BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BYRON SANDBERG, Petitioner, vs. CITY OF KANKAKEE, ILLINOIS, et. al. Respondents.	Case No. PCB 04-33
WASTE MANAGEMENT OF ILLINOIS, INC., Petitioner, vs. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, et al. Respondents.	Case No. PCB 04-34
COUNTY OF KANKAKEE, ILLINOIS, et al., Petitioners, vs. CITY OF KANKAKEE, ILLINOIS, et al. Respondents.	Case No. PCB 04-35

REPLY BRIEF OF PETITIONERS, COUNTY OF KANKAKEE AND EDWARD D. SMITH

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NOW COMES Petitioners, COUNTY OF KANKAKEE and EDWARD D. SMITH, and as and for their Reply Brief, responding to the briefs filed by Town and Country Utilities, Inc. and City of Kankakee, state as follows:

INTRODUCTION

On January 9, 2004, Respondents, Town and Country Utilities, Inc. (T&C) and City of Kankakee (City) filed briefs in response to the initial brief filed by the County of Kankakee (County), which was adopted in its entirety by Waste Management of Illinois, Inc. In its brief, the City adopted and incorporated the portions of T&C's brief related to the City's jurisdiction to hear the application and the City's findings with respect to criteria ii and viii. Therefore, where the County makes reference to T&C's brief on those issues, those references are also relating to the City's brief, which adopted and incorporated such arguments. With respect to the fundamental fairness issue, the City drafted its own argument, and the County responds to both T&C's brief and the City's brief on that issue, as set forth more fully below.

ARGUMENT

I. THE CITY OF KANKAKEE LACKED JURISDICTION TO CONSIDER THE LANDFILL SITING APPLICATION.

A. T&C'S 2003 APPLICATION WAS SUBSTANTIALLY THE SAME AS T&C'S 2002 APPLICATION, WHICH WAS DISAPPROVED BY THE IPCB.

As set forth in section 39.2(m) of the Illinois Environmental Protection Act (Act): "An applicant may not file a request for local siting approval which is substantially the same as a request which was disapproved pursuant to a finding against the applicant under any of criteria (i) through (ix) of subsection (a) of this Section within the preceding 2 years." 415 ILCS 5/39.2(m). Despite this provision, T&C filed an application on March 7, 2003 that was

substantially the same as an application it filed on March 13, 2002, which was disapproved by the Illinois Pollution Control Board for failing to satisfy criterion ii.

T&C attempts to argue that section 39.2(m) does not preclude its 2003 Application for two reasons. First, T&C contends that a "disapproved" application can only be one that is disapproved by the local siting authority. Second, T&C contends that its 2003 application is not substantially the same as its 2002 application. For the reasons set forth below, both of these arguments lack merit.

Turning to T&C's first argument, it is clear that section 39.2(m) precludes the filing of a subsequent application if any body or court disapproves of the application for failing to satisfy the criteria set forth in 39.2(a) of the Act. This is true based on the plain language of section 39.2(m), which refers to an application that was "disapproved pursuant to a finding against the applicant under any of the criteria (i) through (ix) of subsection (a) of this Section." 415 ILCS 5/39.2(m). Nothing in section 39.2(m) provides that the application must be disapproved by the local siting authority, as T&C contends. If the legislature had intended that to be the case, it surely would have specified as much and specifically provided that only disapproval from a local siting authority would preclude the filing of a new application. However, the legislature clearly did not so provide and, instead, set forth that any disapproval based on "a finding against the applicant" that any of the criteria contained in 39.2(a) of the Act was not met would preclude the filing of a new application that was substantially the same within 2 years.

It is clear that in *Town & Country I*, PCB 03-31, 33, 35 (Jan. 9, 2003), the Illinois Pollution Control Board (Board) disapproved T&C's application pursuant to its finding against T&C that criterion ii of section 39.2(a) was not met. Based on that finding, T&C was precluded, pursuant to section 39.2(m), from filing its application in 2003. In fact, this Board has

previously implied that disapproval by the Board of a siting application will trigger section 39.2(m) of the Act. *See Turlek v. Village of Summit*, PCB 94-19, 21, 22 (May 5, 1994) (noting that section 39.2(m) would have applied if the Board had found that the applicant failed to satisfy the statutory criteria); *Slates v. Illinois Landfills, Inc.* PCB 93-106 (Sept. 23, 1993) (dissent) (noting that the Board's reversal of siting approval pursuant to criterion i triggered section 39.2(m) and precluded the applicant from reinstituting its application for two years). Furthermore, T&C has admitted in its own brief that the Board can "disapprove" an application after it has been approved by the local siting authority. *See* T&C's Brief, p. 93 (arguing that Waste Management did not receive "approval" of its application because the local decision was reversed by the Board).

It is well-settled that in interpreting statutes, courts must rely on the plain meaning of the language contained therein. *See Laidlaw Waste Systems, Inc. v. Pollution Control Board*, 230 Ill.App.3d 132, 135, 595 N.E.2d 600, 602 (5th Dist. 1992) (examining the plain language of section 39.2(m) and finding it to be clear and unambiguous). The plain meaning of the word "disapprove" is "to pass unfavorable judgment on; to refuse approval to; reject." Webster's Ninth New Collegiate Dictionary, 359 (1985). Clearly, the Illinois Pollution Control Board, as a body with expertise in landfill siting, is given the task of approving or disapproving applications by reviewing the decisions of local hearing bodies to determine if the local decisionmakers properly granted or denied siting approval to a particular applicant. In its task of reviewing such applications, the Board is not simply an appellate reviewer but, rather, holds expertise in the area of landfill siting that it uses to approve or disapprove landfill siting applications. Pursuant to the plain meaning of "disapproved", T&C's 2002 application was "disapproved" by the Illinois Pollution Control Board in *Town & Country I* because the Board found that the application did

not meet the criterion set forth in section 39.2(a)(ii) and, therefore, passed unfavorable judgment on that application, rejected that application and refused to approve that application. That disapproval prohibited T&C from filing its 2003 application, which was substantially the same as its disapproved 2002 application.

Turning to T&C's second argument, it is clear that T&C's 2003 application is substantially the same as its 2002 application. In fact, T&C's contention that its 2003 application is not substantially the same as its 2002 application is not even supported by T&C's own witnesses. While T&C relies on the testimony of Devin Moose for support of its contention that its application is different from its previous application, T&C fails to point out that Devin Moose admitted that the 2003 application proposed a landfill with the same legal description, the same size, the same capacity, the same daily tonnage, the same waste footprint, the same storm water management plan, the same closure and post-closure care plan, the same description of the operating experience of the operator, the same geotechnical analysis, the same inward gradient design, the same composite liner (with the exception of an optional feature), the same final contours and cover configurations, the same excavation and liner grades, and the same average thickness of the structural fill as was contained in the 2002 application. T&C II, 6/26/03 Tr. Vol. 3-A, 28-33.

The slight differences in the 2002 and 2003 applications pointed out by Mr. Moose are overshadowed by Mr. Moose's admission that the design, location and operating plan contained in the 2003 application were either exactly the same as or substantially the same as those contained in the 2002 application. T&C II, 6/26/03 Tr. Vol. 3-B, 36. T&C's other witness, David Daniel, agreed with Mr. Moose's conclusion that the design of the landfill was substantially the same, the location of the landfill was exactly the same and the plan of

operations was substantially the same as the application filed in 2002. T&C II, 6/26/03 Tr. Vol. 3-B, 117. Because T&C's own witnesses testified that the 2003 application was substantially the same as its 2002 application, it was clearly against the manifest weight of the evidence for the City Council to find otherwise.

Since the undisputed evidence establishes that T&C filed an application in 2003 that was substantially the same as the application it filed in 2002, pursuant to section 39.2(m) of the Act, the Kankakee City Council (City Council) had no jurisdiction to consider T&C's 2003 application.

