BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEORIA DISPOSAL COMPANY,	)	
	)	
Petitioner,	)	
	)	PCB 06-184
v.	)	
	)	(Pollution Control Facility Siting Appeal)
PEORIA COUNTY BOARD,	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: See attached service list

PLEASE TAKE NOTICE THAT on the 6th day of April, 2007, HASSELBERG, WILLIAMS, GREBE, SNODGRASS & BIRDSALL, attorneys for Opposition Groups, PEORIA FAMILIES AGAINST TOXIC WASTE and HEART OF ILLINOIS SIERRA CLUB, filed their Motion for Leave to File an Amicus Brief in Excess of 20 Pages, via electronic filing as authorized by the Clerk of the Illinois Pollution Control Board.

Respectfully submitted,

PEORIA FAMILIES AGAINST TOXIC WASTE
and
HEART OF ILLINOIS SIERRA CLUB

By:_____
One of Their Attorneys

David L. Wentworth II
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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	)	
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MOTION FOR LEAVE TO FILE AN AMICUS BRIEF IN EXCESS OF 20 PAGES

NOW COMES, PEORIA FAMILIES AGAINST TOXIC WASTE and HEART OF ILLINOIS SIERRA CLUB ("Opposition Groups"), by and through their attorneys, HASSELBERG, WILLIAMS, GREBE, SNODGRASS & BIRDSALL, having previously been given leave to file an amicus brief, and move for leave to file said brief in excess of 20 pages, and in support thereof, state that:

1. The Illinois Administrative Code limits amicus curiae briefs filed with the Pollution Control Board (the "Board") to 20 pages, unless the Board or hearing officer grants leave to exceed this limit. 35 Ill. Adm. Code 101.302(k) (2007).

2. That the Response Brief of Respondent and any amicus curiae groups are due on Friday, April 6, 2007.

3. There are multiple issues before the Board, including whether the proceedings were fundamentally fair and whether the Peoria County Board's decision on four of the nine siting criteria was against the manifest weight of the evidence.

4. Petitioner, Peoria Disposal Company, filed an opening brief consisting of 113 pages, and sought leave to exceed the page limitation; such motion was granted by order of the Board dated March 1, 2007.

6. Respondent, Peoria County Board, has filed a Motion to Exceed Page Limitation seeking 75 pages.

7. For the same reasons Petitioner and Respondent found it necessary to exceed the page limitation, the Opposition Groups also find it necessary to exceed the page limit.

8. The Opposition Groups anticipate that their Amicus Brief will be approximately 25 pages.

WHEREFORE, PEORIA FAMILIES AGAINST TOXIC WASTE and HEART OF ILLINOIS SIERRA CLUB, pray for leave to exceed the 20 page limit for their Opening Brief, and for such other and further relief as the Hearing Officer deems just and proper.

Respectfully submitted,
PEORIA FAMILIES AGAINST TOXIC WASTE
and
HEART OF ILLINOIS SIERRA CLUB

By:_____
One of Their Attorneys

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Motion for Leave to File an Amicus Brief in Excess of 20 pages was served upon the following persons by the methods indicated below on the 6th day of April, 2007, before 5:00 pm, with all fees thereon fully prepaid and addressed as follows:

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By: _____
One of their attorneys

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AMICUS BRIEF OF PEORIA FAMILIES AGAINST TOXIC WASTE AND HEART OF ILLINOIS SIERRA CLUB

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AMICUS BRIEF OF PEORIA FAMILIES AGAINST TOXIC WASTE AND HEART OF ILLINOIS SIERRA CLUB

NOW COME Peoria Families Against Toxic Waste, and Heart of Illinois Sierra Club, by and through their attorneys, David L. Wentworth II and Emily R. Vivian of Hasselberg, Williams, Grebe, Snodgrass & Birdsall, and as and for their Amicus Brief, respectfully state and submit as follows:

INTRODUCTION

On November 9, 2005, Petitioner, Peoria Disposal Company ("PDC") filed an Application with the Peoria County Board (the “County Board”) for site location approval pursuant to § 39.2 of the Environmental Protection Act (the “Act”) for a vertical and horizontal expansion of Petitioner’s hazardous waste facility located in Peoria, Illinois (the “Application”). Despite its long history of operations at this location, this was the first time the PDC ever had to seek local siting authority under § 39.2 for the instant pollution control facility. The PDC facility is the only one of its kind in Illinois, and is located adjacent to the only regulated recharge area in Illinois. The existing PDC facility, not even counting the proposed expansion, towers over residences a mere 200 feet away, is adjacent to the City of Peoria, and has 53,190 people living within 3 miles of its site. Peoria Families Against Toxic Waste (“PFATW”), and the Heart of Illinois Sierra Club (“Sierra Club”), (collectively the "Opposition Groups") participated as objectors at the local siting hearing. As participants in the siting attempt, PFATW and the Sierra Club believe that their views in the form of an Amicus Brief would be beneficial to the Illinois Pollution Control Board (the “Board”).

On May 3, 2006, well within the180-day statutory deadline, the County Board convened to make a final determination of Petitioner’s Application. At that meeting, the County Board voted to deny the

Application based on criterion 1, 2 and 3. This final, written decision of the County Board constitutes the entire transcript of the May 3, 2006 meeting.

The process employed by Peoria County in conducting the hearings was very transparent and fundamentally fair, a true example of *absolute* access to information in modern times by virtue of websites. PDC was afforded and actually utilized every opportunity to present its case and to address all issues raised by the Opposition Groups and others. PDC's attempts before the County Board during the hearing to marginalize the opposition as uninformed and irrational backfired. PDC's attempts before this Board on appeal on fundamental fairness grounds similarly ring hollow where PDC cannot point to even one specific way it was prejudiced by any ex parte communication. The decision of the County Board on the substantive siting criteria for criteria 1, 2 and 3 was not against the manifest weight of the evidence.

ARGUMENT

I. THE SITING PROCEEDINGS WERE FUNDAMENTALLY FAIR

The parties in a siting proceeding under §39.2 of the Act are not entitled to the same procedural and substantive due process safeguards as they would receive in a trial. Although parties before a county board may insist on procedures that comport with standards of fundamental fairness, they are not entitled to a fair hearing by reason of the constitutional guarantees of due process. *Tate v. Pollution Control Bd.,* 188 Ill.App.3d 994, 1019, 544 N.E.2d 1176, 1193 (4th Dist. 1989).

Although the nine statutory criteria specified in the Act must be satisfied before local siting approval can be granted, § 39.2 of the Act does not mean that these are the *only* factors which may be considered. *Southwest Energy Corp. v. Pollution Control Bd.,* 275 Ill.App.3d 84, 91, 655 N.E.2d 304, 309 (4th Dist. 1995); *Fairview Area Citizens Taskforce v. Pollution Control Bd.,* 198 Ill.App.3d 541, 547, 555 N.E.2d 1178, 1182 (3d Dist. 1990). Thus, a local governing body may find that the applicant has satisfied the statutory criteria, but may, nevertheless, properly deny the application based upon legislative-type considerations. *Southwest Energy Corporation,* 275 Ill.App.3d at 91-92, 655 N.E.2d at 309-310.

