ILLINOIS POLLUTION CONTROL BOARD
June 21, 2007

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

BRIAN J. MEGINNES AND JANAKI NAIR OF ELIAS, MEGINNES, RIFFLE & SEGHETTI, P.C., AND GEORGE MUELLER OF MUELLER ANDERSON APPEARED ON BEHALF OF PETITIONER; and

DAVID BROWN OF BLACK, BLACK, & BROWN, APPEARED ON BEHALF OF RESPONDENT.

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

The petitioner, Peoria Disposal Company (PDC), filed an application with the Peoria County Board (County) for siting approval of an expansion of PDC's existing regional landfill facility on June 7, 2006. PDC seeks a vertical and horizontal expansion of its existing hazardous waste landfill located in Peoria County. Not receiving the requested approval from the County, PDC has appealed to the Board.

Among its arguments, PDC first contends that the County failed to pass a motion to approve PDC's application within the statutory timeframe. PDC states the County made no written findings and issued no written decision. PDC asks the Board to deem the application for site location approval granted by virtue of the County's failure to take timely action as required by Section 39.2(e) of the Environmental Protection Act (Act). 415 ILCS 5/39.2(e) (2006). PDC argues, alternatively, that if the application is not deemed granted by operation of law, the County's decision to deny siting was against the manifest weight of the evidence and lacked fundamental fairness.

PDC claims the May 3, 2006 action by the County lacked fundamental fairness for various reasons including: (1) the hearing and post-hearing procedures were not fundamentally fair; (2) multiple members of the Peoria County Board were biased against the applicant or had disqualifying conflicts of interest; and (3) the County's decision was based on matters outside the record.

There are nine criteria that a local siting authority must consider when deciding whether to grant siting for a pollution control facility. 415 ILCS 5/39.2(a) (2006). PDC states that the County's alleged findings that PDC did not prove criteria i (necessary to accommodate area

waste needs), ii (designed, located and operated to protect public health, safety, and welfare), and iii (minimize incompatibility and property value effects) are against the manifest weight of the evidence. As to criterion v, PDC appeals any purported finding that criterion v (the facility is designed to minimize danger from fire, spills, or operational injury) had been proven only if certain special conditions were imposed as also against the manifest weight of the evidence. PDC requests the Board to reverse any finding on these criteria and remand the application to the County.

Today the Board affirms the County's decision to deny siting approval of PDC's application for expansion of the existing hazardous waste landfill. The Board finds that the County timely rendered a decision, that the County's proceedings were fundamentally fair, and that the County's decision to deny siting based on the nine statutory criteria was not against the manifest weight of the evidence. Below, the Board provides the procedural background and facts, applicable statutory language, a discussion of the legal issues and the parties' arguments, and analysis for the Board's conclusions.

PROCEDURAL BACKGROUND

On June 7, 2006, PDC filed this petition for review. The Board accepted the matter for hearing on June 15, 2006. The County filed the administrative record (C), with leave from the hearing officer, on July 27, 2006. The County filed a supplement to the record on August 17, 2006.

On September 8, 2006, PDC moved for partial summary judgment in its favor on siting criterion v. The County responded to the motion for partial summary judgment on October 5, 2006. PDC replied to the County's response on October 16, 2006. On December 12, 2006, the Board found PDC's motion for partial summary judgment not yet ripe for review.

On October 20, 2006, two public interest groups, Peoria Families Against Toxic Waste (PFATW) and the Heart of Illinois Chapter of the Sierra Club (HOI Sierra) (collectively, Opposition Groups), moved for leave to file an *amicus curiae* brief in this proceeding. On December 7, 2006, the Board granted the Opposition Groups leave to file an *amicus curiae* brief consistent with post-hearing deadlines set by the hearing officer.

On November 6, 2006, the County moved for leave to supplement the record and filed a second amended index. PDC responded on November 16, 2006. The County replied on November 30, 2006. On December 21, 2006, the Board granted the County's motion for leave to supplement the record. On January 5, 2007, PDC moved the Board to reconsider the December 21, 2006 order.

