (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 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;
>
> * * *
>
> (v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents; 415 ILCS 5/39.2(a) (2002).

In addition, Section 39.2(a) of the Act also provides:

> The county board . . . may also consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant . . . in the field of solid waste management when considering criteria (ii) and (v) under this Section. 415 ILCS 5/39.2(a).

Section 40.1(a) of the Act provides:

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

STANDARD OF REVIEW

In reviewing the decision of a local government disapproving siting based on the nine statutory criteria, the Board must apply the "manifest weight of the evidence" standard of review. Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E. 2d 188, 194 (3d Dist. 2000); Waste Management of Illinois, Inc. v. PCB, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2nd Dist. 1987; City of Rockford v. PCB, 125 Ill. App. 3d 384, 465 N.E.2d 996 (2nd Dist. 1984). A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Harris v. Day, 115 Ill. App. 3d 762, 451 N.E.2d 262 (4th Dist. 1983). The province of the hearing body is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses. Merely because the Board could reach a different conclusion, is not sufficient to warrant reversal. City of Rockford v. PCB and Frank's Industrial Waste, 125 Ill. App. 3d 384, 465 N.E.2d 996 (2nd Dist. 1984); Waste Management of Illinois, Inc. v. PCB, 22 Ill. App. 3d 639, 461 N.E.2d 542 (3d Dist. 1984); Steinberg v. Petta, 139 Ill. App. 3d 503, 487 N.E.2d 1064 (1st Dist. 1985); Willowbrook Motel v. PCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985).

FACTS

On November 2, 2002, petitioners submitted an application for siting a waste transfer station to McHenry County. Pet at 1; C00001-C00002. The application specified a site to be located in unincorporated McHenry County on U.S. Route 14 at 3412 Northwest Highway, Cary. C00001 at 1; C00001 at App. The site is approximately 2.64 acres in size and will be used to consolidate on average 600 tons of non-hazardous residential, commercial and industrial waste per day. C00001 at 2-1, 5-3, 5-34. The facility will be 20 feet from the Hollows, an area owned by the McHenry County Conservation District, which contains wetlands and natural areas. C00178 at 112. Lake Plote is also nearby and the facility will be sited 1300 feet from Bright Oaks, a residential subdivision. C00178 at 112, 116-17; C00182 at 28. There is property also adjacent known as the Plote Property that was zoned residential after the siting hearing concluded. C04132-4174; C07175-7182.

Public hearings were held by McHenry County during the period from March 1, 2003 through March 15, 2003. C00178-C00227. During those public hearings petitioners presented testimony from Marshall Lowe (C00200-203, C00214, C00218), Daniel Zinnen (C00178-87, C00223-24), I Keith Gorden (C0179-87, C00223), Larry Peterman (C00191-195), Frank Harrison (C00191, 193), and Douglas Dorgan (C00199, 224). The credentials for each of the five experts who prepared the application and testified are delineated in the application and the testimony.

Mr. Zinnen is a registered professional engineer in Illinois, Wisconsin, Michigan, and Indiana. C00001 at App. Mr. Zinnen has worked on the permitting and design construction for over 100 landfills, a majority of those in Illinois. C00178 at 109. Mr. Zinnen has also done work in permitting for eight transfer stations. *Id.*

Mr. Gordon is the principal designer of the facility and is also a professional engineer registered in 24 states. C00001 at App. Mr. Gordon has been practicing in the area of solid waste management for over 25 years. *Id.* Mr. Gordon has also served on the Technical Advisory Committee providing assistance to the United States Environmental Protection Agency (USEPA) on solid waste facility siting issues. *Id.* Mr. Gordon has also served as an editor for USEPA's *Solid Waste Transfer Station: A Manuel for Decision Making* and the Solid Waste Association of North America's transfer station certification course manual. C00001 at App.

Mr. Peterman has over 32 years of experience in land planning. C00001 at App.; C00191 at 60-61. Mr. Peterman has extensive experience in evaluating compatibility of property with landfill expansion and transfer sites. *Id.*

Mr. Harrison is a professional real estate appraiser and consultant who has worked in the field for over 32 years. C00001 at App. C00191 at 6. Mr. Harrison's extensive experience includes evaluating impacts of property values due to land uses including interstate highways, gravel operations, and peaker plants. C00191 at 11.

Mr. Dorgan is a hydrologist with over 17 years of experience in the geology and environmental geology fields. C00001 at App. Mr. Dorgan is a certified geologist in both Illinois and Indiana. *Id.*

Objectors who registered at the public hearings before McHenry County included the Village, the Plote family, Bright Oaks Homeowners' Association (Bright Oaks), the Cary Park District, the Trout Valley Homeowners' Association, and several private citizens. C00178 at 9-12; C00043-53. The Village and Bright Oaks provided testimony regarding the design of the facility. On behalf of the Village, Mr. Larry Thomas (C00188-190), Mr. Andrew Nickodem (C00214-218, 223), Mr. Kevin Sutherland (C00218-219), Mr. Cameron Davis (C00204-206), and Mr. Drew Petterson (C00208-209) testified. On behalf of Bright Oaks, Mr. John Whitney (C00220) testified. The credentials for each of the experts are delineated in the transcript and exhibits to the hearing.

Mr. Thomas is a professional engineer in Wisconsin and Illinois and has worked in the area of hydrogeology since 1980. C00188 at 6-8; C00316-25. Mr. Thomas has extensive experience in well exploration and water resource planning. *Id.*

Mr. Nickodem is also a licensed professional engineer in Wisconsin and Illinois. C00214 at 4; C00458-62. Mr. Nickodem serves on the Wisconsin DNR Liaison Committee for Solid Waste Rules, which is a committee that suggests rule change for solid waste facilities to Wisconsin. *Id.* Mr. Nickodem has 15 years experience in design, operation construction maintenance, monitoring, permitting of solid waste facilities including transfer station. C00214 at 5. Mr. Nickodem has been involved in design, construction and operations of 10 transfer stations including four in Illinois. *Id.* Mr. Nickodem has also worked for three different companies who own and operated solid waste facilities. C00214 at 5-6.

Mr. Sutherland is a licensed professional engineer in Illinois. C00218 at 64; C00475. Mr. Sutherland works with communities on National Pollutant Discharge Elimination System Permits and does stormwater review. *Id.* Mr. Sutherland has worked on a number of projects. *Id.*

Mr. Davis is the village administrator for the Village. C00204 at 4, 17; C00395. Mr. Davis has worked for over 15 years in general management for several municipalities. C00204 at 17-18; C00395.

Mr. Petterson is a planner specializing in land planning, agency approval, imminent domain, zoning regulations, land use litigation, and municipal planning. C00208 at 57-59; C00423. Mr. Petterson has worked for a number of communities in his career spanning over 20 years. *Id.*

Mr. Whitney has been a real estate appraiser for over 30 years and is a member of the Appraisal Institute. C00220 at 25-26; C01283. He is a licensed appraiser in Illinois and serves on the Lake County Board of review. C00220 at 26-27.