A. *The County Board rendered a final decision, in writing, within the time permitted pursuant to 415 ILCS § 5/39.2(e).*

Section 39.2(e) of the Act states, in part, "Decisions of the county board or governing body of the municipality are to be in writing, specifying the reasons for the decision . . . If there is no final action by the county board or governing body of the municipality within 180 days after the date on which it received the

request for site approval, the applicant may deem the request approved." On March 27, 2006, during the public comment period, the County Staff issued a report to assist in the County Board's review and understanding of the Application. In its report, the County Staff recommended approval of the Application, subject to certain special conditions. After the public comment period had closed, the County Staff reviewed the public comment file and highlighted the most relevant issues in its supplemental response which was filed April 3, 2006. Again, the County Staff recommended approval of the Application, subject to certain special conditions.

On April 6, 2006, a Committee of the County Board met to discuss proposed findings of fact ("Preliminary Meeting"). On May 3, 2006, the County Board met to make its final decision on the Application ("Final Meeting"). The findings of fact referenced at the Final Meeting were the recommended Findings of Fact ("Findings of Fact") created at the Preliminary Meeting and subsequently filed with the Clerk's office on April 27, 2006. Such Findings of Fact were in writing and sufficiently detailed. At the Final Meeting, the Application was denied by a vote of 12 nos and 6 ayes. In addition, the County Board orally amended the Findings of Fact recommended at the April 6, 2006 meeting and adopted the same as amended. This procedure, as well as the decision, was clearly set forth in the transcript of the Final Meeting (the "Transcript").

PDC argues that the County Board did not create a writing that would constitute a formal decision as required under the Act. However, the entire decision was stated *verbatim* in the Transcript of the Final Meeting. In lieu of creating minutes of the Final Meeting, which would have merely been a summary of the Transcript, the County Board included, in the record at the County Clerk's office, the entire Transcript of the Final Meeting, which was available for inspection by the public. In addition, the Transcript of the Final Meeting was posted on Peoria County's website for inspection and copying by the public. The County Board could not have created a written decision that was more accurate and complete than the Transcript from the Final meeting. By submitting the entire Transcript of the Final Meeting, there can be no confusion or argument as to what took place at said meeting. Furthermore, it would be impossible for one to argue that a summary would be more exact than a transcript.

Because May 3, 2006 was within 180 days of the request to approve the Application, and because the Transcript adequately set forth the County Board's decision and Findings of Fact, the

Transcript of the Final Meeting sufficiently constitutes a final, written decision of the County Board pursuant to 415 ILCS 5/39.2(e).

B. *The County Board was free to accept or reject all or part of the recommendations of the County Staff.*

As a point of law, the local siting authority is not bound by a consultant report or a staff recommendation. *See Hediger v. D & L Landfill, Inc., PCB 90-163 (December 20, 1990)*. This Board has consistently held that a local siting authority is free to reject the findings of its consultants. *Sierra Club v. Will County Bd., PCB 99-136 (August 5, 1999), McLean County Disposal Co., Inc. v. County of McLean, PCB 89-108 (November 15, 1989).*

In this case, the County Staff issued a report recommending approval of the Application, with numerous, substantive special conditions, including not being allowed to expand over an existing cell, Cell C-1, due to design, construction and performance concerns. In addition, the County Staff submitted a supplemental response recommending the approval of the Application, with special conditions. The County Board was free to, and in fact did, reject the County Staff's recommendation. Such rejection is allowable. Nothing prevented the County Board from agreeing with the evidentiary rationale for the imposition of a condition for approval, and then rejecting the condition (and approval) because the condition did not sufficiently resolve the underlying problem.

C. *PDC had ample opportunity to present its case and address opposition arguments.*

Prior to the commencement of the public hearing before the County Board, pursuant to Ordinance, any opposition group had to submit all documentary evidence that they planned to use at the hearing on the application. Peoria County Code ("Ordinance"), §7.5-46(b)(7). PDC even filed a motion to establish the exact cutoff date. C3548-53.

Both PFATW and Sierra Club tendered literally thousands of pages of relevant materials organized by topic and containing an index, with each item addressing one or more of the siting criteria ("Pre-Hearing Documents"). C4174-7256 in its entirety; PFATW Index found at C4190-93 and documents from C4194-5758; Sierra Club Index found at C4174-75 and documents from C5759-7256. PFATW topics for which documents were produced included in part, by way of examples: Photographs of the PDC facility and surrounding properties, including photos of a spill at the Dog Obedience Training Club in Pottstown located at the base of the PDC facility, C4194-4204; Statistics, reports and maps concerning

the PDC landfill, Toxic Release Inventory (TRI) reports, and company information, C4205-97, C4324-91, C5549-5654, and C5678-96; PDC business practices questioned, C4392-4640; Health, cancer and illness concerns related to hazardous waste, C4843-4967; Property value information, C5010-22; Groundwater information, including for the San Koty aquifer, C5362-5548 and C5717--21; HDPE liner and landfill design information and reports, C5080-5220; and transportation information, C5252-5330. Not to be outdone, Sierra Club topics included: Peoria climate data; area well data for the Pleasant Valley Public Water District and Illinois American wells and regional water supply; documentation about San Koty aquifer's location; drinking water quality reports; and ECHO report showing that 53,190 people reside within a 3-mile radius of the PDC site, C6452.

In addition, prior to the commencement of the hearing, PFATW established a website under the name *www.notoxicwaste.org*. The webpage contents, as of February 10, 2006, were printed out and submitted as "PFATW 3" in the Pre-Hearing Documents. C4297-4304. The website referenced many of the documents and information contained in the Pre-Hearing Documents, including the TRI reports and a list of "the most toxic chemicals" PDC accepts. C4298. It also depicted photographs and maps of the location of the facility referencing apartments adjacent to the facility and the proximity to the City of Peoria and its neighborhoods. Two such photos showed the PDC facility rising above the apartments and a playground, and contained a label "Toxic Waste Stacks" for pipes extending up from the top of the site. C4298 and 4300. PDC was complimented on the website as having a sound reputation and being "respected locals." The website contained a "What can you do?" section with headings: "Write a letter for the record," and "Write your county board member." C4303. As will be set forth below, PDC was very familiar with the contents of the website and the Pre-Hearing Documents.

Not only did PDC know the subject topics complete with supporting documentation regarding issues of concern of the opposition prior to the start of the hearing, PDC attempted to set (and by great measure was successful in setting) the rules for the hearing itself. PDC attempted, by written motion filed before the applicable committee of the County Board, to establish a procedure whereby PDC's entire case would be done as a "panel," not each of their witnesses one at a time. C3542-47. Specifically, PDC wanted "panel cross-examination," which contemplated having any questions asked on cross-examination of the PDC witnesses be answered by an individual witness *as solely determined by PDC*.