On November 20, 2006, PDC moved for summary judgment on all counts of the appeal. On February 15, 2007, the Board denied PDC's motion for summary judgment as moot and denied PDC's motion for reconsideration of the December 21, 2006 order.

Hearing Officer Carol Webb held hearing on January 8, 2007, at the Itoo Society in Peoria. At the hearing, Patrick Urich and Russell Haupert testified on behalf of the County and

13 persons gave oral public comment. Urich, the Peoria County Administrator, discussed how he coordinated the local siting hearings and his role in developing and coordinating the County staff report and recommendations. Haupert, the information technology director for Peoria County, testified regarding the County website and the purpose it served during the local siting proceedings. Hearing Officer Webb found both witnesses credible. The parties stipulated to the admission of 13 witness deposition transcripts and associated exhibits as hearing exhibits (Tr. Exh. 1-13). The deposed witnesses did not testify at hearing.

PDC filed a post-hearing brief on February 16, 2007 (PDC Br.). On March 29, 2007, the hearing officer issued an order stating that the parties might have reached a settlement on the issues and extending the post-hearing filing deadlines for the respondent and public interest groups.

The County filed a post-hearing brief on April 5, 2007 (County Br.). The County also moved to strike Exhibits 1, 2, and 3 to PDC's post-hearing brief, stating that the exhibits were not part of the certified record and, therefore, not valid evidence in this appeal (Mot. to Strike).

PFATW and HOI Sierra participated in the local siting hearings on the application as objectors. PFTAW and HOI Sierra filed a joint *amicus curiae* brief on April 6, 2007 (AC Br.). PDC filed a reply brief on April 20, 2007 (PDC Reply). Also on April 20, 2007, PDC responded in opposition to the County's motion to strike exhibits (PDC Resp. to Mot.).

The decision deadline is currently June 21, 2007. Two hundred and thirty-eight written public comments have been filed in favor of affirming the County Board's decision in this siting appeal.

MOTION TO STRIKE EXHIBITS

The County's Arguments

On April 4, 2007, the County moved to strike the exhibits that PDC attached to its post-hearing brief. The County contends that Exhibits 1, 2, and 3 are allegedly invoices, receipts, and an accounting relating to expenses incurred by PDC during the siting proceedings. The County states that at hearing, PDC offered deposition transcripts and exhibits, and videotapes and transcripts of the County Board meeting. PDC did not, asserts the County, present any live witnesses or testimony, and did not offer any documents relating to costs incurred during the local siting proceedings.

The exhibits, contends the County, are not part of the certified record in this appeal. Further, the exhibits were not offered or exchanged during discovery in this appeal nor presented as evidence at the January 8, 2007 hearing. Not only are the exhibits not part of the record, they were not accompanied by an affidavit for purposes of authentication. For these reasons, the County moves the Board to strike the exhibits from the record of these proceedings.

PDC's Response

PDC describes Exhibits 1 and 2 as cover letters and invoices from the County requesting payment of sums for "[r]elated expenses to the PDC Landfill Siting Application Review . . ." by PDC. PDC states that Exhibit 3 is a table prepared by PDC summarizing the costs incurred by PDC for technical consultants and experts during the Board proceedings on the application.

PDC states it submitted the documents along with a request that if the Board remands this matter to the County for a second hearing, PDC's costs incurred regarding the first hearing would be paid. PDC estimates that the costs incurred by PDC in the first hearing that would be duplicative of the costs incurred in a hearing on remand are over $500,000.

PDC agrees that Exhibits 1, 2, and 3 do not have evidentiary value, but states that since they are County documents, they are certainly probative and reliable. PDC also states it included the documents to put the County on notice of the relief it seeks. PDC argues that if the Board awards PDC costs, PDC will then prove the costs with specificity and sworn testimony in a "supplementary proceeding" before the Board.

PDC opposes the motion to strike. The Board, contends PDC, should be able to consider the exhibits without giving them undue evidentiary weight.

Board Discussion of Motion to Strike

Section 101.504 of the Board's procedural rules regarding the content of motions and responses states:

> All motions and responses must clearly state the grounds upon which the motion is made and must contain a concise statement of the position or relief sought. Facts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure [734 ILCS 5/1-109]. A brief or memorandum in support of the motion or response may be included. 35 Ill. Adm. Code 101.504.