B. T&C FAILED TO SEND PROPER 39.2(b) NOTICES TO ALL OWNERS OF THE SKATES PARCEL.

T&C contends that service on only one owner, when several owners were listed in the authentic tax records, was somehow consistent with the requirements of the Act. However, this is clearly not the case. In support of this contention, T&C relies on this Board's ruling in *Town & Country I*, that notice provided only to Judith Skates was appropriate because the tax records were in conflict between various offices of County Government. However, the clear and unrefuted evidence presented in this case shows that no conflict existed in the tax records of Kankakee County because the various County offices actually shares a database and possess the same records. PCB II, Pet. Exs. 9, 10, H.O. Ex. 1. Therefore, this Board's finding in *Town & Country I* cannot form the basis for this Board to conclude that notice to Judith Skates alone was adequate. Instead, this Board should find that the uncontradicted tax records of Kankakee County require that notice be provided to all of the owners contained in the official tax records, which T&C failed to do.

In this case, it is undisputed that notices were not sent to the address listed in the authentic tax records for five of the six owners of the Skates property. Rather, two notices were

sent to Judith Skates at her Onarga address, one in her name alone and one in the names of all of the other owners of the property, "c/o of Judith Skates", even though those owners had not completed any change of address form establishing the Onarga address as their new address.

T&C attempts to argue that the change of address card provided by Ms. Skates somehow created a conflict in the authentic tax records of Kankakee County. However, that is clearly not the case because the change of address card completed by Ms. Skates could only serve to change her address, not the addresses of the other owners of the property. PCB II, 12/2/03 Tr. 62. As explained by the Chief County Assessment Officer for Kankakee County, Ms. Skates could not have changed the addresses of the other owners of the property because Ms. Skates did not have a power of attorney or actual authority to do so. *Id.* at 62-63. T&C ignores this point and asserts that because the change of address form contained the identifying number of the parcel, this somehow suggested that the change of address form was effective for all owners of the property. Such an argument is nonsensical. Clearly, the change of address form had to indicate a parcel number, so that it could be filed appropriately. The listing of that parcel number did not in any way establish that the change of address was effective for anyone but Ms. Skates, the one owner listed on the form.

T&C further asserts that the tax records somehow "provide two conflicting addresses for the owners as well as conflicting information as to who the owners are" of the Skates parcel. T&C Brief, p. 12. T&C's contention that there were conflicting addresses for the owners of property is completed unfounded. The fact that the authentic tax records showed that there were two different addresses for the property owners of the Skates parcel, one being the Rock Falls address and one being the Onarga address, does not create a conflict in the tax records of Kankakee County. Rather, such a situation is probably quite common because owners often do

not reside at the same address. T&C's contention that there was conflicting information regarding the owners of the Skates parcel is also completely untrue because it is uncontested that there were six owners of that property listed in the tax records, and T&C admitted as much by writing each owner's name on a single envelope that was sent to Judith Skates' address.

T&C next asserts that it was appropriate to provide notice to only Judith Skates because there were flags specifying that tax bills and certain specific notices were to be sent to only Judith Skates. This argument, however, ignores the plain language contained in section 39.2(b). Section 39.2(b) requires that notice be served "on the owners of all property within the subject area not solely owned by the applicant . . . said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located." 415 ILCS 5/39.2(b). T&C would have a new requirement written into this section, providing that notice only has to be sent to the owner who is to receive the tax bill for the property. However, section 39.2(b) does not contain such a requirement. Rather, section 39.2(b) provides that notice be sent to <u>all</u> persons or entities listed in the authentic tax records. Therefore, the fact that Ms. Skates was designated to receive the tax bill for the property has no relevance to the notice that is required to be provided in a landfill siting hearing. Pursuant to the Act, such notice is to be given to all owners, not just those owner or owners receiving the tax bill for the property.

In support of its position that only Ms. Skates should have received notice, T&C relies on *Wabash & Lawrence Counties Tax Payers and Water Drinkers' Assoc. v. Illinois Pollution Control Board*, 198 Ill.App.3d 388, 554 N.E.2d 1081 (5th Dist. 1990). However, that case is clearly distinguishable because in *Wabash* only one of the owners was listed by name and address. In this case, however, all of the property owners were listed by both name and address. T&C simply chose not to provide notice to the address provided for five of those property

owners. Therefore, *Wabash* is not controlling and does not stand for the proposition that an applicant can simply decide not to provide notice to owners listed in the authentic tax records.

T&C contends that it would have been inappropriate to send notice to the Rock Falls address because a private process server allegedly attempted personal service on the Rock Falls address and was told that none of the listed owners lived at that address. T&C Brief, p. 11. However, that process server was also told that the owners, other than Ms. Skates, did not live at the Onarga address. PCB I, 11/6/02 Tr. 286-287. Therefore, T&C's argument must fail because while T&C may have had reason to believe that the owners did not live at the Rock Falls address, T&C also knew that the owners, other than Ms. Skates, did not live at the Onarga address. In fact, T&C made no effort to determine the actual addresses of these individuals. PCB II, Pet. Ex. 23, p. 51. As such, T&C should not be allowed to willfully ignore the service requirement.

Finally, T&C suggests that the notices sent in this case were consistent with the requirements of *City of Kankakee v. County of Kankakee*, PCB 03-125, 133, 134 (Aug. 7, 2003) because notices were sent to "each" of the owners of the Skates parcel. T&C Brief, p. 14. This implies that six notices were sent to Ms. Skates' address; however, that is clearly not the case. Actually, only two separate notices were sent to Ms. Skates' address – one addressed to Judith Skates and one addressed to all of the other owners "c/o of Judith Skates." T&C II App., Append. B, Ex. C. Such notices do not comport with this Board's requirements set forth in *City of Kankakee* that separate notices be provided to each landowner. See slip op. at 16-17 (noting that "Mrs. Keller was not sent a notice by certified mail" even though her husband received one). As such, this Board should find that T&C failed to provide the appropriate notices to each landowner as required by section 39.2(b) of the Act.

Sending only one notice to a number of owners is not only inconsistent with this Board's decision in *City of Kankakee*, but it is also inconsistent with section 39.2(b) of the Act, which requires that all owners be sent notice. Sending one notice to multiple owners does not ensure that all owners actually receive notice because one owner could simply sign for the certified mail notice and never show it to the other owners, as Ms. Skates did in this case, thereby, leaving multiple property owners without notice that a landfill could potentially be sited next to their property.

Because it is clear that T&C was required to provide notice to each of the owners of the Skates parcel identified in the County tax records and not simply to one owner, the notices provided by T&C were inadequate. Therefore, the City of Kankakee lacked jurisdiction to consider T&C's siting application.

C. THE APPLICATION FILED BY T&C WAS INCOMPLETE.

T&C contends that the application it filed was complete and attempts to lambast Mr. Schuh for stating otherwise. However, T&C conveniently forgets to point out that its own witness admitted that there were important documents missing from the application. Mr. Drommerhausen specifically admitted that he did not include his sensitivity analyses in the application and stated that he should have done so. T&C II, 6/28/03 Tr. Vol. 5-A, 77. Additionally, Mr. Mueller himself concedes that there were significant documents left out of the application because he specifically relied on a model that was not contained in the application to support his position that the facility would be protective of the public health, safety and welfare. T&C Brief, p. 61.

The absence of these documents was significant because without those documents T&C's application did not contain "the substance of the Applicant's proposal" as required by section 39.2(c) of the Act, 415 ILCS 5/39.2(c). The applicant proposes to remove in situ material and

build the landfill on and in the aquifer serving many wells of Kankakee County. Therefore, it is very important that the applicant's findings be tested in sensitivity analyses. Without these analyses, it impossible to determine if the proposed facility would be protective of the public health, safety and welfare, as specifically found by Mr. Schuh. T&C II, 6/27/03 Tr. Vol. 4-C, p. 18. Because important documentation was excluded from the application and not available for review by the respondents prior to the siting hearing, the application was incomplete. Therefore, the City Council lacked jurisdiction to consider it.