After the Opposition Groups objected to panel cross-examination, PDC still nonetheless was able to present its case in chief uninterrupted, with cross-examination of all witnesses for the applicant held until the final witness of the applicant had testified on direct. C3591-98. In short, PDC was able to present its entire case in chief on direct examination, complete with PowerPoint presentations and narrative testimony one after the other, C7975-8095, and a video presentation, C8099, in one package without periodic cross-examination.

In PDC's opening statement at the hearing, its counsel acknowledged knowing "that a number of concerns have been brought up by opponents to the expansion," and that as a result, PDC offered at the commencement of the hearing to impose seven (7) voluntary conditions "to alleviate their concerns." Tr. 2/21/06, p. 25-29; C7273-74; PDC Exhibit A-3, C8096-98[1]. For example, according to PDC, one such "concern" was apparently raised pre-hearing by Tom Edwards, an opponent of the expansion not affiliated with the instant Opposition Groups, regarding air pollution. Tr. 2/21/06, p. 20; C7272. In the opening statement of the hearing, PDC offered, as a condition to siting approval, to implement an ambient air-monitoring program to check for contaminants. Tr. 2/21/06, p. 26-27, C7274.

The first witness presented by PDC was Ron Edwards, Vice President of Development and Operations of PDC. In his narrative testimony, he took several opportunities to refute the evidence presented by the opposition and to answer questions raised thereby. He went trough the corporate and business history of PDC to answer "Why is the site here?" and "Why is hazardous waste here?", two questions asked by the opposition. Tr. 2/21/06, p. 35-39, C7275-76. He pointed out that the pipes extending up to 18 feet above the ground of the landfill were not "toxic waste stacks" as so named on documents that had "been entered into the record [by PFATW, C4298 and 4300], " but were leachate sump collection risers. Tr. 2/21/06, p. 69-70; C7284-85. (George Armstrong, Vice President of PDC Technical Services, also testified as to the "toxic waste stacks." Tr. 2/21/06, 209-10, C7319-20; p. 231, C7325.)

[1] Citations to the various transcripts of hearings filed in the record with the Illinois Pollution Control Board will generally be in this format: "Tr. [date of hearing], [page number]; C-____." For example, a citation to page 187 of a transcript of a hearing on February 22, 2006, that appears on page C-546 of the entire record would look like: "Tr. 2/22/06, 187; C-546." Citations to transcripts of depositions filed at the hearing before the Illinois Pollution Control Board will reference the name of the deponent and the page number.

Mr. Edwards next addressed the opposition's use of the TRI reports in an attempt to discount their relevance to the matter on the issues of exposure routes to get into the environment or health concerns based solely on the TRI reports. Tr. 2/21/06, p. 93-98, C7290-92. These TRI reports were in the PFATW website and in the Pre-Hearing Documents filed by both PFATW and Sierra Club to quantify the significant volume of metals being disposed of on the City of Peoria's doorstep. See C4297-4304 and C4205-97. The clearest example of PDC's anticipatory preemption of opposition arguments was when Mr. Edwards testified about the Pottstown Obedience Training Club incident, Tr. 2/21/06, p. 85-89, C7288-89, with the aid of a poster-board, topographic map exhibit not otherwise contained in the Application. PDC Exhibit A-5, C8100. Thereafter, no member of the Pottstown Obedience Training Club testified or gave public comment at the hearing.

Other PDC witnesses similarly referenced the opposition evidence in the record as part of their direct examination presentations and testimony. For example, Chris Lannert of the Lannert Group testified as to criterion 3, compatibility. Mr. Lannert referenced the pictures of the landfill from specific views taken by the opponents [See C4298 and 4300] and appearing "on the web site. . . ," indicated "we have been there also," but acknowledged that the opponent picture "shows a more current picture" of the general area. Tr. 2/21/06, p. 171-72, C7310. Mr. Lannert took great pains to discredit the images taken by the opponents as compared to his mechanically produced photo image positioned using aerial photographs. He testified that the "photographs that are on line (*sic*) look to be taken with an area photograph because it moves the landfill much closer to the point of view. And that is, while it's a realistic picture in terms of it shows relationships, it's not a realistic picture as it relates to the proper portion of how things sit within the context of their view." Id., see also Tr. 2/23/06, p. 226, C7514 (Lannert cross-examination). As will be set forth below, Mr. Lannert's attempt to discredit the images on the PFATW website backfired, for he is the one who proffered distorted and unrealistic testimony on compatibility. See Section II, D, below.

In short, PDC fully knew all of the arguments and information to be raised by the Opposition Groups and others before the hearing even began. PDC availed itself of the opportunity to use this information, and did so by responding to the issues in the hearing and public comment period.

D. *None of the purported* ex parte *communications prejudicially influenced the decision makers.*

Petitioner argues that the proceedings were fundamentally unfair because of improper *ex parte* contacts. (Petitioner's Brief, p. 59-83). However, the mere existence of *ex parte* communications does not make the proceeding *per se* fundamentally unfair. In fact, the Appellate Court of the Fourth District has acknowledged that *ex parte* contacts between the public and its elected representatives are inevitable. *Southwest Energy Corp.,* 275 Ill.App.3d at 92, 655 N.E.2d at 310. If *ex parte* contacts occur, then the Board must decide whether the party complaining of such contacts was prejudiced by those contacts. *Land and Lakes Co. v. Randoph County Bd. of Comm'rs, PCB 99-69 (September 21, 2000)*. Thus, the analysis of alleged *ex parte* communications requires a initial two-step process: (1) determine whether the contacts that occurred in the proceeding were *ex parte* contacts, and (2) if the answer to (1) is yes, decide if the party complaining of such contacts was in fact prejudiced by those contacts. *Land and Lakes Co., PCB 99-69*. Additional considerations may also be relevant, including the gravity of the communication. *E & E Hauling, Inc. v. Pollution Control Board,* 116 Ill. App. 3d 586, 606, 451 N.E.2d 555 (2d Dist. 1983), affirmed in part, 107 Ill.2d 33, 481 N.E.2d 664 (1985).

Many of the alleged *ex parte* communications occurred during the public comment period. Although PDC may not have been carbon copied to such communications, many of the communications that were addressed to the individual board members were also submitted to the Clerk via the Peoria County's website. Because of the use of the Internet by the County, these comments were available on-line, virtually instantaneously with their submission. Thus, such comments were in the record, and Petitioner had every opportunity to respond to such comments. In fact, Petitioner did respond to many of the comments by filing its own public comments. As a result, these subject communications lose their ex parte status because they are not ex parte.

Petitioner assumes that none of the information transmitted to the County Board members through *ex parte* communications was in the Record. However, as aforementioned, the on-line submissions to the Peoria County website *were* most of the alleged *ex parte* communications and consisted solely of referencing information that was already in the record. They were in balance to the numerous letters in support of the PDC expansion submitted by vendors and customers of PDC, albeit via a form letter created by Petitioner. *See,* Public Comment submitted by Getz Fire Equipment Company on

1/12/06, C711, compared to Public Comment submitted by Schaub Mobile Line Boring Service, Inc. on 1/12/06, C720, evidencing the information each company was to fill-in on Petitioner's form.