On May 6, 2003, McHenry County voted to deny the application for siting and found that the applicant had not demonstrated compliance with criteria (ii), (iii), and (v). C07245-C07247. McHenry County also found against the applicant when considering the previous operating experience of the applicant. C07248. McHenry County found the applicant had complied with criterion (viii) and imposed a special condition on that approval requiring that a host fee be paid to McHenry County. C07248. McHenry County also found the applicant complied with criterion (vi) and imposed conditions. C07247. Finally, McHenry County found that the applicant complied with the remaining criteria.

TESTIMONY FROM HEARINGS BEFORE MCHENRY COUNTY

The following section summarizes the testimony and application content on each of the challenged criteria. The Board will summarize the petitioners' testimony and then the testimony of the objectors.

The Facility is So Designed, Located and Proposed to Be Operated That the Public Health, Safety and Welfare Will Be Protected (Section 39.2(a)(ii))

Petitioners' Witnesses

Mr. Gordon testified that there are four design components to be considered in designing a waste transfer station. Those four components are waste receiving, waste unloading and inspections, waste loading, and tarping and weighing. C00001 at 2-4 through 2-5; C00179 at 23. Mr. Gordon stated that the facility was designed to exceed minimum industry standards for each of those elements. *Id*.

The facility has three design factors, regarding the waste receiving component. First the facility can queue twice as many vehicles as the typical peak flow requirements. C00001 at 2-5 through 2-6; C00179 at 24-25. Second, the internal flow of the traffic is also designed to separate transfer trailer traffic from the collection traffic. C00001 at 2-8, 5-7 through 5-8. Third, the scale house building is separate from the transfer building and will be enclosed to minimize the potential for noise, dust and visual ascetics. C00001 at 5-E-2. In response to objectors' testimony regarding the program known as "Auto Turn", Mr. Gordon testified that he is familiar with "Auto Turn" however, he used AASHTO hand templates in examining traffic patterns. C00223 at 6-7. Mr. Gordon opined that "Auto Turn" has a degree of conservatism built in. C00223 at 7, Mr. Gordon indicated that moving vehicles with a wheelbase of 52 or 54 the vehicles could traverse the site with no trouble even using "Auto Turn" to do the calculations. C00223 at 8-9.

The second component of waste unloading has been addressed by designing for all waste unloading to occur inside the building. C00001 at 2-7, 5-3. Mr. Gordon testified that this minimizes the risk for blowing litter. C00179 at 65. Bays will be utilized in sequence and the backing in will maximize the visibility. C00001 at 5-7; C00179 at 27. The tipping floor can accommodate more than twice the anticipated incoming waste. C00179 at 28.

Waste loading will take place within an enclosed loading tunnel. C00001 at 2-5, 2-8, 5-6, 5-7, 5-8. The transfer building is designed with ramps of gentle slopes to allow easy access to and from the loading tunnel. C00001 at 5-8; C00179 at 31. Slotted drains have been included on both sides of the tunnel for surface water protection. C00001 at 5-9 through 5-10; C00179 at 31.

The facility is designed so that the tarping of loads will occur inside and this will eliminate blowing litter. C00001 at 2-4 through 2-5; C00179 at 33. All pavement in the tarping area is within the contact water system and will go into the contact water storage tanks. C00001 at 5-9 through 5-10.

In addition to the four design components, the facility is also designed to address storm water management and groundwater protection. With regards to stormwater management, the facility is designed to cause all surface water on-site to flow into an underground chamber where it will be stored before percolation into the groundwater. C00001 at 2-9 through 2-12; C00179 at 12-13; C00223 at 46-62. The design includes sloping vegetative waterways and a water quality catch basin for the removal of silt, oil and grease before the stormwater enters the underground storage chambers. C00179 at 8-10. The design goal is to have no discharge from the system to the surface water. C00179 at 12.

To protect groundwater, the proposed facility will include a reinforced concrete floor with sealed joints to protect from leakage, a geomembrane liner under the building. C00001 at 2-9, 5-9, 5-E-4; C00178 at 139. In addition, groundwater-monitoring wells will be installed on the down gradient boundary of the site. C00001 at 2-12 through 2-13; C00179 at 5-6. One well will be located in the northeast corner of the property and the second will be near the northeast corner of the transfer building. *Id*. The groundwater wells will be drilled to a depth of approximately 37 feet. C00002 at App. D.

Other design features include automatic doors that close when transfer trucks enter the tunnel to reduce noise and litter. C00001 at 5-7 through 5-8. The transfer building is designed to face the prevailing winds. C00001 at 5-3 through 5-4. Also the loading tunnel is below grade and lined on the side nearest the Bright Oaks. C00001 at 5-3. The transfer building is designed using precast concrete and no overnight storage of waste will occur. C00179 at 38, 40-42. Landscape plans are also included in the design. C00001 at 2-3.

Objectors' Witnesses

Mr. Nickodem testified that in his opinion the facility did not meet the requirements of criterion ii, because of the proximity to the Hollows. C00215 at 54-55; C00216 at 4. Mr. Nickodem testified that he has never seen a transfer station located next to two areas such as the Hollows and Bright Oaks. C00214 at 17-18. Mr. Nickodem stated that he believed the buffer between the facility and the Hollows is inadequate and would recommend a screening wall to protect the Hollows. C00214 at 25-26; C00215 at 29. Mr. Nickodem indicated major concerns that the facility could adversely effect the wetlands in the Hollows. C00214 at 19-20.

Mr. Nickodem also testified that he believes the 2.64-acre site is too small for a transfer station. C00215 at 54-55. Mr. Nickodem stated that the site was smaller than any transfer

station developed in Illinois in twelve years. C00215 at 104-06. Mr. Nickodem had an associate run a program called "Auto Turn" to simulate trucks on the site. C00214 at 34. The program indicated that trucks would not be able to adequately turn around and maneuver on site. C00214 at 29-38. Mr. Nickodem testified that in his opinion there would be a possibility of accidents on site as well as back-ups on U.S. Route 14. C00214 at 33-34, 48-51, and 55.

Mr. Thomas testified that the groundwater below the site travels to several lakes in the area including Lake Plote. C00188 at 25-26; C00190 at 44-45. Mr. Thomas stated that there is substantial risk for groundwater contamination, because even a very small amount of contamination can contaminate a large amount of ground water. C00188 at 33, 35-36. Mr. Thomas testified that the contaminants would move through the subsurface because the subsurface is comprised of sand and gravel and also contaminants could move through pathways along the septic system, injection chambers and any utility pipes on the property. C00190 at 41-42.

Mr. Thomas testified that the groundwater monitoring wells were too few and the location was inadequate because there were no upgradient wells and the wells were not nested to test different layers of stratigraphy. C0188 at 48-49. Mr. Thomas opined that there was an inconsistency between the landscape plan and the groundwater-monitoring plan as he believed there was inadequate space to actually monitor and maintain the wells given the landscape plan. C00188 at 41-42.

Aside from the inadequacies of the wells, Mr. Thomas also believes the constituent monitoring is problematic. Specifically, Mr. Thomas expressed concern that there is no plan to monitor for compounds heavier than water or even certain target contaminants. C00188 at 36, 40-41, 48-49. Mr. Thomas believes that the site should be tested for all contaminants that affect drinking water. C00188 at 40-41.