II. THE MANIFEST WEIGHT OF THE EVIDENCE ESTABLISHES THAT THE FACILITY IS NOT PROTECTIVE OF THE PUBLIC HEALTH, SAFETY AND WELFARE.

A. T&C HAS CONTINUED TO MISCHARACTERIZE THE SITE BY CREATING AN UNRELIABLE GROUNDWATER IMPACT MODEL.

The opinions by T&C's witnesses on criterion ii are dependent upon the groundwater model created with respect to this site. If that groundwater model is incorrect in any way, it affects the safety of the site. In this case, the groundwater impact model was unreliable and was not based on "conservative assumptions" as suggested by T&C. As a result, T&C has failed to establish that its facility will be protective of the public health, safety and welfare.

T&C contends that it adequately characterized the hydrogeology of the site and made a "number of conservative assumptions" in groundwater modeling. T&C Brief, p. 56. However, that is clearly not the case because T&C failed to examine how changes in permeability, which definitely exist at the site, would impact the groundwater model. Mr. Drommerhausen testified that the distinction between weathered and competent bedrock is really based on the permeability test results with the area identified as the weathered zone having an average permeability of 5.3 x 1×10^{-4} cm/sec, and the competent zone having a permeability of 1.13 x 1×10^{-5} cm/sec. T&C II, 6/24/03 Tr. Vol. 1-C, p. 115. Mr. Drommerhausen also testified that the permeabilities in the

Silurian Dolomite Aquifer vary greatly depending upon location. T&C II, 6/24/03 Tr. Vol. 1-B, p. 85. In fact, the data in the application demonstrates that the permeability in the bedrock varies by over 60,000 times. T&C II, 6/27/03 Tr. Vol. 4-B, p. 115. Because the permeability of the aquifer varies greatly, T&C should have performed a sensitivity analysis to assess the impact of changes in permeability on groundwater impact. The fact is that the groundwater model contained in the application was run only for a bedrock permeability of $1.13 \times 1 \times 10^{-5}$ cm/sec, and no variations were made in the application to assess the impact of permeability on groundwater impact. As such, that groundwater model was inherently unreliable.

T&C also failed to provide an adequate sensitivity analysis on the groundwater model. Mr. Drommerhausen testified that modeling the aquifer as only being 10 feet thick for purposes of the groundwater impact assessment means that there will be less water to dilute the theoretical contaminants released from the facility in the model run. T&C II, 6/25/03 Tr. Vol. 2-B, p. 42. However, reducing the aquifer thickness, as well as reducing the effective and total porosities, results in less water available to dilute contaminants that diffuse from the landfill, and that is precisely why a sensitivity analysis should have been run on the parameters used in the model. Reducing the porosity of the bedrock by 25% and leaving the aquifer thickness as 10 feet reduces the water available for dilution by 25%. This, coupled with the fact that the Application states that T&C will remove all weathered bedrock (and thereby leave only the unweathered bedrock which by Drommerhausen's testimony has a lower permeability) clearly demonstrates that T&C did not perform due diligence for the assessment of groundwater impact. The Applicant is merely saying "Trust us," which is especially problematic because T&C's last application did not propose a landfill that was protective of the public health, safety and welfare, as found by this Board.

T&C missed the point of Mr. Schuh's testimony regarding primary and secondary porosity. Mr. Schuh testified that the Applicant did not measure the secondary porosity, and testified that there is no simple test that can be performed to measure secondary porosity. Mr. Schuh criticized T&C's use of the incorrect porosity and not running a sensitivity analysis on the possible ranges in porosity. T&C II, 6/27/03 Tr. Vol. 4-C, p. 31. Because of this, and the fact that the "Hydrogeolgist's Bible" states that porosity can vary for dolomite, it was the Applicant's duty to evaluate the sensitivity of the model to porosity, because the Applicant does not know what actual variations exist below the landfill and what the fracture spacing and sizes are. Mr. Schuh was not criticizing the Applicant for not performing field tests to determine secondary porosity, but was criticizing the Applicant for not considering the impact of secondary porosity on the model results. Because the actual value is unknown, it was incumbent on the Applicant to address the impacts of porosity on model results, which T&C did not do.

B. T&C HAS FAILED TO ADEQUATELY ESTABLISH THAT AN INWARD FLOW AND INWARD GRADIENT WILL EXIST ON THE SITE.

As is made clear from T&C's brief, the safety and operation of T&C's landfill is dependent upon its inward gradient design. T&C Brief, pp. 61, 64 and 68 (explaining that certain features are irrelevant based on the inward gradient of the facility). In fact, T&C's star witness admitted that all of his opinions were premised on the maintenance of an inward gradient at the facility. T&C II, 6/28/03 Tr. Vol. 5-A, p. 137. However, T&C has failed to adequately establish that an inward flow and inward gradient will exist and be maintained. This is true because T&C's witnesses used miscalculations and mischaracterizations to support their conclusions that the inward flow and inward gradient would exist.

T&C goes so far as to even mischaracterize what an inward gradient is. In its brief, T&C states that an inward gradient is nothing more than the difference between the potenitiometric

head and the level of the leachate in the landfill where the head in the bedrock is higher. T&C Brief p. 54. This description is inaccurate because the gradient is actually the difference in head divided by the thickness of soil between the measured heads. Therefore, if there is a massive flaw in the liner system, water would tend to flow into the landfill. However, T&C has not performed adequate analyses to demonstrate that a properly constructed liner system will reverse the flow of water in the aquifer and provide the necessary protection from leachate impact due to diffusion. Because T&C failed to adequately establish that the flow at the site will be reversed, T&C cannot establish that the groundwater will not be contaminated and, therefore, cannot establish that the facility is protective of the public health, safety and welfare.

T&C asserts that Dr. Daniel established that the existing downward flow would be reversed. However, when Dr. Daniels' created his "trivial" calculation and subsequent "on the fly" analysis (T&C Brief, p. 65), he used information in the application that is not consistent with this testimony. Dr. Daniel used information that suited his intended outcome, rather than using data that would demonstrate that a competent liner system will not cause a reversal of groundwater flow in the aquifer. Therefore, that "analysis" is not reliable.

Dr. Daniel compared post-construction flow into the landfill with flow underneath to create his "trivial calculation." T&C II, 6/28/03 Tr. Vol. 5-A, p. 133. Dr. Daniel purported that this analysis resulted in the landfill being able to trap 35 times more flow than what flows underneath the landfill. *Id.* at 130. However, there are many deficiencies with this "trivial calculation." First, Dr. Daniel used the inflow rate provided in Appendix K of the application. This inflow rate assumes the liner is severely flawed and was performed by the Applicant to design the leachate collection system, not to evaluate the impact of the landfill on the aquifer. The application even states that "the Construction Quality Assurance Program assures that this

will not occur" (Application Page 2.3-12) and, therefore, this calculated rate of flow is irrelevant to the calculation performed by Dr. Daniel. (Using this percentage of liner flaw, there would be a hole 20 square feet in size for each acre of liner.) The inflow rate used by Dr. Daniel in his "trivial calculation" is not associated with the proposed liner system, and specifically the properties testified to by Moose. The value significantly overestimates the seepage rate, leading to his incorrect conclusion. Secondly, the compacted backfill and clay liner components will inherently be compacted to permeabilities significantly lower that the maximum specified. This will result in significantly lower inward flow velocities, which will minimize the seepage of water into the landfill. Thirdly, if Dr. Daniel were correct in his presumption that the gradient will be reversed and inflow to the landfill is significantly greater than the ability of the aquifer to supply groundwater, then he is admitting that the landfill will be withdrawing water from the aquifer faster than it can be replenished, which will ultimately result in the lowering of the potentiometric surface, which, over time, could result in an outward gradient condition. Therefore, regardless of the position taken, the Applicant cannot assume that the aquifer will reverse flow and that there is no potential for advective flow in the aquifer away from the landfill.