Although we acknowledge that contacts made by nonparties outside the public hearing, to a board member, concerning a pollution control facility siting proceeding is an *ex parte* contact, most of the alleged *ex parte* communications occurred during the public comment period, and thus, were not outside the public hearing. *See Land and Lakes Co., PCB 99-69*.

Moreover, intense public opposition does not necessarily render a hearing fundamentally unfair. "The various telephone calls, letters, and personal contacts were merely expressions of public sentiment to county board members on the issue of Waste Management's landfill application." *Waste Management of Illinois, Inc. v. Pollution Control Bd.,* 175 Ill.App.3d 1023, 1043, 530 N.E.2d 682, 697 (2nd Dist. 1988)("Existence of strong public opposition does not render a hearing fundamentally unfair where, as here, the hearing committee provides a full and complete opportunity for the applicant to offer evidence and support its application.") In this case, Petitioner had a full and fair opportunity to plead its case, and did so even after the hearing had ended and the public comment period had ended by submitting a Response to Committee of the Whole. *See,* Peoria Disposal Company's "Response to Committee of the Whole Vote." C13461-13522.

Before filing its Brief before this Board, at no time did Petitioner allege bias by any members of the County Board. However, in its Brief, for the first time, Petitioner alleges that the County Board members who voted against its application were "biased" against PDC. Where an administrative agency or local government acts in an adjudicatory capacity, bias or prejudice may be shown if a disinterested observer might conclude that the adjudicatory body, or one of its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing the case. *Concerned Adjoining Owners v. Pollution Control Bd.*, 288 Ill. App. 3d 565, 573 (5th Dist. 1997); *Waste Management,* 175 Ill. App. 3d at 1040. During the May 3, 2006 final vote hearing, PFATW and Sierra Club filed a motion objecting to County Board member William Prather voting on the siting application. C13574-94. This motion was essentially denied by the local siting authority after Mr. Prather gave a detailed explanation of his relationship with a PDC affiliate company. Mr. Prather made representations that he had not prejudged the Application but was basing his vote on the testimony and record. Tr. 5/03/06, C13710-48.

PFATW and Sierra Club made the objection to Mr. Prather right after they obtained the information forming the basis of the objection because a claim of disqualifying bias or partiality on the part of a member of the judiciary or an administrative agency must be asserted promptly after knowledge of the alleged disqualification, or it is deemed waived. *E & E Hauling, Inc. v. Pollution Control Bd.,* 107 Ill. 2d 33, 38, 481 N.E.2d 664, 666 (1985). To allow a party to first seek a ruling in a matter and, upon obtaining an unfavorable one, permit him to assert a claim of bias would be improper. *E & E Hauling,* 107 Ill.2d at 38-39, 481 N.E.2d at 666. Petitioner has waived any right to raise allegations of bias for two reasons. First, Petitioner had knowledge of the allegations and claims of bias it now asserts during the hearing on May 3, 2006, but failed to object. Second, Petitioner made a calculated decision not to object at that time. PFATW and Sierra Club had just raised a similar claim, unsuccessfully, and Petitioner chose to avoid such treatment. Thus, Petitioner has waived any rights it had to raise the issue of bias on appeal.

Even if members of the public participate in *ex parte* communications, a court will not reverse an agency's decision because of *ex parte* contacts with members of that agency absent a showing that *prejudice* to the complaining party resulted from these contacts. *Rochelle Waste Disposal v. City of Rochelle,* PCB 03-218 (April 15, 2004); *Fairview Area Citizens Task Force,* 198 Ill.App.3d at 548, 555 N.E.2d at 1183; *Waste Management of Illinois,* 160 Ill.App.3d 434, 513 N.E.2d 592; *E & E Hauling v. Pollution Control Bd.,* 116 Ill.App.3d 586, 607, 451 N.E.2d 555 (1985). In its Brief, Petitioner details a plethora of alleged *ex parte* communications by opponents of the Application, and Petitioner requests that the votes of 8 of the County Board members who voted against approval of the Application be stricken. (Petitioner's Brief, p. 71-72). In its argument, Petitioner describes statements made by various members of the County Board, claiming that such members relied solely on information outside the Record in making their decisions.

However, Petitioner fails to allege, let alone prove, that any of the *ex parte* contacts prejudicially influenced the decision makers. Just the opposite conclusion is warranted. While PDC certainly knew of the contents of the PFATW website, there is not evidence that any County Board member ever visited and site or otherwise viewed content. The mere fact that a member of the governing body of the municipality has publicly expressed an opinion on an issue related to a site review proceeding does not preclude the member from taking part in the proceeding and voting on the issue. *See* 415 ILCS 5/39.2(d)

(2007). But in fact, in this case, there is not even any evidence of any member of the County Board publicly expressing an opinion regarding the proposed expansion. Thus, the County Board members were even more conservative in partaking in communications than the Act allows, and did not prejudge the case.

Petitioner filed a "Response to Committee of the Whole Vote" after said committee voted to deny the Application. C13461-13522. The filing was highly improper because it was after the public comment period had ended. In its Response to Committee of the Whole Vote, Petitioner unilaterally took it upon itself to purportedly set the record straight. Thus, it is virtually impossible for Petitioner to claim that it suffered any actual prejudice from any alleged improprieties in the hearing process because it got to "correct" any misperceptions or issues before final action was taken. In fact, in the instant case, the County Board members were forced to endure political pressure by Petitioner. *See,* Tr. 04/03/06, p. 119, (". . . this is what some people call the deal you can't refuse, then."). Nevertheless, the County Board overcame the political pressure and denied the Application.

In addition, many of the alleged *ex parte* communications that were not originally part of the record were subsequently placed in the public record. Such inclusion in the public record removed any danger of prejudice, even when the tone of the contacts was adverse to the granting of the site application. *City of Rockford v. County of Winnebago,* 186 Ill.App.3d 303, 313-314, 542 N.E.2d 423, 431 (2nd Dist. 1989).

Petitioner argues that the fact it lost the vote should be sufficient proof of the prejudice it suffered. If this was true, then there would be no need to impose a specific requirement of demonstrating prejudice. Rather, the finding of prejudice would be presumed. Furthermore, the mere fact that County Board members voted against the Application does not necessarily infer that Petitioner was prejudiced. *See E & E Hauling,* 116 Ill.App.3d at 599, 451 N.E.2d at 566.

In addition, Petitioner argues that the sheer volume of *ex parte* contacts creates a presumption of prejudice. (Petitioner's Brief, p. 70). However, even an extensive number of *ex parte* contacts is not enough to infer prejudice. *See Land and Lakes Co., PCB 99-69.* In *Land and Lakes*, members of both the County Board and Planning Commission Board were contacted concerning the siting application outside the record of the proceedings. Each member received at least one phone call concerning the

siting application, and most of the members received several phone calls, with one member testifying that he had received about 30 messages on his home answering machine. Several of the members also received information and letters in the mail regarding the landfill siting proceeding. In addition, many of the members were approached in person regarding the landfill siting. In fact, one member testified that he had been approached in person about 8-10 times. Even in light of the extensive *ex parte* contacts involved in this case, the Board found the applicant was not prejudiced. *Land and Lakes, PCB 99-69.* Petitioner is incorrect that the sheer volume of *ex parte* contacts creates a presumption of prejudice.