Mr. Sutherland testified that the design of the stormwater system does not adequately protect against stormwater contamination and that could lead to groundwater contamination. C00218 at 85. Mr. Thomas also indicated concerns with the stormwater system and the potential for groundwater contamination. C00188 at 42-43. The infiltration system may not be effective because there is no ability to stop the material in the system from migrating into the sewer system if contamination is detected. *Id*.

The Facility is Located So as to Minimize Incompatibility With the Character of the Surrounding Area and to Minimize the Effect on the Value of the Surrounding Property (Section 39.2(a)(iii))

Petitioners' Witnesses

Mr. Peterman's evaluation of the location included adjacent land uses, subdivision and zoning ordinances and comprehensive plans. C00001 at App; C00191 at 63. Mr. Peterman reviewed the site plan, the site and the surrounding areas. *Id.* Mr. Peterman's testimony described the site and the overall design of the facility using aerial maps and pictures of the site.

C00192 at 2-26. Mr. Peterman opined that the facility was located to minimize incompatibility with the surrounding property. C00192 at 28.

Mr. Harrison testified that he is familiar with the site and surrounding properties because he has appraised the properties in the past. C00191 at 12. Mr. Harrison inspected all properties within one mile of the facility, all zoning maps, and all comprehensive plans. C00191 at 13. In addition, Mr. Harrison looked at eight transfer stations located in the Chicago area. C00191 at 24-26. After establishing whether any of the eight transfer stations were similar to the facility proposed, Mr. Harrison used four of the eight in his study (Northbrook Transfer Station, Groot Transfer Station, Rolling Meadows Transfer Station, and ARC Disposal and Recycling Facility. C00001 at Section 3; C00191 at 31-58.

Northbrook Transfer Station (Northbrook). This facility is located in unincorporated Northfield Township, adjacent to the Villages of Glenview and Northbrook. C00001 at Section 3; C00191 at 33. Northbrook is situated on approximately 2.42 acres and received an average of 350 tons of waste per day in 1998 and 1999. C00001 at Section 3; C00191 at 36. Northbrook, which has been in existence since 1983, is located within approximately 200 feet of a town home development known as Princeton Village, which commenced development in 1989. C00001 at Section 3; C00191 at 34. Northbrook and Princeton Village are separated by a railroad right-of-way. *Id*. Mr. Harrison established a control area and a target area to determine what if any effect the transfer station may have on property values. C00191 at 36-37. In the target area, Mr. Harrison found an annual appreciation rate of 1.257% per year and in the control area an annual appreciation rate of 1.325%. C00191 at 37-38. Based on this data, Mr. Harrison concluded that the location of Northbrook did not influence surrounding property values. C00191 at 38-39.

Groot Transfer Station (Groot). Groot is located near O'Hare Airport on a 6.63 acre site. C00001 at Section 3; C00191 at 46-47. Groot received 1,888 tons of waste per day in 2000. C00001 at Section 3; C00191 at 47-48. The property surrounding the Groot site is industrial and Mr. Harrison compared unit prices in control and target areas. *Id*. Mr. Harrison also did a sale and resale analysis in the target area. C00191 at 48-50. Based on both of these analyzes, Mr. Harrison determined that Groot had no influence on the surrounding properties. C00191 at 49-50.

Rolling Meadows Transfer Station (Rolling Meadows). Rolling Meadow is located on 6.7 acres and received 755,000 tons of waste in 2000. C00001 at Section 3; C00191 at 50-51. Mr. Harrison was unable to do a sale/resale analysis but did compare unit prices in the target and control areas. C00191 at 51. Mr. Harrison determined that Rolling Meadows had no measurable impact on surrounding properties. *Id*

ARC Disposal and Recycling Facility (ARC). ARC is located on 3.28 acres and was constructed in 1984. C00001 at Section 3; C00191 at 54. In 2000, ARC received an average of 922 tons of waste per day. *Id*. Multi-family dwellings surround ARC and since there had been no sales in the area, Mr. Harrison analyzed the rents in a control area and a target area. C00191 at 52-54. Mr. Harrison's analysis determined that there had been no influence on the rents by ARC. C00191 at 54-56.

Objectors' Witnesses

Mr. Davis testified that the transfer station would have a negative impact on the surrounding area, particularly the property in the Village. C00205 at 65. Mr. Davis discussed the Village's "Comprehensive Plan" which designates the properties surrounding the proposed transfer facility as residential and recreational. C00205 at 21. During the public comment period before McHenry County voted on the transfer station siting, the Village annexed the Plote property adjacent to the facility. C04132-4174; C07175-7182. Prior to the annexation, the proposed facility would have been 1300 feet from residentially zoned property. After the annexation, the proposed facility was adjacent. Mr. Davis noted that the Village had been in discussion with the Plote family for an extended period of time. C00205 at 23-25.

Mr. Davis further opined that the facility would not be compatible with the "Comprehensive Plan" because the facility was not fulfilling the need for a recycling facility in the area. C00205 at 30-41. The facility's location at the "gateway" of the Village is also contrary to the "Comprehensive Plan. C00205 at 51-52.

Mr. Davis also testified as to the impact on the Kaper Development which is located directly across the street from the proposed facility. C00205 at 9-15. Mr. Davis indicated that developers were concerned with the proximity and smells from the potential facility. *Id*. Mr. Davis opined that the proposed facility was impeding the development of the property. C00208 at 23.

Mr. Petterson testified that the proposed transfer station is incompatible with the adjacent Hollows because of added noise, litter, odor, fumes, and use of trucks either waiting to access the facility or waiting to exit onto U.S. Route 14. C00208 at 89. Mr. Petterson opined that these impacts are not consistent with the recreational use of the Hollows. *Id*. Mr. Petterson also reviewed the "Comprehensive Plan" and current land use and in his opinion the proposed transfer station is an inconsistent future use of the property. C00208 at 97.

Mr. Whitney opined that the lack of comparable studies regarding the impacts of transfer stations on residential use indicates that an inherent incompatibility exists between transfer stations and residential areas. C00220 at 33. Mr. Whitney challenges the studies done by Mr. Harrison and believes that that studies do not adequately address the effect the proposed facility will have on surrounding property values. C00220 at 28. Mr. Whitney testified that Mr. Harrison did not remove all of the other influences on property values to sufficiently isolate the actual effect of the transfer station on surrounding properties. C00220 at 30-31. Mr. Whitney also disagrees with Mr. Harrison's calculation of the appreciation rate. C00220 at 88.

The Plan of Operations for the Facility is Designed to Minimize the Danger to the Surrounding Area from Fire, Spills, or Other Operational Accidents (Section 39.2(a)(v))

Petitioners' Witnesses

Mr. Gordon testified that the facility is designed to minimize danger to the surrounding areas from fire, spills or other operational accidents. C00179 at 43. The transfer building is a

concrete structure and the design was chosen for noise abatement and aesthetics among other reasons. C00001 at 2-8; C00179 at 38. The transfer building is designed with a segregated contingency waste management area to isolate unacceptable waste for identification and removal. C00001 at 5-28; C00179 at 28-29. An emergency response contractor will be retained to deal with any unacceptable waste. *Id*.