Dr. Daniel testified that the Applicant "made an extraordinarily conservative assumption which bordered on absurdity by modeling groundwater flow away from the landfill when the flow will, in fact, be inward." T&C II, 6/26/03 Tr. Vol. 3-B, pp. 73, 74. However, Dr. Daniel confused the inward gradient in the compacted backfill with the gradient in the aquifer. While there will be an inward gradient in the compacted backfill and the compacted clay located below the HDPE liner, inward gradient does not translate to inward flow. Inward seepage, at an extremely slow rate, may occur, but no data provided by the Applicant supports Dr. Daniel's

hastily made conclusion that this rate will essentially deplete the aquifer. There is inadequate evidence to suggest that the gradient in the aquifer will reverse, which is the basis for the Applicant concluding that groundwater will not be impacted.

As further evidence of T&C's mischaracterizations of the site, Dr. Daniel testified that the permeability of bedrock at the site was irrelevant, because with the strong inward gradient that exists at this site, a higher permeability aquifer would actually increase the driving velocity of groundwater inward thereby tending to overcome diffusion. This statement is false, and demonstrates that Dr. Daniel did not fully evaluate and appreciate the site conditions. The velocity in the bedrock has nothing to do with the velocity of water into the landfill. The velocity of water into the landfill depends solely on the hydraulic conductivity of the complete liner system, the inward gradient, and the effective porosity of the liner system. The confusion by Dr. Daniel, and his misuse of information in the application to perform his "on the fly" calculations led to his incorrect conclusions. Furthermore, Dr. Daniel testified that bedrock permeabilities only serve to increase the driving force of groundwater into the landfill; however, this is also untrue. The permeability of bedrock has no relationship with the velocity of groundwater moving up and into the landfill, unless the permeability of bedrock is lower than the permeability of the liner system, which, by the Applicant's own testimony, is not the case. The driving force of water into the landfill is the difference between the head in the aquifer and the head in the landfill, and has nothing to do with the permeability of the aquifer.

Further, T&C relies on incorrect features of the liner to establish that the downward flow presently existing on the site will be reversed. In its brief, T&C asserts that the composite liner system of the proposed facility will consist of a 60 mil HDPE liner, 3 feet of compacted clay, and an average of 4.5 feet of structural backfill, with the clay and backfill compacted to achieve a

coefficient of hydraulic conductivity of no more than 1 x 10^{-7} cm/sec. T&C Brief, p. 51. While this information is consistent with the application, it is not consistent with the data used by Mr. Moose, Mr. Drommerhausen, and Mr. Daniel to determine the effectiveness of the liner system to prevent the movement of contaminants out of the landfill and into the aquifer. Specifically, this data was not used in their determination of the ability of the landfill to reverse the flow in the bedrock aquifer. This is significant because if the inward gradient is not created or properly maintained by reverse flow, all of the opinions presented by T&C's witnesses are invalid.

C. T&C CONTINUES TO FAIL TO ACCOUNT FOR FRACTURES IN THE BEDROCK, THE VERTICAL GRADIENT ON THE SITE AND AN INSUFFICIENT MONITORING SYSTEM.

T&C has failed to establish that contamination will not flow through fractures in the bedrock. Mr. Drommerhausen testified that since the permeabilities obtained from field scale measurements at the site are approximately 3 orders of magnitudes higher (than the laboratory tests), the fractures in the Dolomite increased the permeability of that unit by a factor of at least 1,000. T&C Brief, p. 63. However, such testimony shows that Drommerhausen is confusing the vertical permeability (permeability vertically through bedding planes) with the permeability along bedding planes. There is no data in the application providing the permeability through fractures, which is a significant concern, as was noted by this Board in *Town & Country I.*.

Additionally, just as it did at the siting hearing, T&C again erroneously alleges that the downward gradient present at the site is "very slight." T&C Brief, p. 64. However, this is not supported by the evidence. Although Mr. Drommerhausen characterized the downward gradient as so slight that it cannot be measured (T&C II, 6/25/03 Tr. Vol. 2-B, p. 50), this is only because Mr. Drommerhausen conveniently used only one value that was measured. If Mr. Drommerhausen had used the November 8, 2002 readings, there is no conceivable way he could make this statement because the difference in head was 0.27 feet, or over 3 inches.

Conventional surveying techniques can measure to the nearest 0.01 feet. Therefore, his assertion that such a gradient was so slight that it could not be measured was completely untrue.

T&C also fails to establish that its groundwater monitoring system is adequate. While Dr. Daniel testified that it would take a contaminant particle between 500 and 1,000 years to diffuse downward even 30 feet (T&C Brief, p. 66), Dr. Daniel provided no basis for this statement, nor any information on the conditions for which this statement pertains. Contaminant concentration, contaminant type, and other factors impact the diffusion rate. The Applicant's own Exhibit 14 shows that 25% of a contaminant concentration can move completely through the liner system in 130 years. Therefore, T&C's assertion that it will take 500 to 1,000 years for contamination to flow beneath the site is unreliable.

T&C's brief takes Mr. Schuh's testimony regarding groundwater monitoring out of context. T&C Brief, p. 72. Mr. Schuh testified that the computer model by the Applicant indicated that groundwater will be impacted at the monitoring wells such that additional monitoring and assessment would be required. T&C II, 6/27/03 Tr. Vol. 4-C, p. 21. This was in response to Mr. Mueller's question if the groundwater impact assessment failed for some constituents. Mr. Schuh provided his opinion that the assessment failed to demonstrate that groundwater will be protected because the model predicted that groundwater will be impacted at the monitoring well locations such that the Maximum Applicable Predicted Concentration is exceeded. If this were to occur, additional monitoring and assessment could be required to demonstrate compliance with regulatory requirements. Again, additional analyses should have been performed, and the analyses in the application were insufficient to verify that groundwater will not be impacted.

D. THE ALLEGED "SENSITIVITY ANALYSES" WERE GROSSLY INADEQUATE.

T&C tries to argue that performing two model runs using different bedrock thicknesses is a sensitivity analysis. T&C Brief, p. 69. However, this is not true because changing one parameter, one time, is not considered a sensitivity analysis, and is not adequate to determine with confidence that the landfill will not impact groundwater quality.

Mr. Drommerhausen claims that Exhibit 14 represents a sensitivity analysis for the worst-case scenario. T&C Brief, p. 73. This is absurd. The analysis performed in Exhibit 14 had only one parameter different than the base case provided in the application. The only parameter changed was the horizontal velocity in the bedrock, and the value was set to zero. No analyses were performed for changes in porosity, changes in permeability, and changes in gradient. These analyses are needed to demonstrate that the landfill will protect groundwater quality. (Hrg. Tr. Volume C, Pages 14, 15).

E. THE PETITIONERS' WITNESSES WERE CREDIBLE AND COMPETENT.

T&C glorifies its own witnesses and questions the credibility of the Petitioners' witness in an attempt to undercut the convincing testimony from the County's expert. In fact, T&C fails to point out that two of its own witnesses, Dr. Daniel and Mr. Drommerhausen have never before submitted applications for new landfills or been personally involved in the design or engineering of landfills. T&C II, 6/24/03 Tr. Vol. 1-C, p. 56-58; 6/26/03 Tr. Vol. 3-B, p. 114. Furthermore, T&C fails to point out that the Petitioners' witnesses at the siting hearing each have over 20 years of experience in their respective professions, as a professional engineer and hydrologist. T&C II, 6/27/03 Tr. Vol. 4-A, pp. 20-21; 4-B, p. 105.