Petitioner's argument that it suffered actual prejudice is undercut by its recognition that Thomas Edwards was constantly participating in *ex parte* communications, but PDC does not seek any remedy related to Mr. Edwards' actions in its Brief. As he admitted throughout his entire deposition, Mr. Edwards was everywhere all the time on the issue of the siting application. It is not a stretch to say he participated in more alleged *ex parte* contacts than all other opponents to the siting application, combined. For example, Mr. Edwards admitted that he phoned at least one County Board member. He also hand-delivered documents to the County Board members; he spoke at dozens of County Board and Peoria City Council meetings, which were conducted for purposes other than discussing the siting application. In addition, he mailed several documents to the County Board members. See Thomas Edwards, 10/24/06.

It is undisputable that Mr. Edwards participated in a plethora of *ex parte* contacts, and Petitioner readily acknowledges the same. However, Petitioner fails to allege that Mr. Edwards's *ex parte* contacts resulted in any prejudice to the Petitioner. If Mr. Edwards *ex parte* contacts did not result in any prejudice to Petitioner, then certainly none of the other opponents *ex parte* contacts resulted in any prejudice to Petitioner. Furthermore, Mr. Edwards' *ex parte* contacts were made so public that Petitioner knew everything Mr. Edwards was doing. In good faith, Petitioner is unable to allege, let alone prove, actual prejudice related to Mr. Edwards' actions because Petitioner had perfect knowledge as to those actions and responded accordingly. For example, at the opening of the hearing, Petitioner quoted a letter written by Joyce Munee of the Illinois EPA to Tom Edwards, point blank declaring that PDC did not landfill "many of the most toxic compounds known to man," Tr. 2/21/06, p. 19; C-7271, and that there is "no evidence of any health risk from the gas emission tests at the PDC facility," *Id.*, both directly contrary to statements

Petitioner attributed to Mr. Edwards. By the same token, Petitioner had the same level of knowledge and responded accordingly as to any perceived communications of any member of the Opposition Groups.

Having come up with no evidence of actual prejudice, Petitioner then attacks the messengers, the members of the County Board. Petitioner condemns Mr. O'Neill by alleging that Mr. O'Neill admitted that he did not consider any of the evidence submitted during the proceedings on the Application, or the Application itself. Mr. O'Neill preliminarily voted in favor of the Application on April 6, 2006, but he voted against the approval in the final vote on May 3, 2006. Mr. O'Neill testified that when asked by the Peoria Journal Star if he was contacted by constituents, he answered "yes." When asked if those contacts changed his vote, he answered, "no." PDC Application, Deposition of Thomas O'Neill, 09/27/06, p. 22-23. At his deposition, Mr. O'Neill was asked, "So, as I understand it, Mr. O'Neill, the only information you had to base your decision on in this case would have been a partial reading of one staff report and whatever e-mails, letters, and phone calls you got; is that correct?" Mr. O'Neill answered, "First part's correct. I never really read many of the e-mails or the mail." He was then asked, "Well, was there any other information that you had which you considered in making your decision besides the one partial staff report?" Mr. O'Neill answered, "No." Thomas O'Neill, 09/27/06, p. 27-28. Thus, Mr. O'Neill did not consider any information outside of the Record, and as such, Petitioner was not prejudiced by any of the alleged *ex parte* communications involving Mr. O'Neill.

In addition, Petitioner alleges that Mr. Salzer did not understand his role in the proceedings. However, when Mr. Salzer was asked if it was his belief that he took into account the content of phone calls, letter and emails when considering his decision, Mr. Salzer stated, "No, I didn't." Phillip Salzer, 09/14/2006, p. 20. Rather, Mr. Salzer believed he should *listen* to the public, but not that he had to consider their wishes in his vote. Therefore, Mr. Salzer's vote did not prejudice Petitioner because he only *listened* to the public; he did not take them into account when he made his decision.

Petitioner was not prejudiced by the alleged *ex parte* comments cited by Petitioner because the communications relied on by Petitioner were taken out of context. When analyzed in the proper context, such comments were not prejudicial. Furthermore, at the Final Meeting, each Board member was asked to state for the Record whether he or she was able to decide the case impartially based solely on the evidence presented to him or her. Tr. 05/03/06, C13710-48. Each Board member responded that he or

she would be fair and impartial and make a decision *based solely on the evidence*. Thus, Petitioner was not prejudiced by any alleged *ex parte* contacts because the County Board members based their decisions solely on the evidence.

II. THE DECISION OF THE COUNTY BOARD ON THE SUBSTANTIVE SITING CRITERIA WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

A. *Standard of Review*

A decision by a local siting authority in a landfill siting appeal may not be overruled unless it is against the manifest weight of the evidence. *McLean County Disposal, Inc. v. County of McLean,* 207 Ill.App.3d 477, 566 N.E.2d 26 (4th Dist. 1991). 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. *Fairview Area Citizens Task Force,* 198 Ill.App.3d at 550, 555 N.E.2d at 1184. A decision is contrary to the manifest weight of the evidence only when, after reviewing the evidence in the light most favorable to the County Board, the Board determines that no rational trier of fact could have agreed with the County Board's decision. *Am. Fed'n of State, County & Mun. Employees v. Illinois Educ. Labor Relations Bd.,* 197 Ill.App.3d 521, 525, 554 N.E.2d 476 (4th Dist. 1990). The hearing body is to weigh the evidence, resolve conflicts in testimony and assess the credibility of the witnesses. The reviewing court is not in a position to reweigh the evidence, but can merely determine if the decision is against the manifest weight of the evidence. *Fairview Area Citizens Task Force,* 198 Ill.App.3d at 550, 555 N.E.2d at 1184. Under a manifest weight of the evidence review, the decision of the County Board should be affirmed, unless the findings and conclusions of the County Board are found to be contrary to the manifest weight of the evidence. *Cent. Illinois Pub. Serv. Co. v. Dep't of Revenue,* 158 Ill.App.3d 763, 767, 511 N.E.2d 222 (4th Dist. 1987).

Petitioner argues that it presented unrebutted testimony and called several more witnesses than did PFATW and Sierra Club. Although Petitioner called more witnesses than PFATW and Sierra Club, PDC's witnesses were extensively cross-examined by counsel and by multiple individual participants, and served to raise questions of credibility and genuineness of facts. Petitioner's contention that they "win" because no one testified in opposition to some of the criteria fails to recognize that testimony adverse to Petitioner's position was obtained during extensive cross-examination. The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, by bringing out contradictions and

improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony. *See Black's Law Dictionary,* 7th Edition. Thus, witnesses' testimonies are many times rebutted by simple cross-examination. Moreover, even if the County Board determined that the Petitioner's expert testimony was uncontroverted, the County Board, nevertheless, could have found such testimony deficient and denied the Application. *CDT Landfill Corp. v. City of Joliet, PCB 98-60 (March 5, 1998).*

B. Criterion #1: *The County Board's Finding that the Applicant had Not Proven Need is Not Against the Manifest Weight of the Evidence.*

Based on Sheryl Smith's testimony, an expert called by PDC, the County Board was certainly welcome to find Sheryl Smith biased, and thus, question her credibility and the adequacy of her report. Ms. Smith admitted that in the 18 or 19 times she has participated in siting hearings, she only determined two times that there was no need, and on those two occasions, she was retained by a group or community who opposed the permitting. Tr. 2/23/06, p. 151-152; C-7495.