For groundwater protection the facility is designed with tipping floors reinforced with concrete and sealed joints. C00001 at 2-9, 5-9; C00178 at 139; C00179 at 30. In addition a polyethylene geomembrane liner will be placed underneath the entire transfer building. *Id*. Also to protect against contamination, fuel filling will be done inside the transfer building. C00001 at 5-Attach 1 at 5.

The internal traffic flow is designed to separate incoming collection traffic from transfer trailer traffic and the collection and transfer trailers have individual routes on the site. C00001 at 2-8, 5-8; C00179 at 36. Also for potential traffic issues, an emergency access gate from the adjoining property will utilized. C00001 at 5-4; C00179 at 79-80.

A fire prevention plan includes a "hot load" management area, sandpit, and alarm system and the facility will store no waste on site overnight. C00001 at 5-32; C00179 at 43-44. The fire pit is sized to hold the equivalent of two collection truckloads and this allows for segregation of a hot load from the rest of the facility. *Id*. The Cary Fire Protection District has approved the fire protection plan. C00001 at 5-29.

The facility will also have both an "Operations Plan" and a "Fire and Accident Prevention Plan". C00001 at 5-Attach 1; C00179 at 44-45. All employees will be required to have training in waste screening, health and safety protocol and emergency response. C00179 at 39. The facility will have random inspections of incoming loads C00001 at 5-23. Petitioners will hire a certified transfer station operator. C00179 at 39.

Objectors' Witnesses

Mr. Thomas, Mr. Nickodem, and Mr. Sutherland all testified that the proposed facility did not meet criterion v. C00189 at 9-10; C00215 at 55; C00218 at 80. Specifically, Mr. Nickodem testified about concerns for fire safety due truck fueling in the building. C00215 at 24-25, 28-29. The failure of the design to incorporate sprinklers and using only hand held fire extinguishers is inadequate for fire protection, according to Mr. Nickodem. C00215 at 31-32; C00216 at 9. Mr. Nickodem also expressed a concern that the proximity of the Hollows and the numerous trees located on the property line would increase the risk for fire. C00215 at 32-33.

Mr. Nickodem testified that the design of the stormwater system does not include valves or gates to shut off flow to the stormwater system and he would normally include such valves or gates. C00215 at 17. The purpose of valves and gates is to protect against the spread of contaminants in the groundwater in case of a spill. C00216 at 19, 25; C00218 at 73. Mr. Sutherland suggested that some provision for spill isolation was necessary to protect the groundwater. C00218 at 82-83. And Mr. Nickodem also believed that curbing should be added to prevent spills from flowing to neighboring properties. C00215 at 18-19.

Mr. Nickodem testified that he is familiar with a transfer station site that includes boxes in which potentially hazardous waste can be locked and secure. C00215 at 78-79, 90-91. He stated that this is safer than simply putting the questionable waste aside until a response contractor can arrive at the site. *Id.*

Experience of Petitioners

Mr. Lowe testified that he has extensive experience running businesses including an excavating business. C00200 at 7-9. However, Mr. Lowe testified he has no experience operating a transfer station or landfill. C00200 at 19-20, 78-79. Mr. Lowe intends to rely on the experts he has hired to plan the transfer station to assist in hiring a qualified individual to run the facility. C00200 at 20-21. He would personally oversee the operation and make suggestions. *Id.*

Host Fee

Mr. Lowe testified that he had spoken with his attorney and, in an attempt to negotiate before public meetings were held, suggested paying McHenry County, McHenry County Defenders, and a scholarship fund specified amounts per ton of waste processed. C00200 at 10-11. The application contains these suggested fees as well. C00001 at App.

TESTIMONY BEFORE THE BOARD

Both the petitioners and McHenry County provided argument on the record at the Board's hearing held on August 14, 2003, but neither offered testimony. Tr. at 1-53; 136-174. The acting mayor for the Village, Steve Lamal, and 11 other members of the public testified. Specifically, the Board heard testimony from: Hal Rubel, Kathleen Park, Greg MacKintosh, Betty Post, John McCue, Brian O'Shaughnessy, Dave Hanson, Suzanne Johnson, Robert Appleton, Karen Pritchard, and Anna Mae Miller. All of the testimony was in support of McHenry County's decision denying siting to petitioners.

ISSUE

McHenry County denied site approval for petitioners' waste transfer station, determining that the petitioners had not met three of the enumerated statutory criteria of Section 39.2 (a) of the Act (415 ILCS 5/39.2(a) (2002)) and the "unnumbered criterion" (concerning the applicant's experience) included in that section. Petitioners challenge the decision on the criteria and the imposition of a host fee condition. Therefore there are five issue in this appeal. The Board will delineate each of the issues below.

The first three issues deal with the numbered criteria of Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2002)). The first issue is whether McHenry County's decision that the applicants failed to establish that the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected is against the manifest weight of the evidence. 415 ILCS 5/39.2(a)(ii). The second issue is whether McHenry County's decision that

the applicants failed to establish that the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property is against the manifest weight of the evidence. 415 ILCS 5/39.2(a)(iii). The third issue is whether McHenry County's decision that the applicants failed to establish that the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents is against the manifest weight of the evidence. 415 ILCS 5/39.2(a)(v).

The fourth issue deals with the "unnumbered criterion" of Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2002)). This issue is whether McHenry County's decision to consider the applicants' "operating experience and past record of convictions or admissions of violations of the applicant . . . in the field of solid waste management" (415 ILCS 5/39.2(a) (2002)) was against the manifest weight of the evidence.

The fifth issue for the Board's review is whether or not the imposition of a host fee was appropriate in this case.

DISCUSSION

In this section of the opinion, the Board will set forth each of the issues and then summarize the arguments by the parties under each issue. The Board will then analyze the argument under each issue and render a decision.

The Facility is So Designed, Located and Proposed to Be Operated That the Public Health, Safety and Welfare Will Be Protected (Section 39.2(a)(ii))

Petitioners' Arguments

Petitioners argue that criterion ii does not require a guarantee against any risk or problem. Pet. Br. at 7, citing File v. D&L Landfill, 219 Ill. App. 3d 897, 579 N.E.2d 1228 (5th Dist. 1991). The petitioners argue that the standard enunciated in Industrial Fuels & Resources v. PCB, 227 Ill. App. 3d 533, 592 N.E.2d 148 (1st Dist. 1991) is important for this case. *Id*. Petitioners argue that the court reversed a siting denial based on five of the criteria in Section 39.2 of the Act (415 ILCS 5/39.2 (2002)) because there was no evidence in the record to demonstrate the design of the facility was flawed. Pet. Br. at 7. Petitioners argue that the facts in Industrial Fuels and this case are nearly identical. *Id*.

Petitioners argue that the site is located in an industrial zoned area with direct access to U.S. Route 14, a federal highway with traffic volumes averaging 23,700 per day. Pet. Br. at 22. The highway is a class I roadway with a weight limit of 80,000 pounds per vehicle and the McHenry County Solid Waste Plan states that an ideal site for a transfer station is off a major highway. *Id*. The McHenry County Solid Waste Plan also indicates that a transfer station should be located in an industrial area. *Id*. Thus, the petitioners argue the facility is located to protect the public health, safety and welfare. *Id*.