Therefore, the Board cannot rely on Exhibits 1, 2, and 3 to PDC's post-hearing brief in rendering its final decision. However, the Board also denies the County's motion to strike. PDC concedes that the exhibits do not have evidentiary value and the Board finds that allowing the exhibits to remain part of this record would not materially prejudice the County. Accordingly, the Board denies the County's motion.

FACTS

In this section, the Board briefly recites the facts. Facts pertinent to each argument will be provided below.

The Application

PDC filed an application for local siting approval of an expansion of its existing hazardous waste landfill, PDC No. 1 Landfill, received by the County Clerk's office on

November 14, 2005. C14. The existing facility, located at 4349 Southport Road, Peoria, Peoria County, is approximately 32 acres. C22. PDC seeks to expand the landfill by 8 horizontal acres and an additional 45 vertical feet. PDC requests the expansion to extend the facility's operating life by 15 years, or until 2023. *Id*. The facility currently receives, and will continue to receive under the proposed expansion, approximately 150,000 tons of hazardous solid waste and non-hazardous process and remediation wastes per year. C25. As an example, the largest type of waste accepted by PDC is electric arc furnace (EAF) dust generated by steel mills. *Id*. EAF is a listed Resource Conservation and Recovery Act (RCRA) hazardous waste (waste code K061). *Id*.

The County conducted a public hearing on the application from February 21, 2006, through February 27, 2006. PDC called nine witnesses: Ron Edwards, Sheryl Smith, Lee Canon, Chris Lannert, Gary DeClark, George Armstrong, Kenneth Liss, Dr. Larry Barrows, and Dr. David Daniel. C7268, C7360. The Opposition Groups called four witnesses: Charles Norris, Timothy Montague, Dr. Gary Zwicky, and Dr. Michael Vidas. C7571, C7777. Many written and oral public comments were received. C7667-C7934. The post-hearing public comment period ran through March 29, 2006. C13355.

On April 3, 2006, the Peoria County Pollution Control Site Hearing Subcommittee (Subcommittee) met to hear County staff reports and recommendations on PDC's application and to ask questions of the staff. C13354. Dr. David Brown, on behalf of the County, informed the Subcommittee that when making a decision on the application, "the County Board must base its decision exclusively on information which is contained in the public record of this application process." C13355.

On April 6, 2006, the entire Peoria County Pollution Control Site Hearing Committee, comprised of the entire County Board, met to consider and recommend findings of fact. On April 27, 2006, County staff filed "Recommended Findings of Fact." C13627-40. Karen Raithel, the Peoria County Recycling and Resource Conservation Director, drafted the Recommended Findings of Fact to be representative of the County Board's actions on April 6, 2006. The Recommended Findings of Fact were distributed in writing and addressed each siting criterion individually, providing reasons why the criterion had or had not been met.

The County's May 3, 2006 Vote

On May 3, 2006, the County Board met to vote on a final decision. C13710-48. At that meeting, the Peoria County State's Attorney advised the County:

> If you vote down, that will be the end of the motion to approve. You would not have to have a second motion to deny the application. You either vote it up or down based on the motion to approve. C13715.

On May 3, 2006, one change was made to the Recommended Findings of Fact, which was reflected in a one-page document. C139659. A motion to approve the Recommended Findings of Fact was moved and seconded, then failed by a vote of 12 against to 6 in favor. C13722. According to JoAnn Thomas, the Peoria County Clerk, the Recommended Findings of

Fact have been kept and maintained in the County Board files in the Peoria County Clerk's Office since May 3, 2006. Resp. to Mot. for PSJ, Exh. 1.

A court reporter transcribed the meeting and the County included those transcripts in the siting record. *Id*. The transcript was placed on the County Clerk's website on May 12, 2006. The County kept no minutes of the meeting nor drafted any subsequent summary of the vote.

Fundamental Fairness

County Board members Salzer, Mayer, and Thomas testified that the County Board members were advised by a State's Attorney early in the local siting process that they were not to have communications outside of the record regarding PDC's application. Tr. Exh. 8 at 10-11; Tr. Exh. 3 at 17-18; Tr. Exh. 9 at 16-22.