Petitioner receives waste from 27 Indiana generators (PDC Application, Table 1-2, pages 11 and 12 of 16 (as determined by hazardous listing codes)), even though hazardous waste facilities in Indiana recently received expansion permits. PDC Application, Volume 1, page 1-22. The County Board could have reasonably considered this fact as evidence that there is no need for an expansion at this facility.

Without the expansion, the lifespan of the current landfill is four years. If the landfill were to only accept local waste, its lifespan would reach about 33 years, *without the expansion*. This fact alone could have created doubt as to whether the expansion is necessary to accommodate the waste needs of the area it is intended to serve. With the expansion, the landfill is expected to reach capacity in about 19 years. Thus, local business will lose roughly 14 years if the expansion is granted.

Furthermore, the receipt of local hazardous waste is declining. It appears that local businesses, including Caterpillar Inc., are trying to keep the environment clean by reducing hazardous waste production. Petitioner is responding to this by reaching out to new markets to increase the amount of hazardous material that it imports into Peoria county. The fact that PDC is making effort to attract more waste directly contradicts the requirement of Criterion 1.

Throughout Petitioner's Brief, Petitioner responded to various conclusions made by the County Board. In its conclusions, the County Board stated that Smith testified that there are a decreasing

number of hazardous waste landfills in both the service area and the nation. Petitioner's responds by stating, "Common sense suggests that this would increase the need for the PDC expansion." This is not necessarily true - the County Board also concluded that the need for hazardous waste facilities is declining. Thus, the fact that there is a decreasing number of such facilities may relate to the decrease in demand for such facilities. While Petitioner's response is one justification for the decrease in the number of facilities, there are other, equally viable reasons for the decrease in the number of facilities.

In addition, Petitioner attempted to justify its use of a constant rate of hazardous waste generation in the service area from 2001 until 2009 by explaining that such was "the most prudent assumption," absent evidence of whether there will be a further decline of hazardous waste generation. (Petitioner's Brief, p. 94). Given the suggested evidence that hazardous waste generation is declining, the more *conservative* assumption would have been a gradual decrease in such waste generation. Rather than being conservative, Petitioner chose to use an assumption that may very well have affected its credibility with the County Board.

Petitioner and Sheryl Smith excluded Indiana from the intended service area, even though Petitioner accepted significant quantities of hazardous waste, non-hazardous waste and specials wastes from Indiana during the same 1999-2004 study period. Petitioner also accepts waste from Ohio, another state with its own facility. Both Indiana and Ohio recently received expansion permits, and no testimony was given that Indiana and Ohio facilities would be incapable of providing disposal services for Peoria County generators. The County Board could have reasonably determined that PDC was intentionally trying to manipulate such data by failing to include Indiana and Ohio from the intended service area. Thus, it was reasonable for the County Board to find that there is no need to expand Petitioner's facility.

In *CDT Landfill Corp., PCB 98-60,* the Board upheld the City's decision that Criterion 1 had not been satisfied. Although the Board acknowledged that CDT had presented expert testimony on Criterion 1, the Board also recognized that the City showed that the testimony was deficient. *See, CDT Landfill Corp*. For example, the City identified a number of purported flaws in CDT's testimony, including the fact that the need report analyzed the disposal needs for the intended service area until the year 2020 despite the fact that the proposed expansion was only intended to operate for period of 7-8 years. Furthermore, the City asserted that CDT failed to properly consider existing and planned alternative available disposal

capacity. The Board found enough merit in the City's arguments that it could not reverse the City's decision.

In the present case, like the *CDT Landfill* case, the County Board found that Criterion 1 was not met because of the deficiency of the need analysis. In its Application and at the hearing, Petitioner failed to establish that there is a need to expand the PDC facility when other hazardous waste landfills exist in the Midwest. Because of the foregoing inconsistencies and manipulations, the decision of the County Board to reject Sheryl Smith's conclusions is not against the manifest weight of the evidence. Thus, this Board should not reverse the County Board's decision that Criterion 1 was not satisfied.

C. Criterion #2: *The County Board's Finding that the Facility is Not so Designed, Located and Proposed to be Operated that the Public Health, Safety and Welfare will be Protected is Not Against the Manifest Weight of the Evidence.*

Determination of Criterion 2 depends solely on the assessment of the credibility of testifying experts. *Fairview Area Citizens Taskforce,* 198 Ill.App.3d at 553, 555 N.E.2d at 1185. During the hearing, there was direct, conflicting evidence between the testimony of Charles Norris for PFATW and the Sierra Club, and Dr. Larry Barrows for PDC. In weighing the evidence, the County Board chose to accept Mr. Norris' testimony over that of Dr. Barrows. Such conclusion is not against the manifest weight of the evidence. In other cases, the testimony of Mr. Norris was found to be credible and determinative of Criterion 2. See *Rochelle Waste Disposal,* PCB 03-218, Slip op. at 43. The County Board is the body delegated the task of assessing witness credibility. It is not the function of the reviewing court to reweigh evidence or reassess credibility. *Fairview Area Citizens Taskforce,* 198 Ill.App.3d at 553, 555 N.E.2d at 1185. Furthermore, Petitioner emphasizes that it had a total of five experts testify on this criterion and that such testimony comprises more than 700 pages. Such emphasis is misplaced as it is the quality, not the volume, of testimony that the County Board was to evaluate. Thus, the fact that Petitioner had more resources available to present evidence than did voluntary, not-for-profit organizations should not have impacted the County Board's ultimate decision.

Petitioner cites *Industrial Fuels* for the proposition that mere compliance with minimum governmental regulations, coupled with a good plan of operations, demonstrates compliance with Criterion 2. The last sentence of the supporting text states, "Nothing indicates that Industrial's controls and procedures, safety features, training of personnel, or security systems are substandard or create a

significant safety hazard." (Petitioner's Brief, p. 97). Although, in our case, Petitioner has been in compliance with governmental regulations, there was a plethora of testimony that indicated safety hazards would be created with such expansion over the aquifer. Thus, *Industrial Fuels* is not directly on point with our case because in our case, there is evidence of substandard controls, procedures, and safety features.

In addition, throughout the hearings, representatives of PDC as well as their retained industry consultants testified that the liner system of the *entire* landfill was state of the art and met or exceeded any standards that existed even today. However, the County Staff did not recommend any expansion over Trench C-1 because of its *minimum technology liner design* which is *not protective of the groundwater*. Peoria County Staff Report, 03/27/06, p. 2-3, C-12096-12097. Petitioner clearly overreached in declaring that the *entire* landfill was designed in a manner that met or exceeded any standards existing today. Such overreaching in this criterion could reasonably allow the County Board to question Petitioner's credibility when analyzing other data.