The petitioners also assert the facility operation plan is designed to protect the public health, safety and welfare. Pet. Br. at 22. The facility will not accept hazardous waste and a trained employee will screen incoming waste for hazardous waste. *Id*. If hazardous is brought to the site it will be segregated and emergency response contractors will be retained to handle the suspect waste. *Id*. The petitioners argue that a certified transfer station manger will be hired and the entire staff will receive training in waste screening, health and safety protocol, and emergency response. Pet. Br. at 22-23.

Petitioners maintain that the record discloses the "superior qualifications" of the experts retained by petitioners. Pet. Br. at 23. Petitioners argue that the Board has determined that a facility designed by an experienced design engineer to be in compliance with standards for nonhazardous waste satisfies criterion ii. Pet. Br. at 23, citing Clutts v. Beasley, 185 Ill. App. 3d 543, 541 N.E.2d 844 (5th Dist. 1989). The petitioners further argue that the Village's witnesses, "only speculated" on general issues of possible concern and failed to provide any evidence. Pet. Br. at 23. Petitioners assert that the Village's witnesses were even contradicted in their own testimony. *Id*.

In response to the arguments set forth in the brief by McHenry County, petitioners make three additional points. First, petitioners point to the evidence in the record regarding noise. Pet. Reply at 1, citing C04025-27. Petitioners argue that Thomas Thunder, a licensed audiologist and a certified noise engineer with over 25 years of experience, submitted a letter supporting the application. *Id*. According to petitioners, Mr. Thunder's opinion is that the noise generated would meet the state noise regulations at the nearest neighbors. Pet. Reply at 2.

The second point made by petitioners is a challenge to Mr. Nickodem's findings using the "Auto Turn" program. Pet. Reply at 4. Petitioners argue that Mr. Nickodem did not perform the modeling; he did not know the wheelbase used and he did not know the speed assumed for the trucks. *Id*. Petitioners assert that the modeling was done using the largest, tallest, and heaviest trucks contained in the program, whereas the modeling done by petitioners used flexibility. Pet. Reply at 5-6.

The last point raised by petitioners is that McHenry County staff found that criterion iii was met. Pet. Reply at 6. Further, petitioners allege the staff concurred with the testimony offered by petitioners' experts. Pet. Reply at 7.

McHenry County's Arguments

McHenry County argues that in order to grant siting approval all nine of the statutory criteria in Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2002)) must be met. R.Br. at 3, citing Waste Management of Illinois v. PCB, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2nd Dist. 1987). If any one criteria is not met, McHenry County appropriately denied siting for the transfer station. *Id*. In this case, McHenry County found that three of the criteria were not met. R.Br. at 3.

McHenry County contends that the legislature has charged the county board and not the Pollution Control Board with resolving technical issues such as public health ramifications of the landfill's design. R.Br. at 4 citing McLean County Disposal, Inc. v. County of McLean, 207 Ill.

App. 3d 477, 566 N.E.2d 26 (4th Dist. 1991). Further, courts have acknowledged that whether a facility is so designed, located, and operated to protect the public health, safety, and welfare is "purely a matter of assessing the credibility of the expert witnesses." R.Br. at 5, citing File and Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 555 N.E.2d 1178.

McHenry County argues that in this case several expert witnesses testified regarding criterion ii and the testimony was clearly conflicting. R.Br. at 5. Witnesses for the petitioner testified that the criterion was met by the design of the proposed facility, while objectors presented witnesses who testified the criterion was not met. *Id*. McHenry County argues that the determination of credibility of witnesses is up to the governing body and the Board cannot reweigh the testimony to decide which expert is more qualified. R.Br. at 6, citing McLean County and Concerned Adjoining Owner v. PCB, 288 Ill. App. 3d 576, 680 N.E.2d 818 (5th Dist. 1997).

McHenry County maintains that several courts have specifically found that where there is conflicting testimony a local governing body's decision is not against the manifest weight of the evidence. R.Br. 6, citing Rockford v. County of Winnebago 186 Ill. App. 3d 303, 542 N.E.2d 423 (2nd Dist. 1989), Wabash and Lawrence Counties v. Taxpayer and Water Drinkers Association, 198 Ill. App. 3d 388, 555 N.E.2d 1081 (5th Dist. 1991), Fairview, and McLean. In this instance, McHenry County asserts that the decision was not only consistent with one expert but with three. R.Br. at 6. McHenry County argues that in at least three areas (location, groundwater protection, and noise, odors, and litter) the petitioners failed to meet the components of criterion ii.

Location. McHenry County argues that the evidence clearly indicates that the public health, safety and welfare will be adversely affected by the location of the site. R.Br. at 7. McHenry County points to the proximity of the Hollows, Lake Plote, and Bright Oaks. *Id*. McHenry County asserts that the delicate ecological environment of the Hollows could be impacted by contaminants. R.Br. at 9. Furthermore, the size of the site and the ability of trucks to maneuver is an issue testified to at hearing, according to McHenry County. R.Br. at 10.

Groundwater. McHenry County asserts that the design of the facility may not be protective of the groundwater and the groundwater can flow into area lakes. R.Br. at 12. McHenry County relies on the testimony of Mr. Thomas and notes that even petitioners' witness, Mr. Zinnen admitted that the groundwater is connected to the area lakes. *Id*. Further, the groundwater monitoring may be inadequate, argues McHenry County. R.Br. at 13. McHenry County again points to the testimony of Mr. Thomas and Mr. Zinnen to support this assertion. *Id*.

McHenry County asserts that the record demonstrates that the stormwater retention plan may not be effective, because there is no ability to stop materials in the system from migrating to the sewer system. R.Br. at 14. As currently proposed, the runoff from the ramp and apron will be treated as stormwater instead of contact water and McHenry County argues this is inappropriate. R.Br. at 15.

Noise, Odors, or Litter. McHenry County argues that the testimony at the hearing establishes that the facility was not proposed to be operated in a way that will protect the public health, safety, and welfare. R.Br. at 17. In support of this assertion, McHenry County points to the testimony of Mr. Lowe that he has no experience with transfer stations and the he has not hired the operator at this time. *Id*. McHenry County further points out that Mr. Lowe admitted he is relying on others to establish a safe and efficient operation. *Id*. McHenry County asserts that because Mr. Lowe is not assuming direct responsibility for safe and efficient operation of the facility, petitioners have failed to satisfy criterion ii. Further, McHenry County argues that the testimony indicates that the petitioners' plan will not protect against the potential impacts of odors, noise and litter. *Id*.

McHenry County asserts that the areas surrounding the proposed facility will be adversely affected by odors because prevailing winds blow from across the facility to the Hollows and the Plote property. R.Br. at 17. McHenry County maintains that odors will be present because inadequate protections were proposed. R.Br. at 17. The inadequate measures according to McHenry County include washing the tipping floor only once a week and lack of planned misting procedures. R.Br. at 18. Therefore, the plan does not adequately address potential odors at the site. *Id*.