T&C also mischaracterizes and misrepresents the testimony of the County's witnesses in order to support their position. For example, T&C asserts that Steven Van Hook, who testified

in *Town & Country I,* somehow supported T&C's application with his testimony. However, this is clearly not the case. Rather, Mr. Van Hook's comments were greatly taken out of context. For example, while Mr. Van Hook indicated that the facility was "over-designed," he was referring to the fact that it had to be because it was located directly on top of an aquifer that was used by adjacent property owners for drinking water. Mr. Van Hook never asserted that the "over-design" of the facility was good or somehow was protective of the public health, safety and welfare. This is just one example of a statement taken out of context so that it could be used by T&C to support its position.

The fact of the matter is that it is the credibility of T&C's witnesses that should be questioned in this proceeding because it appears that no matter how unsafe a proposed facility is, T&C's witnesses will testify that it is designed to protect the public health, safety and welfare. This is true because Mr. Moose testified in *Town & Country I,* asserting that the proposed facility was safe at that time. However, that was clearly not the case because this Board found that criterion ii was not met. Furthermore, at the siting hearing in this case, Mr. Moose asserted that he believed this Board was incorrect to disapprove T&C's first application. T&C II, 6/26/03 Tr. Vol. 3-A, p. 17. Because T&C's witness has previously testified that an unsafe facility is safe and continues to assert that a facility meets criterion ii even though this Board has found otherwise, the testimony of that witness should not be trusted.

Furthermore, this Board should completely disregard T&C's assertion that Professor Daniel is "one of the world's foremost experts in waste containment." T&C Brief, p. 77. This assertion is unfounded because Professor Daniel has never even been involved in the design or engineering of a landfill. T&C II, 6/27/03 Tr. Vol. 3-B, p. 114. Furthermore, T&C's assertion that it was appropriate for the City Council to rely heavily on Professor Daniel's testimony

should also be disregarded because, rather than reflecting the Council's confidence in Mr. Daniel, the numerous references to Professor Daniel in the Findings of Fact merely establish the inherent bias of the City Council and the author of the Findings of Fact.

F. THIS BOARD AND THE LOCAL SITING AUTHORITY CANNOT SIMPLY DEFER TO THE IEPA.

Apparently because T&C did not like this Board's decision in *Town & Country I*, T&C now asserts that it is inappropriate for this Board to "become a technical review of the evidence." T&C Brief, p. 67. However, T&C fails to acknowledge that it is this Board's role and responsibility to review the evidence presented at the siting hearing to determine whether the evidence presented adequately establishes that the criteria set forth in section 39.2 of the Act have been met. Therefore, T&C's assertion that the issues raised by the County are matters that should be left to the IEPA is completely unfounded. Rather, it is the duty of this Board to examine the evidence presented at the hearing, just as this Board did in *Town & Country I*, to determine that the manifest weight of the evidence establishes that criterion ii was not met. As such, this Board cannot simply turn a blind eye to deficiencies in an application, relying on the IEPA to correct those deficiencies.

Just as this Board cannot defer to the IEPA, neither can a local siting authority. The procedure for granting approval of a pollution control facility is clearly created to give authority to local governments and the Pollution Control Board to first determine whether a facility meets certain requirements contained in section 39.2 of the Act. It is only after those requirements are met that the IEPA becomes involved. Therefore, it was simply inappropriate for the City Council to do as it did in this case, through its imposition of Condition 9, and defer to the IEPA to determine if the facility is safe. Such deference was explicitly rejected by this Board in *Town & Country I* and should again be rejected by this Board.

III. T&C'S APPLICATION IS NOT CONSISTENT WITH THE COUNTY SOLID WASTE MANAGEMENT PLAN.

A. T&C'S APPLICATION IS INCONSISTENT WITH THE COUNTY'S PLAN, WHICH SPECIFICALLY PROVIDES THAT ONLY EXPANSION OF THE EXISTING FACILITY BE ALLOWED.

As set forth in Petitioners' initial brief, it is clear that T&C's application was not consistent with the Kankakee County Solid Waste Management Plan (Plan). The City Council employed a strained and unconvincing reading of the County's unambiguous Plan to find it did not specifically prohibit the siting of the proposed landfill even though the language in the Plan clearly indicated: "It is the intent of Kankakee County that no landfills or landfill operations be sited, located, developed or operated within Kankakee County other than the existing landfill located southeast of the Intersection of U.S. Route 45/52 and 6000 South Road in Otto Township, Kankakee County, Illinois." See Append. C to County's initial Brief. Based on this provision and others contained in the Plan, it was clear that T&C application was inconsistent with the County Plan.

The City Council's finding that the proposed facility was consistent with the County Plan is also not supported by the evidence because, in the injunctive case filed by the City, the City of Kankakee admitted that the Plan intended for no landfills, other than expansion of the Waste Management facility. T&C II, Pet. Ex. 5. Therefore, the City of Kankakee had no problem understanding the County Plan when it filed its injunctive action against the County. As a result, the City's finding that T&C's facility is consistent with that plan is clearly against the manifest weight of the evidence.

Probably because T&C recognized that the City's conclusion was not supported by the evidence presented at the hearing, T&C did not even respond to the County's arguments that the Plan was clear in evincing its intent that no landfills, other than an expansion of the existing

facility, be allowed. T&C's lack of argument on the subject establishes that a clear reading of the County Plan precludes siting of T&C's proposed landfill and establishes that T&C's Application is not consistent with the County Plan.

While there is no existing landfill siting approval for the expansion of the existing facility in Kankakee, that should not in any way affect the County Plan's clear intent that only expansion of that landfill is appropriate in Kankakee County. This is particularly true because expansion of the existing facility is inevitable. In fact, the local siting authority had actually granted siting approval to the expansion at the time of the hearing on T&C's application; however, on review, this Board disapproved the expansion based on notice issues. *See City of Kankakee*, PCB 03-125, 133, 134, slip op. at 17. Currently, the Kankakee County Board is now engaged in a siting hearing with respect to the proposed expansion. As a result, it is clear that expansion of the existing facility is forthcoming and, therefore, Kankakee County's intent should be fulfilled by concluding that T&C's application is inconsistent with the County Plan.

B. THE COUNTY PLAN WAS PROPERLY ENACTED AND IS CONSISTENT WITH ALL APPLICABLE STATUTES.

Apparently because T&C cannot genuinely assert that its Application is consistent with the County's Plan, T&C instead argues that the Plan was not property enacted. However, this contention is completely untrue, as was specifically found by this Board in *Town & Country I.* T&C contends that the County's Plan is not consistent with the Solid Waste Planning and Recycling Act (SWPRA) and the Local Solid Waste Disposal Act (Disposal Act) because following the County's adoption of the plan in 2000, the County enacted three amendments, one on October 9, 2001, one on March 12, 2002 and one on February 11, 2003. However, this Board has already found that two of those amendments (October 9, 2001 and March 12, 2002) were properly enacted and consistent with the SWPRA and Disposal Act. *Town & Country I*, PCB 03-

31, 33, 35, slip op. at 29. Because the February 11, 2003 amendment was not enacted until after this Board's decision in that case, this Board has not ruled on the legality of that amendment; however, based on this Board's ruling with respect to the other amendments, this Board should also rule that the February 11, 2003 amendment was properly enacted and consistent with the applicable statutes. Therefore, T&C's contentions, and the City Council's findings, that these amendments were inconsistent with the SWPRA and Disposal Act are erroneous and against the manifest weight of the evidence.