One of Petitioner's experts, Mr. Kenneth Liss, testified that both chloride and suflate are common constituents found in the leachate of the landfill. Tr. 2/24/06, p. 246; C-7632. He also testified that chloride and sulfate are generally used as indicator parameters to determine if a waste disposal facility has impacted groundwater. Tr. 2/24/06, p. 246; C-7632. Chloride and sulfate concentrations in downgradient wells from C-1 indicate just that – that the groundwater quality in the sand aquifer has been impacted. Charts SR-2.5 and 2.6. Because chloride and sulfate concentrations in downgradient wells from Trench C-1 indicate that the landfill's leachate has gotten down into the groundwater, the County Board was reasonably concerned that chloride and sulfate parameters were not statistically compared with background for any sort of compliance. Tr. 2/24/06, p. 248; C-7632.

In his direct testimony, Mr. Norris stated,

> "There exists at this site a complex distribution of strongly differing soil types, soil materials across the site and with depth. The depth of weathering of these materials greatly varies from place to place across the site. Water drains readily and rapidly through the site. Contaminants that are not inside containment structures move with that water readily and rapidly down through the site. ***Such contaminants directly enter the aquifer system that is used ultimately by the public water supplies of the community, and the groundwater impact assessment modeling that was done is inadequate with respect to methodology and the results are inconsistent with site observations***."

Tr. 2/24/06, p. 115; C-7599 (emphasis added). The County Board considered such testimony when it made its final decision, and it was permissible for the County Board to consider this testimony more credible than that of Petitioner's experts.

In addition, Mr. Norris testified that the groundwater impact assessment modeling that was conducted was flawed and that the results were inconsistent with site observations. Tr. 2/24/06, p. 153; C-7608. Moreover, Mr. Norris testified, "The simple fact is that under the conditions that are in that model, organic chlorinated contaminants cannot have reached the deep aquifer yet, and they are there . . . The results are inconsistent with the observed contaminants that are at the site . . .." Tr. 2/24/06, p. 154-155; C-7609. Because the County Board is to assess each witness' credibility, it was reasonable for the County Board to determine that Criterion 2 was not satisfied because of inconsistencies and unreliability of Petitioner's evidence.

Petitioner criticizes Mr. Norris for submitting public comment. (Petitioner's Brief, p. 98)("Anyone can spew reckless, untrue and unsupported garbage into the Record under the guise of public comment when they are not under oath, and that is exactly what Chuck Norris did."). However, the parties were well informed during the hearing that Mr. Norris would be submitting public comment:

> **MR. WENTWORTH**: Yes, thank you, Mr. Brown. As was noticed at the end of Mr. Norris' presentation, we shortened it considerably on some of the things that he wanted to say again to accommodate what we understood was the message of the hearing committee as far as the time limits to give everybody an opportunity to get out of here by the 8:00, 8:30 hour. It's unfortunate that the timing of his other trial in Denver necessitated this along with the much longer process that this has become that many of us envisioned in good faith originally at the beginning of the process, but **I just wanted to note for the record that there was some testimony that was not given**. Thank you.
>
> **MR. BROWN**: Thank you, and I would note that **there is still the opportunity to submit written items into the record for 30 days after the close of this public hearing and I noted that Mr. Norris indicated that he intended to do that with at least some of his materials**.

Tr. 2/24/06, p. 158; C-7610 (Emphasis added). Thus, although we acknowledge that public comment is not accorded the same weight as facts admitted into evidence, Mr. Norris should not be penalized for submitting public comment when he was unable to present all of his information at the siting hearing because of time constraints. *City of Geneva v. Waste Management of Illinois, Inc.,* PCB 94-58 (July 21, 1994), slip op. at 17. This is especially true in that even if his testimony is rejected, the County Staff Report still says the same thing. Attacking the messenger leaves the message intact.

A county board's finding of failure to meet the health and safety and traffic flow criteria and subsequent denial of a landfill site permit is not against the manifest weight of the evidence if it is not met, in part, because it cannot be established that the facility would provide adequate protection for water wells in the area. *McLean County Disposal, Inc. v. County of McLean,* 207 Ill.App.3d 477, 566 N.E.2d 26 (4th Dist. 1991). That is precisely the situation here: Petitioner failed to satisfy Criterion 2 because it did not establish that the facility would provide adequate protection for water wells in the area. Thus, such a finding by the County Board was not against the manifest weight of the evidence.

Much has been made about the recent *Town & Country* case. *See Town & Country Utilities, Inc., v. Illinois Pollution Control Bd.,* Nos. 101619, 101652 cons., March 22, 2007. As a matter of precedential value, *Town & Country* does very little to impact the Board's review of the instant siting appeal. *Town & Country*, however, has enormous factual precedence to the instant case. In *Town & Country,* the "salient evidentiary issue" presented by the appeal concerned the potential groundwater impact of the proposed landfill. In other words, the Board reversed the local siting authority's decision granting approval on Criterion 2 based solely on the issue of groundwater.

Even though the Board reversed the local siting authority's decision based solely on groundwater issues, Criterion 2 concerns much more than those issues. For example, location, proximity to population, and presence of toxic substances are also analyzed under Criterion 2. In the instant siting appeal, not only did the County Board determine that Criterion 2 was not satisfied because of potential groundwater impacts, but the it also determined that Criterion 2 was not satisfied because of other issues analyzed under that criterion. In addition, in *Town & Country,* the local siting authority stated, "There is evidence in the record that the bedrock may constitute an aquifer as opposed to an aquitard." *Town & Country*. The Board found this evidence, that the bedrock *may* constitute an aquifer, sufficient to deny the application based on Criterion 2. In the present siting appeal, experts for the Applicant testified that the proposed facility <u>was</u> over the interconnected and interfingered Sankoty aquifer. Tr. 2/27/06, p. 18-29, C7781-83. Thus, the facts in the instant case, even more so than those in *Town & Country*, suggest that Criterion 2 is not satisfied.

Because the facts in the underlying siting appeal, including those concerning location, proximity to population masses and presence of toxic substances, lead to a conclusion that Criterion 2 is not met,

even more so than those facts in *Town & Country*, the Board should affirm the County Board's decision that the Applicant failed to satisfy Criterion 2. Furthermore, *Town & Country* stands for the proposition that the Board can overrule the decision of a local siting authority if the local siting authority *approved* the application. Nothing in *Town & Country*, or any other Pollution Control Board case for that matter, indicates that the Board can reverse a local siting authority's decision when the local siting authority initially *denied* the application based on credible evidence. In the instant siting appeal, since the County Board initially denied the application, the Board should not reverse its decision unless the County Board's decision was against the manifest weight of the evidence. It was not.