McHenry County takes issue with the litter control plan. R.Br. at 18. Specifically, McHenry County argues that the litter patrol area is insufficient because the petitioners admit that the areas covered will be those petitioners "believe" are directly affected by the proposed operation. *Id*. McHenry County notes that Mr. Lowe testified that he would not cover an area within a half-mile radius, even though Mr. Gordon recommended such an area. *Id*. Thus, McHenry County asserts there is direct conflict on this issue between the petitioners and their own expert. R.Br. at 18-19.

As to noise control, McHenry County contends that petitioners did not even quantify the noise level that will be present at the site. R.Br. at 19. Further, petitioners' own expert concedes that the noise from back-up beepers alone can be horrible for neighbors, argues McHenry County. *Id*. McHenry County points out that expert testimony by the objectors suggested several additional remedial steps that would be necessary for noise control at a transfer station. *Id*.

Village's *Amicus Curiae* Brief

The Village contends that the experts presented by the objectors are practicing professionals, not professional testifiers. Village Br. at 2. The Village argues that McHenry County was entitled to give weight to the views expressed and entitled to consider inconsistencies in the views expressed. *Id*.

The Village argues that the record is clear that the proposed facility does not meet criterion ii. Village Br. at 3. The Village cites four specific areas of concern. Village Br. at 4-14. First, the Village argues that the proposed site threatens groundwater and the area lakes. Village Br. at 4. The Village asserts that concerns about groundwater are justified especially as petitioners have failed to address the sites impact on wetlands in the area. Village Br. at 5.

Further, only the top of the shallow aquifer will be monitored and the stormwater system is not protective, argues the Village. Village Br. at 6.

Second, the Village argues that the proposed site threatens the neighbors with odors, litter, dust, diesel emissions, noise and vectors. Village Br. at 8. The Village asserts that because of the small size of the site, there is no room onsite for a buffer to disperse odors. Village Br. at 8. Further, the Village argues there is no evidence concerning air quality impacts to the neighbors and the plan for noise abatement is also lacking. Village Br. at 9-10.

Third, the Village asserts that petitioners' only argument for site suitability is the zoning classification. Village Br. at 10. The Village maintains that no testimony was provided that the proposed site is a good site environmentally. Village Br. at 10. The Village further maintains that the site is too small to be used for a transfer station. Village Br. at 11.

Fourth, the Village asserts that the parts of the plan which petitioners rely on for mitigating effects on the surrounding properties are without merit. Village Br. at 12. The Village argues that petitioners "rely on luck for any accidents, leaks, spills, or drips" which happen anywhere on the site other than the transfer building. Village Br. at 12-13. Although, petitioners argue that the plans for the site exceed standards, there are no Illinois standards for transfer stations, argues the Village. Village Br. at 13.

Board's Discussion

The law is well settled that McHenry County is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses in this waste transfer facility siting case. Merely because the Board could reach a different conclusion, is not sufficient to warrant reversal. City of Rockford v. PCB and Frank's Industrial Waste, 125 Ill. App. 3d 384, 465 N.E.2d 996 (2nd Dist. 1984); Waste Management of Illinois, Inc. v. PCB, 22 Ill. App. 3d 639, 461 N.E.2d 542 (3d Dist. 1984); Steinberg v. Petta, 139 Ill. App. 3d 503, 487 N.E.2d 1064 (1st Dist. 1985); Willowbrook Motel v. PCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985). Therefore, the Board cannot and will not reweigh the evidence, but rather the Board will examine the record to determine if the decision by McHenry County is against the manifest weight of the evidence.

Petitioners' major argument is that their experts have designed the facility to protect the public health, safety and welfare, and therefore, petitioners have satisfied criterion ii. Petitioners assert that their experts have superior qualifications and that opponents' experts only speculated on general issues of concern. Further petitioners maintain that opponents' experts failed to provided any evidence that criterion ii was not met. Therefore, petitioners cite Industrial Fuels as a basis for overturning McHenry County's decision to deny siting for petitioners' waste transfer station.

The Board does not agree with petitioners that the facts of this case are similar to the facts in Industrial Fuels. In Industrial Fuels the court found that no contrary evidence was presented; in this case an abundance of contradictory expert testimony was offered. Experts testifying on behalf of the objectors raised issues concerning the actual location and potential

adverse impacts to the Hollows, existing residential developments and future residential development from noise, odor, litter and even potential impacts so the groundwater. Clearly McHenry County could properly rely on the testimony of these experts and the reports presented by them. The Board cannot and will not reweigh the evidence. Therefore, the Board finds that McHenry County's decision on criterion ii was not against the manifest weight of the evidence.

The Facility is Located So as to Minimize Incompatibility With the Character of the Surrounding Area and to Minimize the Effect on the Value of the Surrounding Property (Section 39.2(a)(iii))

Petitioners' Arguments

Petitioners argue that McHenry County's decision on criterion iii is against the manifest weight of the evidence. Pet. Br. at 24. Petitioners maintain that criterion iii only requires a demonstration that the facility is located to *minimize* not *eliminate* the effect on surrounding property values. Pet. Br. at 24, citing File. Further petitioners assert that the location chosen need not guarantee that no fluctuations in property value occur. Pet. Br. at 24, citing Sierra Club v. Will County Board, PCB 99-136 (Aug. 5, 1999).

Petitioners further maintain that criterion iii does not require proof that the applicant can assure an odor-free facility or roads devoid of stray papers; rather the applicant must demonstrate more than a minimal effort to reduce incompatibility. Pet. Br. at 24, citing File. Petitioners assert that the application and the public hearing demonstrate that no incompatibility or little incompatibility exists. Pet. Br. at 24. Specifically, petitioners argue that the facility is located in an industrial area and the properties immediately adjacent are also zoned industrial. Pet. Br. at 27. The adjoining properties to the south and southeast are presently being used for heavy industrial. *Id*. The petitioners concede that the adjacent property of the Hollows is used for recreation; however, petitioners assert that the site is still zoned industrial. *Id*.

The petitioners argue that Mr. Peterman identified fourteen factors demonstrating compliance with criterion iii. Pet. Br. at 28. Petitioners assert that the Village witness never contradicted Mr. Peterman and even agreed that the concrete transfer building provide a better visual screen and sound barrier than a metal building. *Id*.

Petitioners also argue that the witnesses presented by Bright Oaks did not diminish the testimony offered by petitioners' witnesses. Pet. Br. at 36. Further, petitioners assert Mr. Whitney admitted he was not present for Mr. Harrison's testimony and the methodology used is acceptable for evaluating values. *Id*. Further, according to petitioners, Mr. Whitney admitted he used no independent study of raw figures to critiques Mr. Harrison's report. *Id*.

McHenry County's Arguments

McHenry County asserts that the petitioners failed to meet criterion iii because the proposed facility is not designed to minimize incompatibility nor effect on property values. McHenry County argues that criterion iii requires more than minimal efforts to reduce the incompatibility. R.Br. at 20.21, citing File. McHenry County argues that the applicant must

demonstrate that the applicant has or will do what is reasonably feasible to minimize incompatibility. R.Br. at 21, citing Waste Management of Illinois v. PCB, 123 Ill. App. 3d 1075, 463 N.E.2d 969 (2nd Dist. 1984) (WMI). McHenry County argues that conflicting evidence was presented in this case; however, the evidence does support McHenry County's finding. R.Br. at 21.