T&C first contends that these amendments are improper because they were not reviewed and approved for consistency by the EPA. T&C Brief, p. 85. However, it is uncontested that all of these amendments were submitted to the Illinois EPA for its review, as required by section 4(b) of the Act, 415 ILCS 15/4(b). PCB II, C.1626-1776. Furthermore, nothing in the SWPRA requires that the amendments actually be approved by the Illinois EPA before they are implemented. *See* 415 ILCS 15/1 et seq. Rather, once the amendments are submitted, they are presumed to be acceptable and approved unless returned to the county with specific recommendations for improving them. *See* 415 ILCS 15/4(b). Because the amendments in this case were accepted by the IEPA and not returned with recommendations, those amendments were effective upon submission. As such, Kankakee County clearly followed the appropriate statutory guidelines in amending its Plan and timely submitting those amendments to the IEPA. Consequently, the City Council's finding that the amendments were not properly enacted is against the manifest weight of the evidence.

Further, T&C suggests that the amendments at issue were not consistent with the SWPRA and the Disposal Act because of the timing of those amendments. In making such an argument, T&C seems to assert that a solid waste management plan can never be amended but

that such a plan can only be submitted and reviewed every five years. However, section 5(e) of the SWPRA specifically allows for amendments and revisions to a county plan. *See* 415 ILCS 15/5(e). Therefore, T&C's assertion that the scheme created by the SWPRA precludes amendments to solid waste management plans is simply erroneous. Furthermore, T&C's contention that the timing of the County's amendments was improper is not supported by any provision in the applicable Acts because neither the SWRPA or the Disposal Act place limitations on the number or timing of amendments to a solid waste management plan.

T&C also asserts that the amendments to the County's Plan are inconsistent with the SWPRA and Disposal Act because the amendments at issue serve to establish that only one landfill should be located in Kankakee County. In support of this argument, T&C cites the SWPRA's provision that the Act "shall not be construed to impact the authority of units of local government in the siting of solid waste disposal facilities." 415 ILCS 15/2(a)(5). While the legislature made clear in the SWPRA itself and in public comments to the SWPRA that the Act would not affect the ability of units of local government to hold siting hearings for solid waste disposal facilities, nothing in the Act provides that the plans created by counties may not impact landfilling, which might affect a unit of local government or a home rule unit. Furthermore, the County has the primary authority for solid waste planning. *See* 415 ILCS 15/2. Therefore, the amendments to the County Plan are entirely appropriate and are not in conflict with the applicable statutes.

Because it is clear that neither the SWPRA nor the Disposal Act prohibit the amendments passed by the County of Kankakee, the Plan is clearly consistent with the SWPRA and Disposal Act.

C. T&C'S APPLICATION IS INCONSISTENT WITH THE COUNTY'S PLAN BECAUSE IT DOES NOT INCLUDE AN APPROPRIATE PROPERTY VALUE PROTECTION PROGRAM OR CONTINGENCY FUND.

T&C does not even dispute that their application does not contain a Property Value Guarantee Program "prepared by an independent entity satisfactory to the County" or an environmental contingency escrow fund with a minimum deposit of one million dollars ($1,000,000) or some other type of payment or a performance bond or policy approved by the County, as explicitly required by the County Plan. PCB II, C1626-1776, Public Comment of the County of Kankakee. As such, the City Council's decision that the application was consistent with the County Plan was against the manifest weight of the evidence and cannot be upheld.

D. THE CITY'S OWN WASTE MANAGEMENT PLAN IS IRRELEVANT.

T&C next contends that because the County's plan was not appropriately developed and established, this Board should consider whether the Application is consistent with the City's own solid waste management plan adopted pursuant to the Disposal Act, 415 ILCS 10/1.1. This contention is unsupported because, as set forth above, the County Plan was properly enacted. Furthermore, there is no support or authority setting forth that it is appropriate to examine a City's Waste Management Plan in a section 39.2 siting hearing.

Although the Disposal Act does allow municipalities to create their own solid waste management plans, such plans are irrelevant in a landfill siting hearing. This is true because section 39.2(a)(viii) requires that an application be consistent with a county solid waste management plan, if one exists. See 415 ILCS 5/39.2(a)(viii). There is no provision in section 39.2 that requires, or even allows, a local siting authority to consider any solid waste management plan other than a county plan when determining whether to grant or deny siting approval to a facility. Further, T&C 's assertion that the County Plan is not effective or binding

on the City because the City has created its own solid waste management plan is entirely without support. Nothing in section 39.2(a)(viii) suggests that an application has to be consistent with a County plan only if no City Plan exists. Rather, section 39.2(a)(viii) provides that all applications must be consistent with a County Plan with no exceptions and no mention of any other type of solid waste management plan. Therefore, the City's adoption of its own solid waste management plan is irrelevant in determining whether T&C's application should be approved or disapproved by a local siting authority or this Board.

Finally, T&C has no support for its assertion that the City's solid waste management plan should control over the County Plan to the extent that there are conflicts between them because section 39.2(a)(viii) does not provide that any solid waste management plan other than a County Plan should be considered. Therefore, it is unnecessary to determine whether any other plan contradicts a County Plan. As set forth in section 39.2(a)(viii), it is the County Plan that should prevail over all others because it is the only plan considered in a local siting hearing. Furthermore, T&C's assertion that the County's plan is subordinate to the City's Plan is directly contradicted by the SWPRA, which specifically provides that "counties should have the primary responsibility to plan for the management of municipal waste in their boundaries to insure the timely development of needed waste management facilities and programs." 415 ILCS 15/2(a)(2). Therefore, the legislature, through section 39.2(a) of the Act and the SWPRA, has already determined that a County's Plan is primary and a Plan created by any other political subdivision should be secondary

Because it is clear under section 39.2(a)(viii) that the only relevant waste management plan is the County Plan, T&C's assertion that this Board should look to the City's plan is completely without support.

E. THIS BOARD SHOULD NOT FIND THAT THE COUNTY PLAN IS UNCONSTITUTIONAL.

T&C urges this Board to look beyond the procedures set forth in section 39.2 of the Act and somehow find that the Plan adopted by the County is unconstitutional because it was created in violation of the City's home rule power. However, it is clearly not the role of this Board to make such a determination. As an administrative agency, the Board possesses only the powers granted to it by statute. *See W.F. Hall Priting Co. v. Environmental Protection Agency*, 16 Ill.App.3d 864, 869, 306 N.E.2d 595, 599 (1st Dist. 1974) (explaining that the Pollution Control Board "must proceed strictly within the authority defined by the Act").

Pursuant to section 40.1(a) of the Act, the Board has authority to review a local governing body's grant or denial of a request for local siting approval. *See* 415 ILCS 5/40.1(a). That review is limited to the procedures and considerations set forth in section 39.2, and no new or additional evidence can be presented to the Board. *Id.* Section 39.2 sets forth specific criteria that a local siting authority and, on review, the Illinois Pollution Control Board are to examine in determining whether an application for local siting authority should be granted or denied. See 415 ILCS 5/39.2. None of the criteria in that section requires, or even allows, a local siting authority or the Board to examine the contents of a county solid waste management plan to determine if the Plan is constitutional. Rather, the examination of such a Plan by the local siting authority and the Board is expressly limited to determining whether an application is consistent with the Plan. *See* 415 ILCS 5/39.2(a)(viii).

The hearing officer at the local siting hearing correctly concluded that the constitutionality of the Plan was beyond the scope of the siting hearing and specifically refused to consider that subject even though he was urged to do so by T&C. T&C II, 6/26/03 Tr. Vol. 3-C, pp. 4-6. Specifically, the hearing officer found that he had no jurisdiction to determine the

constitutionality of the County Plan because a siting hearing is "limited in the matters is may address." *Id.* at 6. Likewise, this Board should expressly refuse to consider the constitutionality of the County Plan because it is beyond the scope and jurisdiction of this Board to examine solid waste management plans for constitutionality or legality.