County Board members Trumpe and Pearson understood that they were to, and did, keep communications received outside of the hearing context and file them with the County Clerk's office. Tr. Exh. 10 at 12-17; Tr. Exh. 5 at 12.

County Board members Mayer and Thomas stated at the May 3, 2006 County Board meeting that they were Sierra Club members. C13717, C13718. When asked whether there was anything about their memberships that would make them partial in making a decision based on the application, the members responded that they would base their decisions on the application, testimony, and evidence presented at the hearings. *Id*.

County Board member O'Neil voted to approve siting on April 6, 2006, and then voted to deny siting on May 3, 2006. Tr. Exh. 4 at 24. In a newspaper article published in the Peoria Journal Star, O'Neil was quoted as saying he changed his vote due to influences from his constituents. *Id*. at 23-24. County Board member O'Neil stated, however, he did not tell the reporter that he changed his vote because of being contacted by constituents. *Id*. at 40. All of the Board members who voted on May 3, 2006 stated they could make a decision based only on the evidence presented. C13717-18.

The County's Decision on the Siting Criteria

Criterion i

PDC called Sheryl Smith, a Senior Project Manager with Golder Associates of Columbus, Ohio to testify regarding criterion i. Smith prepared a report containing all of her conclusions regarding need for the proposed expansion. The report identified Illinois and nine surrounding states as the hazardous waste service area of the facility. C7296. Only the State of Illinois is the service area for the manufactured gas plant remediation waste. C7296. Peoria County and the five surrounding counties in Central Illinois are the service area for non-hazardous process waste. C7297. Smith concluded that even with the proposed expansion, there will be a significant disposal capacity shortfall for all three types of waste received by PDC. C7299-300.

Criterion ii

PDC presented Ron Edwards, George Armstrong, Kenneth Liss, Dr. Larry Barrows, and Dr. David Daniel to testify regarding criterion ii. Edwards is the Vice-President of Development and Operations for PDC and testified regarding the design, location, and background of the PDC No. 1 Landfill. C7275-7276. Edwards also testified regarding the operating plan for the facility and the proposed expansion. C7281-92.

Armstrong, Vice-President of PDC Technical Services, testified regarding the site location and dimensions of the proposed expansion. C7314. Armstrong also discussed the geologic setting of the facility, the hydrogeologic and geotechnical properties of the local soil, and the results of permeability and strength testing. C7364. The nearest active community water supply, testified Armstrong, is operated by the Pleasant Valley Public Water District and is located 1.6 miles away. C7363-64.

Liss, Director of Environmental Services at Andrews Engineering, testified regarding the groundwater monitoring program, the leachate generated at the facility, and the content of the wastes PDC accepts. C7954-56, C7367, C7369. Andrews Environmental Engineering performed an independent review of the site data. C7367.

Dr. Barrows testified about the groundwater impact evaluation he performed on the facility. C7377. Dr. Barrows reached the conclusion that after 500 years, the proposed expansion would have no negative impact on groundwater quality and that the concentration of all leachate constituents at the compliance boundary (50 feet downgradient of the facility) would be in compliance with the drinking water standards. C7381-82.

The site characterization and proposed design analyses were peer-reviewed by Dr. David Daniel, President of the University of Texas, at Dallas. C7959-74.

Four witnesses offered sworn testimony on behalf of the Opposition Groups. Charles Norris, a geologist, testified on behalf of PFATW and HOI Sierra. C7596-7630. Norris reached his conclusions by walking the site, analyzing the evidence in the record, and reviewing monitoring data filed with the Illinois Environmental Protection Agency (Agency). C7598, C7601.

Timothy Montague also testified on behalf of the Opposition Groups regarding landfill liners and landfills in general. C7828-C7844. Dr. Gary Zwicky, a diagnostic radiologist, testified regarding the potential short and long-term health consequences that the facility poses to Peoria County. C7846. Finally, Dr. Michael Vidas, an ear, nose, and throat specialist, discussed the health effects of hazardous waste landfills and cancer rates in Peoria County. C7851-52.