To support the argument, McHenry County points to the testimony of Mr. Davis who opined that the transfer station was incompatible with the surrounding residential and recreational uses. R.Br. at 22-23. Further, Mr. Lowe tried to expedite his application because of the ongoing discussions between the Village and Plote and therefore, impliedly, Mr. Lowe knew the proposed facility was incompatible argues McHenry County. R.Br. at 22. Mr. Petterson also testified that the transfer station is incompatible, because of the added noise, liter, odor, and fumes. R.Br. at 23-24.

On the second part of criterion iii, minimizing the effect on property values, McHenry County asserts that the evidence also does not support the siting of the proposed facility. R.Br. at 24. McHenry County cites the testimony of Mr. Whitney to support McHenry County's argument. *Id*. Based on the testimony, McHenry County argues that the decision by McHenry County was not against the manifest weight of the evidence. R.Br. at 25

Village's *Amicus Curiae* Brief

The Village asserts that the proposed facility fails to meet criterion iii and points to three areas that the Village specifically feels are flawed. Village Br. at 14-21. First, the Village argues that petitioners have focused on zoning and provide no showing of compatibility with the surrounding area. Village Br. at 14. The Village argues that petitioners assume that because the land on which the Hollows is located is zoned industrial, that use of the land is industrial; and these misassumptions about actual land use render petitioners' conclusions incorrect. Village Br. at 15.

Second, the Village asserts that the petitioners' own data show a potential serious impact on surrounding properties. Village Br. at 16. The Village maintains that the fact that only one transfer station in the entire State is sited near a residential subdivision establishes that transfer stations do not belong near residential areas. Village Br. at 17.

Third, the Village cites Section 22.14 of the Act (415 ILCS 5/22.14 (2002)) as support for the proposition that transfer stations should not be located near residential areas. Village Br. at 20. Section 22.14 requires a 1000-foot setback from residential areas for transfer stations. Village Br. at 20, citing 415 ILCS 5/22.14 (2002).

Board's Discussion

The law is well settled that McHenry County is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses in this waste transfer facility siting case. Merely because the Board could reach a different conclusion, is not sufficient to warrant reversal. City of Rockford v. PCB and Frank's Industrial Waste, 125 Ill. App. 3d 384, 465

N.E.2d 996 (2nd Dist. 1984); Waste Management of Illinois, Inc. v. PCB, 22 Ill. App. 3d 639, 461 N.E.2d 542 (3d Dist. 1984); Steinberg v. Petta, 139 Ill. App. 3d 503, 487 N.E.2d 1064 (1st Dist. 1985); Willowbrook Motel v. PCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985). Therefore, the Board cannot and will not reweigh the evidence, but rather the Board will examine the record to determine if the decision by McHenry County is against the manifest weight of the evidence.

Petitioners argue that the McHenry County decision on criterion iii is against the manifest weight of the evidence primarily because of the facility's design and local zoning. Petitioners argue that the design of the facility must minimize incompatibility, not eliminate incompatibility. For example, petitioners point to fourteen design factors identified by petitioners' witness, Mr. Peterson, to demonstrate compliance with criterion iii. Petitioners also noted that the proposed facility is located in an area zoned industrial and even the adjacent conservation area, the Hollows, is zoned industrial.

However, the petitioners have ignored the evidence presented by the objectors that the area is developing into a more residential area and becoming less industrial. There is ample evidence in the record to establish that the facility is located next to a conservation area and will be adjacent to residential areas. Further, experts for the objectors considered the landscape barriers insufficient. McHenry County could rely on the experts' opinions provided by objectors and the evidence of surrounding use. The Board cannot and will not reweigh the evidence. Therefore, the Board finds that the McHenry County decision is not against the manifest weight of evidence.

The Plan of Operations for the Facility is Designed to Minimize the Danger to the Surrounding Area from Fire, Spills, Or Other Operational Accidents (Section 39.2(a)(v))

Petitioners' Arguments

Petitioners argue that criterion v requires minimization, not elimination, of any problems because it is virtually impossible to guarantee that no accidents will occur. Pet. Br. at 38, citing Wabash and Lawrence Taxpayers Association v. PCB, 198 Ill. App. 3d 388, 555 N.E.2d 1081(5th Dist. 1990). Petitioner further argue, relying on Industrial Fuels, that the issue is safety with emphasis on avoiding or minimizing damage from catastrophic accidents. Pet. Br. at 38. Petitioners assert that a plan of operation is sufficient if the plan provides a reasonable blueprint or overview of procedures, the plan need no include all details of any coordination agreements with municipal workers. Pet. Br. at 38, citing Industrial Fuels and Fairview.

Petitioners argue that the testimony of Mr. Gordon establishes that the facility is designed to minimize the danger to surrounding areas. Pet. Br. at 38. Petitioners argue that the record demonstrates that petitioners are in compliance with the required regulations. Pet. Br. at 44. Petitioners assert that the record is "devoid" of any evidence that the facility is substandard or poses any safety hazard. *Id.*

McHenry County's Arguments

McHenry County argues that, like criteria ii and iii, there was conflicting testimony offered as to whether criterion v was met. R.Br. at 26. McHenry County argues that the credibility of witnesses and weighing of conflicting evidence is the sole province of the governing body. R.Br. at 26, citing Tate. The decision of McHenry County cannot be against the manifest weight of the evidence because the evidence clearly establishes that there are safety concerns at the proposed site, according to McHenry County. R.Br. at 26. Specifically, McHenry County cites to concerns regarding fire protection, spill protection, and the handling of hazardous waste. R.Br. at 26-30.

McHenry County details that the concerns about adequate fire protection include that there are no sprinklers at the site. R.Br. at 26-27. The lack of sprinklers is even more disconcerting because the fueling of trucks will be inside the building, asserts McHenry County. R.Br. at 27. McHenry County also argues that the proximity of the Hollows and concerns about adequate water for fire fighting all were raised and petitioners did not adequately address these issues in the plan for the proposed facility. *Id*.

McHenry County argues that the petitioners' own expert indicated that the plan did not include a spill prevention plan and the petitioners have not determined whom to contact in case of a spill. R.Br. at 27-28. McHenry County points out that Mr. Zinnen testified that there is no provision to shut off the flow into the stormwater system if there is a spill; however, Mr. Nickodem testified that normally valves are included to protect against contact with contaminants. R.Br. at 28. McHenry County argues that this could lead to groundwater contamination at the site. *Id*.

McHenry County also asserts that criterion v is not met because of the lack of adequate procedures for handling hazardous waste. R.Br. at 29. McHenry County argues that the petitioners have not hired a firm to handle the waste and have not provided leak-proof containers to hold the hazardous waste. *Id*. McHenry County maintains that there is ample evidence to support the decision by McHenry County that criterion v was not met. *Id*.

Village's *Amicus Curiae* Brief

The Village asserts that the petitioners failed to satisfy criterion v and the Village relies on the testimony of Mr. Nickodem and the "Auto Turn" program to support the argument. Village Br. at 21. The Village also cites problems with adequate buffers, stormwater management, fire safety and spills as deficiencies in the application. Village Br. at 22.