If this Board were to examine the constitutionality of the County's Plan, this Board would find that the Plan is constitutional because it was enacted in accordance with the SWPRA. The authority to create county solid waste management plans is explicitly provided for in the SWPRA, which provides that "counties should have the primary responsibility to plan for the management of municipal waste within their boundaries." 415 ILCS 15/2. Through this legislation, the General Assembly clearly gave counties the power and right to draft and implement county waste management plans. In fact, the legislature determined that counties should have "primary responsibility" for doing so.

As such, the County had a right to draft its solid waste management plan as it so desired with the provisions that it chose to include, and nothing in the SWPRA or any other statute precludes the County's right to do so. In fact, the SWPRA specifically allows provisions, like the one contained in the County's plan, which restrict the development of multiple landfills because the Act itself requires a County to select waste management sites to reduce reliance on landfilling. *See* 415 ILCS 15/2. This is exactly what the County has accomplished by only allowing for one landfill. Because the County's Plan was created with the explicit authority of the legislature, through the SWPRA, that Plan is not unconstitutional or violative of any laws.

IV. THE PROCEEDINGS WERE FUNDAMENTALLY UNFAIR.

Both T&C and the City of Kankakee allege that the County of Kankakee has exaggerated facts in support of its fundamental unfairness arguments. However, this is entirely untrue. In fact, the County simply presented the existing facts, which clearly establish that the proceedings

were fundamentally unfair. Because those facts are so overwhelming, Petitioners had no choice but to allege that those facts are grossly exaggerated and, in fact, themselves paint a picture that grossly misrepresents the truth.

A. RESPONDENTS SERIOUSLY DOWNPLAYED THE FUNDAMENTALLY UNFAIR PROCEDURES EMPLOYED IN THE PROCEEDINGS.

In its opening paragraph to its fundamental fairness discussion, T&C drastically mischaracterizes the facts in an attempt to establish that the County is not painting the true picture for the Board when, in fact, it is T&C that is misrepresenting the truth and downplaying the fundamental unfairness that occurred at the siting hearing. For example, T&C asserts that the City and the applicant had "pre-filing discussions on administrative and unrelated matters between the Applicant and the City." T&C Brief, p. 26. However, the fact of the matter is that Mr. Volini himself admitted that: 1) he and the City engaged in a closed session meeting to discuss appealing T&C's first application to the PCB, 2) he had conversations related to T&C refiling its application, and 3) he had communications with the City about the City hiring a geological consultant to review T&C's newly filed 2003 application. PCB II, Pet. Ex. 23, pp. 12-19. These communications establish that Mr. Volini had a great deal of pre-filing contacts with the City on matters directly related to the siting application and proceedings, which made the proceedings fundamentally unfair.

Furthermore, T&C suggests that the "City's consultant and the Applicant had a remote and isolated business contact many years prior to the Application." T&C Brief, p. 26. In fact, the Applicant had direct communication with the Consultant, Mr. Yarborough, prior to the Consultant's hiring and on the same day as the closed session meeting. PCB II, Pet. Ex. 16, p. 9. Mr. Volini also had discussions with the City about Mr. Yarborough, as Mr. Volini was the one who recommended that Mr. Yarborough be hired and submitted Mr. Yarborough's name to the

City Council. *Id.* Furthermore, Mr. Yarborough had previously testified on behalf of Mr. Volini, and Mr. Volini's attorney prepared Mr. Yarborough for his deposition in this case. *Id.* at 14, 22. Such contact is clearly neither "remote" nor "isolated."

Next, T&C contends that the "Hearing Officer has assistance from other City staff in drafting proposed Findings of Fact for the City Council." T&C Brief, p. 26. However, the truth of the matter is that the Hearing Officer actually only drafted two or three pages of the 30 page document himself, and the City Attorney, Mr. Bohlen, drafted the remainder of the document. PCB II, Pet. Ex. 15, p. 18-22, 25-26, 29. Although the City and T&C contend that Mr. Boyd actually drafted most of the document, that is clearly untrue because Mr. Boyd himself admitted that Mr. Bohlen sent him the findings of fact and conclusions of law that were issued in the prior proceeding related to the 2002 application (drafted by Attorney Bohlen), and then Mr. Boyd made some changes and sent them back to the City. *Id.* at 19-20. Mr. Boyd himself admitted that he only recalled typing up 2 to 3 pages of additional pages after reviewing the 2002 findings of fact. *Id.* at 25-26, 29.

Both the City and T&C attempt to distort the truth by asserting that Mr. Bohlen only drafted one or two portions of the findings of fact. However, this assertion ignores that the findings of fact presented to the board were based, in large part, on the 2002 findings of fact, which were drafted by Mr. Bohlen and that Mr. Bohlen admitted that he may drafted more than just the Yarborough references in the 2003 document. The City and T&C also fail to acknowledge Mr. Boyd's own testimony that he only typed up two or three pages of that 30-page document.

Both the City and T&C suggest that the County improperly accused Mr. Bohlen and Mr. Boyd of a conspiracy based on the absence of any documentation of the correspondence between

those two individuals related the findings of fact and conclusions of law, purportedly drafted by Mr. Boyd. However, the County stands firm in its assertion that it is highly suspicious that all of that documentation that was transmitted back and forth between Mr. Bohlen and Mr. Boyd was destroyed or is missing from both Mr. Bohlen's and Mr. Boyd's entire offices, and the County would be remiss not to point that out to this Board.

Finally, T&C noted that "the City received and considered a report from its consultant after the public comment period was closed." T&C Brief, p. 26. However, the City fails to point out that the document was created by a Consultant who had direct contact and communication with the Applicant. T&C also failed to mention that the document presented new evidence to which the Respondents were never able to respond. That document was unlike the report presented in *Sierra Club*, which contained only a summary of the testimony, public comments and recommendations of the authors of the report. Rather, the Yarborough reports presented new evidence, which specifically influenced the City's approval and caused the City Council to add a grouting requirement, upon which no testimony was provided at the siting hearing.

The misrepresentations noted above are just a few examples of how T&C oversimplified the arguments presented by the County and downplayed the fundamental unfairness that existed at the siting hearing. As explained more fully below, the proceedings were clearly unfair based on the actions of the City Attorney, the evidence of prejudgment by the City Council, and the ex parte communications between the Applicant and decisionmaker.

B. THE ROLE PLAYED BY THE CITY ATTORNEY RENDERED THE PROCEEDINGS FUNDAMENTALLY UNFAIR.

A great deal of evidence establishes that the City Attorney's role in the proceedings rendered them fundamentally unfair. The first evidence of this is that the City attorney was representing both the City Council and City staff. While T&C argues that Mr. Bohlen was

clearly representing only the City Staff at the proceeding, this is less than clear based on a review of the record, which establishes that the Mr. Bohlen entered an appearance on behalf of the "City of Kankakee." PCB II, Pet. Ex. 14, p. 26. At the siting hearing itself, Mr. Bohlen announced that he was appearing for "the City of Kankakee." T&C II, 6/24/03 Tr. Vol. 1-A p. 16. Therefore, based on Mr. Bohlen's own statements at the hearing, it appeared that Mr. Bohlen was representing both the City Council and the City Staff. Furthermore, the minutes of the City Council meeting establish that Mr. Bohlen was advising both the City Council and City staff. Such actions were improper and led to a fundamentally unfair hearing.

Furthermore, as explained above, Mr. Bohlen's participation in drafting the Fndings of Fact also establishes that the proceeding was fundamentally unfair because those Findings of Fact were, by ordinance, to be drafted by the Hearing Officer. The clear testimony in this case establishes that the majority of those findings of fact were not actually drafted by the Hearing Officer but were drafted by Mr. Bohlen. Adding to the fundamental unfairness of the proceeding is the fact that the City Council was never advised of the fact that Attorney Bohlen drafted the majority of the document. In fact, the City Council was explicitly told that findings of fact were drafted by Hearing Officer Boyd. PCB II, C 1907.