In deciding not to approve a petition to establish a landfill, the Pollution Control Board cannot review on a de novo basis the public health evidence relied upon by a county board. *City of East Peoria v. Pollution Control Bd.,* 117 Ill.App.3d 673, 452 N.E.2d 1378 (3rd Dist. 1983). In *City of East Peoria,* evidence was presented that demonstrated that the proposed landfill site was directly over the Sankoty Aquifer. Such proximity of landfill wastes and public water was the basis of the County Board's public health concern and of the site location denial. The court found that the Board could not review that basis using a *de novo* standard. *City of East Peoria,* 117 Ill.App.3d at 676, 452 N.E.2d at 1380. The same analysis applies to the instant case. The County Board was entitled to deny the application if it determined that the *proximity* of the landfill expansion to the interconnected Sankoty aquifer creates a present or future public health concern, even if all technical requirements of the application process are otherwise met. Thus, the finding that Criterion 2 was not satisfied is not against the manifest weight of the evidence.

D. Criterion #3: *The County Board's Finding that the Facility is Not so Located as to Minimize Incompatibility with the Character of the Surrounding Area and to Minimize the Effect on the Value of the Surrounding Property is Not Against the Manifest Weight of the Evidence.*

In its Brief, Petitioner highlighted the fact that no witnesses were presented by opponents to rebut DeClark and Lannert's testimony. (Petitioner's Brief, p. 111). Although the opponents did not present any witnesses, the cross-examinations by the opponents were sufficient to rebut and raise doubt as to DeClark and Lannert's testimonies and reports. DeClark and Lannert's testimonies were contradictory and showed bias in their opinions. The County Board was free to use such contradictions and bias in

determining their credibility and making a decision as to whether Petitioner's evidence had met its burden of proof.

The area to the east of Petitioner's facility is overwhelmingly residential. Nonetheless, Petitioner has failed to provide adequate PDC-owned buffer lands between places where hazardous wastes have been, and are proposed to continue to be, deposited and adjacent properties.

Petitioner's claim that property values will not decrease is fundamentally flawed. Petitioner presented no evidence that buyers or sellers of property in close proximity to the landfill were even aware of the existence of the hazardous waste facility. Tr. 2/23/06, Page 291-292; C-7530.

By not analyzing the 52 percent of the land to the west of the site, which is predominantly agricultural and vacant, DeClark did not conduct a report of the entire surrounding property. Rather, he only analyzed half of it. PDC Application, Volume 2, p. 3.2-21. DeClark admitted that he did not investigate the agricultural land on the west half of the site and never even considered doing a study on it. Tr. 02/23/06, p. 285; C-7528. Thus, the Peoria County Board could have reasonably concluded that Petitioner and DeClark were only presenting half of the picture.

Furthermore, the Peoria County Board could have questioned the credibility of DeClark by reasons of his past experience. DeClark has studied valuation and impact issues relating to landfill siting on four prior occasions and found no affect on value from the location of a landfill on **all** four occasions. Tr. 02/23/06, p. 275; C-7526. Although DeClark opined that there is no impact on property values, he declared that every real estate salesperson has a duty to disclose the existence of the landfill to their clients and customers. Tr. 02/23/06, p. 292; C-7530. It defies reality and common sense to declare that a real estate salesperson must disclose the existence of a hazardous landfill to potential buyers when such disclosure allegedly has no impact on valuation.

Although some residences are a mere 200 feet from Petitioner's site, Petitioner's consultant, Chris Lannert, testified that no incompatibility was found. Tr. 02/23/2006, p. 256; C-7521. Mr. Lannert also concluded that no visual detriment to the landscape would be created by adding 45 feet in elevation to the site. PDC Application, Volume 2, p. 3.1-13. In addition, Mr. Lannert failed to analyze the size of the population living in close proximity to the landfill but acknowledged the presence of a large number of homes and apartment buildings, including some ongoing new construction. Tr. 02/23/06, p. 214-215; C-

7511. Mr. Lannert admitted that he had never seen an operating hazardous landfill this close to a major residential population center, yet, he concluded that Petitioner's landfill was found to be compatible with its surroundings. Tr. 02/23/06, p. 216-217; C-7511. In fact, he acknowledged that there are houses "within 200 feet" of the edge of the PDC facility within the City of Peoria. Tr. 2/23/06, p. 256.

To distort and minimize the truly massive impact and proximity that another 45 feet vertical expansion would have on adjacent residential properties, the Lannert Group manipulated Proposed View 3 by taking it from a *third-story balcony* in a distant apartment (800 feet back) to lessen the modeled impact, a greater distance away than any other computer modeled photo created by Lannert Group. PDC Application, Volume 2, p. 3.1-11 and Photo Sheet 3.1-5, 2-23-06 Tr., p. 224-25; C-7513. Mr. Lannert stated that the initial picture forming the basis for the modeled image was taken on a public access cul-de-sac at ground level, and that he always stayed on public property, and implied that the computer use of aerial photos made it look like the picture was taken from a higher vantage point. Tr. 02/23/06, p. 223-227; C-7513-7514. The correct answer (a third-floor balcony) was in the report itself at page 3.1-11, which the testifying witness apparently did not know because on two separate occasions, he said the photograph was taken at ground level on a public street. It was this "Proposed View 3" which Mr. Lannert used to purportedly discredit the PFATW photos. He was the one who was ultimately discredited by his overreaching.

Although Mr. Lannert is a member of the American Planning Association (APA), he was unfamiliar with the APA's Guide on Solid and Hazardous Waste Management dated April 15, 2002. In particular, he was not familiar with Policy 6 which recommended that environmental protection and environmental justice should be ensured in every landfill siting determination. Mr. Lannert agreed with said policy, just not as it applied to the PDC case. Tr. 02/23/2006, p. 172; C-8817.

Mr. Lannert essentially testified that since the landfill is already in existence, the surrounding uses must be compatible. However, the Application is treated as if it is a new pollution control facility, and compatibility standards must be applied as strictly to an expanded facility as to one not yet in existence. Thus, just because a landfill is already is existence does not automatically ensure that Criterion #3 is satisfied.

CONCLUSION

WHEREFORE, PEORIA FAMILIES AGAINST TOXIC WASTE and the HEART OF ILLINOIS SIERRA CLUB, respectfully pray that the Illinois Pollution Control Board deny all of Petitioner's requests for relief, affirm the decision of the Peoria County Board denying Petitioner's landfill expansion application, and for such other and further relief as is just and proper.

Peoria Families Against Toxic Waste and
Heart of Illinois Sierra Club

By:_____
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STATE OF ILLINOIS)
) SS
COUNTY OF PEORIA)

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the Amicus Brief was served upon the following persons by the methods indicated below on the 6th day of April, 2007, before 5:00 pm, with all fees thereon fully prepaid and addressed as follows:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEORIA DISPOSAL COMPANY,	)	
	)	
Petitioner,	)	
	)	PCB 06-184
v.	)	
	)	(Pollution Control Facility Siting Appeal)
PEORIA COUNTY BOARD,	)	
	)	
Respondent.	)	

NOTICE OF FILING

The undersigned hereby certifies that the Amicus Brief of Peoria Families Against Toxic Waste and Heart of Illinois Sierra Club, was filed with the Illinois Pollution Control Board via electronic filing as authorized by the Clerk of the Illinois Pollution Control Board, on the 6th day of April, 2007.

Peoria Families Against Toxic Waste and
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