Board's Discussion

As stated above, the Board does not reweigh the evidence or credibility of witnesses in reviewing the decision of McHenry County. The petitioners assert that the plan for the facility minimizes the dangers from fires, spills, and groundwater contamination. Further, petitioners assert that the plan of operation provides an overview of safety features and under Industrial Fuels the plan is sufficient to meet criterion v.

Testimony provided by objectors' witnesses indicated that the experts had questions concerning the handling of hazardous waste, the protection of the groundwater, fire protection, and spill prevention. The testimony indicated that the proposed facility's plan to handle hazardous waste by setting the waste aside until a contractor arrived to handle the waste was ineffective. Also, objectors' experts raised concerns with the lack of a sprinkler system and groundwater protection. McHenry County evaluated the evidence and testimony in the record, and determined that criterion v was not met. After reviewing the record in this proceeding, the Board finds that McHenry County's decision was not against the manifest weight of the evidence. Therefore, the Board affirms the decision by McHenry County regarding criterion v.

McHenry County's Decision to Consider the Applicants' "Operating Experience and Past Record of Convictions or Admissions of Violations of the Applicant . . . In the Field of Solid Waste Management"

Petitioners' Arguments

Petitioners argue that McHenry County inappropriately considered the lack of experience of Mr. Lowe when considering the criteria in this case. Pet. Br. at 46. Petitioners assert that under McHenry County's reading of the Act only applicants in existence at the time the provision was added could apply for siting. *Id*. Petitioners argue that there is nothing in the Act or in the discussions by the General Assembly that would provide a basis for this narrow reading of the statute. *Id*. In addition, petitioners maintain that there is no evidence in the record of any complaints, violations, or enforcement actions against Mr. Lowe. Pet. Br. at 47.

McHenry County's Arguments

McHenry County maintains that the Act and case law clearly allow McHenry County to consider the applicants' experience. R.Br. at 34, citing 415 ILCS 5/39.2(2) and Medical Disposal Services, Inc. V. IEPA, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1997). McHenry County asserts that such consideration was justified, particularly in this case, where the applicant is relying on others to operate the proposed facility. R.Br. at 35. Furthermore, McHenry County asserts that McHenry County was entitled to consider the petitioners' experience in current businesses because his current experience is germane to the application and how the proposed facility will be run. R. Br. at 36.

Village's A*micus Curiae* brief

The Village argues that McHenry County could appropriately consider the experience of Mr. Lowe in deciding if the application met the criteria of Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2002)). Village Br. at 23. The Village argues that the record supports the finding against the petitioners on the issue of experience because Mr. Lowe did not even read the application submitted to McHenry County. Village Br. at 24. The Village argues that the petitioners have waived the right to argue this point as the petitioners conceded that experience could be considered at McHenry County hearing. Village Br. at 24, citing C00221 at 18.

Board's Discussion

Petitioners argue that McHenry County inappropriately considered petitioners' lack of experience when examining criteria ii and v. The Board disagrees. Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2002)) specifically allows for the consideration of an applicant's previous operating experience in the area of solid waste when reviewing criteria ii and v. The fact that the applicant has no experience does not render the provisions of Section 39.2(a) of the Act (415 ILCS 5/39.2(a)(2002)) meaningless. The evidence in this record indicates that not only is there no experience, but at this time an experienced operator has not been hired. Clearly this type of information is germane to a decision by McHenry County and McHenry County properly considered the information. Therefore, the Board affirms the decision of McHenry County on this issue.

The Imposition of a Host Fee

Petitioners' Arguments

Petitioners argue that McHenry County's solid waste management plan contains no provisions for a host fee and the record contains no indication that the siting committee or McHenry County discussed a host fee. Pet. Br. at 47. Petitioners argue that imposition of a fee is not reasonable and necessary in order to accomplish the purposes of Section 39.2 of the Act and therefore McHenry County has no authority to impose a fee. Pet. Br. at 48.

McHenry County's Arguments

McHenry County argues that the Board should not address the issue of whether or not the host fee was lawful because the issue is not ripe for adjudication. R.Br. at 30. McHenry County asserts that the issue is not ripe for adjudication because McHenry County denied siting and the petitioners will clearly not be required to pay a host fee. R.Br. at 30.

McHenry County alternatively argues that if the Board does consider the issue of the host fee, McHenry County could appropriately assess a fee under the Section 39.2(e) of the Act (415 ILCS 5/39.2(e) (2002)). R.Br. at 30. McHenry County states that Section 39.2(e) allows for the imposition of such conditions as are necessary to accomplish the purposes of the Act and that are not inconsistent with the Act, including the negotiation of host agreements. R.Br. at 30-31. McHenry County asserts that economics are a relevant consideration under the Act and it is within the discretion of the local decision maker to consider economics. R.Br. at 31 citing Concerned Adjoining Owners. Furthermore, McHenry County points out that the imposition of a host fee was raised by petitioners in both the application and by Mr. Lowe in testimony. R.Br. at 31.

Village's *Amicus Curiae* brief

The Village adopts the arguments by McHenry County on this issue. Village Br. at 1-2.

Board's Discussion

Section 40.1 of the Act (415 ILCS 5/40.1(a) (2002)) states that if a governing body "refuses to grant or grants with conditions approval under Section 39.2 of this Act" an appeal may be filed. The Act does not contemplate conditions on a denial. Therefore, the Board is persuaded by McHenry County's arguments that this issue is not justiciable as the petitioners will not be paying a host fee as a result of this siting decision.

CONCLUSION

The Board today addresses four motions filed by petitioners. Specifically, the Board denies in part petitioners' motion seeking to strike the *amicus curiae* brief filed by the Village and asking for sanctions by striking the brief but denying the request for sanctions. The Board denies petitioners' September 2, 2003 motion to strike the Village's response to the motion to strike and asking for sanctions and the Board allows the filing of a modified *amicus curiae* brief. The Board also denies petitioners' motion to strike portions of the brief filed by McHenry County.

The Board denies the petitioners' September 15, 2003 motion to deem siting approved by operation of law. Petitioners sought approval by operation of law asserting the Board failed to properly notice the public hearing held in this matter. The Board finds the arguments unpersuasive and without merit and therefore denies the motion.

Regarding the merits of the case, after careful review of the record before the Board, the Board finds that the decision by McHenry County to deny siting to petitioners was not against the manifest weight of the evidence. The Board finds that the record supports McHenry County's conclusions that petitioners in the application did not meet criteria ii, iii, and v of Section 39.2(a) of the Act (415 ILCS 5/39.2 (2002)). In addition the Board finds that the decision by McHenry County to consider the lack of experience of petitioners in making the decision to deny siting was appropriate. Further, the Board finds that the host fee issue is not properly before the Board in this proceeding.

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

ORDER

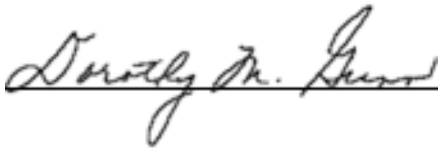
The decision of County Board of McHenry County, Illinois denying Marshall Lowe and Lowe Transfer, Inc.'s application to site a waste transfer station is affirmed.

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 5/31(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 October 2, 2003, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board