T&C relies on *Sierra Club v. Will County Board*, PCB 99-136 (Aug. 5, 1999) to support its position that a county or municipality can have its staff create a report that is presented to the decisionmakers to review. However, the report at issue in *Sierra Club* is vastly different than the findings of fact drafted in this case because in *Sierra Club* the County Board was aware that the report was created by the County staff, including attorneys, and the report was not a purported finding of an impartial hearing officer. Here, that was clearly not the case because the City Council was led to believe that the findings of fact were drafted by the Hearing Officer, not the

City's staff. The County does not contest that the City staff in this case could have drafted a report for the City Council, but the City staff did not do so and instead drafted the Hearing Officer's report for him, which was fundamentally unfair. Nothing in *Sierra Club* provides otherwise.

T&C also cites to *Waste Management of Illinois v. County Board of Kane County*, PCB 03-104 (June 19, 2003) to support its position that the City did not have to rely on the Findings of Fact purportedly drafted by Hearing Officer Boyd. However, *Waste Management* does not support T&C's position because the memo at issue in *Waste Management* was drafted by a county board member, and that fact was disclosed to the County Board. Therefore, there was no misrepresentation as to the author of that memo, as there was in this case. Because the findings of fact in this case are readily distinguishable from the memo at issue in *Waste Management*, *Waste Management* is not controlling, as it does not stand for the proposition that decisionmakers can be misled about who is the author of a report or other document that is to be consider in a landfill siting hearing.

T&C contends that this Board should not even consider the fact that Attorney Bohlen violated the City ordinance by drafting the majority of the Hearing Officer's Findings of Fact. However, as admitted by T&C, this Board can consider the violation of an ordinance if that violation contributes to fundamental unfairness. T&C Brief, p. 35; *see also Gallatin National Co. v. Fulton County Board*, PCB 91-256 (June 15, 1992); *Citizens for Controlled Landfills v. Laidlaw Waste Systems, Inc.*, PCB 91-89, 90 Sept. 26, 1991). In this case, it is clear that the failure of the Hearing Officer to personally draft the findings of fact contributed to fundamental unfairness because the City Council was voting on a document it believed was drafted by an unbiased hearing officer, when in fact, the document was drafted by the City's attorney.

Finally, T&C makes light of the fact that Mr. Bohlen drafted a new version of the City Council's Findings and Fact and Conclusions of Law, which was signed by the Mayor but never actually voted upon by the City Council. T&C contends that is unimportant because the changes made were not significant; however, that is simply not true. Many of the changes made by Mr. Bohlen after the City Council met to approve the findings and conclusions were substantive, as they changed significant words and indicated that the City Council made specific findings when no specific findings were made in the original document. PCB II, Pet. Ex. 14, pp. 51-52; Appendix B to County's brief. The changes made by Mr. Bohlen were so extensive that a summary of them covered six type-written pages. Appendix B to County's Brief. Clearly, the changes made by Mr. Bohlen were more than mere corrections to typos and grammatical changes as asserted by T&C. Rather, Mr. Bohlen's changes were substantive ones, which were never voted upon by the City Council. This fact, in and of itself, establishes that the proceedings were fundamentally unfair, as the conclusions of the City Council were never even voted upon.

C. THE CITY COUNCIL'S ACTIONS DEMONSTRATED PREJUDGMENT OF THE APPLICATION.

T&C contends that the lawsuits filed by the City Council against the County of Kankakee do not demonstrate prejudgment of T&C's application. However, a review of the timing and substance of those suits establishes otherwise. The first suit, alleging an improper use of funds by Kankakee County, was instituted the same day as the County's brief in *Town & Country I* was to be filed with this Board. That suit completely lacked merit and was dismissed by the trial court; however, the fact that such a suit was filed at the same time *Town & Country I* was being briefed raises quite an inference that the City was attempting to disrupt the County's ability to adequately represent the County in *Town & Country I.* Furthermore, the City's suit for injunctive relief against the County based on the County's solid waste management plan clearly establishes

that even before a siting hearing on T&C's application, the City had decided it would grant siting approval to T&C. This is true based on the explicit language contained in the City's complaint, which all but admits that it intended to site the landfill and did not want any interference in doing so.

T&C asserts that the issues raised by the County that occurred prior to this landfill siting hearing are irrelevant. However, as pointed out in Petitioners' initial brief, those issues are relevant because they establish that the City Council decided over a year before this hearing even took place that it was going to approve T&C's application before even hearing any evidence. As such, this Board should examine the facts presented by Petitioners, which establish that the City Council decided long ago to approve T&C's application no matter what the evidence presented at the hearing showed.

D. T&C HAD IMPROPER EX PARTE COMMUNICATIONS WITH THE DECISIONMAKERS.

Although T&C asserts otherwise, it is clear that T&C, through its President, Mr. Volini, had improper ex parte communications with the decisionmakers. T&C implies that the only communications Mr. Volini had with City officials were related to an industrial park that he hoped to develop on land near his proposed landfill. However, a review of the evidence establishes that Mr. Volini had other contacts with City officials. Most notably, Mr. Volini participated in a closed session meeting with the City Council and City attorney. The minutes for that closed session were withheld by the City. The City asserts in its brief that the contents of that meeting were somehow privileged even though there was clearly no privilege attached to that meeting because Mr. Volini was never Attorney Bohlen's client. Because Mr. Volini was present at the meeting, he destroyed any attorney-client privilege that would have otherwise existed between Attorney Bohlen and the City. As a result, the City should have provided the

minutes to that meeting, but it refused to do so, establishing that there were discussions contained within those minutes that the parties did not want the County to see.

Adding insult to injury, the City contends that there is "no evidence to support the conclusion that any statements made in the executive session of the City Council in February, 2003 in anyway related to the yet to be filed siting application or in anyway belittled the reputation of the objectors or enhanced the reputation of the applicant's witnesses." City Brief, p. 8. This statement is completely untrue because Mr. Volini admitted that at that meeting he discussed his intent to file a new landfill siting application. PCB II, Pet. Ex. 23, p. 21. Furthermore, there is strong circumstantial evidence that suggests that Mr. Volini and the City discussed Mr. Volini's filing of a new application because on the very same day as that meeting, Mr. Volini contacted Mr. Yarborough about Mr. Yarborough potentially acting as a consultant for the City with respect to T&C's new application. PCB II, Pet. Ex. p. 9. Furthermore, the fact that there is little evidence about the contents of the closed session meeting is understandable since the City refused to produce the minutes of that meeting. Because it was the City that refused to disclose the contents of that meeting, it is entirely disingenuous for the City to now assert that there is no direct evidence of what occurred during that meeting, especially since there is evidence and testimony to support the County's assertion that T&C's application was discussed at that meeting.

In addition to the closed session meeting, Mr. Volini had other conversations with the City and its officials after the PCB disapproved T&C's application but before T&C filed a new application, including a conversation about the City hiring a consultant geologist. Such conversations were improper because those conversations related specifically to the siting application that T&C intended to file.

For the reasons set forth above and outlined more thoroughly in the County's opening brief, it is abundantly clear that the siting proceedings were fundamentally unfair, requiring a remand.

CONCLUSION

For the foregoing reasons, Petitioners , County of Kankakee and State's Attorney Edward D. Smith, pray that the Illinois Pollution Control Board issue an Order reversing the decision of the City of Kankakee which approved the Landfill Siting Application of Respondent, Town & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C.

Respectfully Submitted,

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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on January 16, 2004, a copy of the foregoing was served upon:

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Via UPS Next Day Air to Ms. Gunn and to the remainder of those on the Affidavit of Service by depositing a copy thereof, enclosed in an envelope in the U.S. Mail at Rockford, Illinois, before the hour of 5:00 P.M., addressed as above.

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