Criterion iii

Chris Lannert, a landscape architect and land use planner, testified on behalf of PDC that the proposed expansion was designed to minimize incompatibility with the surrounding area.

C7311. Lannert stated the PDC site would be screened from view during operation and that the end use plan of passive open space is compatible with other land uses in the area. C7311.

PDC also presented Gary DeClark, a real estate valuation consultant, to discuss the probable impact of the expansion on real estate valuation. C7311. DeClark's evaluation of property values of both single-family homes and condominiums concluded that the PDC landfill is not impacting appreciation of property values in the area adjacent to the landfill. C7313.

Criterion v

PDC presented Ron Edwards to testify that PDC's plan of operation is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. Edwards testified that throughout the operating history of the facility, there have been no significant fires, spills, or other operational accidents.

STATUTORY BACKGROUND

The procedures for handling siting applications and any appeals of local decisions to the Board are set out in Sections 39.2 and 40.1 of the Act. 415 ILCS 5/39.2, 40.1 (2006). No later than 120 days after receiving an application for landfill siting, the local siting authority must hold at least one public hearing. 415 ILCS 5/39.2(d) (2006). The local siting authority's decision must be in writing and must specify the reasons for the decision. 415 ILCS 5/39.2(e) (2006). If there is no final action by the local siting authority within 180 days after the date on which it received the request for site approval, the applicant may deem the request approved. *Id*. The procedures followed in the hearing must be fundamentally fair. 415 ILCS 5/40.1(a) (2006).

The Act requires PDC to submit sufficient details describing the proposed facility to demonstrate compliance with nine criteria of Section 39.2(a). 415 ILCS 5/39.2(a) (2006). PDC disputes the County's conclusion that PDC did not satisfy criteria i, ii, and iii and that criterion v was against the manifest weight of the evidence. Criteria i, ii iii, and v require that:

> i. the facility is necessary to accommodate the waste needs of the area it is intended to serve;
>
> ii. the facility is so designed, located and proposed to be operated that the public health, safety, and welfare will be protected;
>
> iii. the facility is so located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;
>
> ***
>
> v. the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. 415 ILCS 5/39.2(a)(i), (ii), (iii), and (v) (2006).

Section 40.1(a) of the Act provides:

> If the county board . . . refuses to grant or grants with conditions approval under Section 39.2 of this Act, the applicant may, within 35 days after the date on which the local siting authority disapproved or conditionally approved siting, petition for a hearing before the Board to contest the decision of the county board.
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> ***
>
> In making its orders and determinations under this Section the Board shall include in its consideration the written decision and reasons for the decision of the county board . . . the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board . . . in reaching its decision. 415 ILCS 5/40.1(a) (2006).

The Act also requires that Board hearings on landfill siting decisions be based "exclusively on the record before the county board or governing body of the municipality." 415 ILCS 5/40.1(b) (2006). In some cases, however, the Board may consider new evidence relevant to the fundamental fairness of the local siting proceedings "where such evidence necessarily lies outside of the record." Land and Lakes Co. v. PCB, 319 Ill.App. 3d 41, 743 N.E.2d 188, 194 (3rd Dist. 2000).

SECTION 39.2(e)'s "FINAL ACTION" REQUIRMENT AND THE COUNTY'S MAY 3, 2006 VOTE

Section 39.2 (e) of the Act provides, in pertinent part, that:

> Decisions of the county board or governing body of the municipality are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section . . . Such decision shall be available for public inspection at the office of the county board or governing body of the municipality and may be copied upon payment of the actual cost of reproduction. 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. 415 ILCS 5/39.2(e) (2006)

As previously stated, PDC first contends that the County failed to pass a motion to approve PDC's application within the statutory timeframe. PDC also asserts the County made no written findings and issued no written decision. Accordingly, PDC asks the Board to deem the application for site location approval granted by virtue of the County's failure to take timely action as required by Section 39.2(e) of the Act. The County and the Opposition Groups dispute these contentions.

PDC's Arguments

PDC contends there was no final action taken or written decision issued as required under Section 39.2 of the Act. PDC asserts that the transcript of May 3, 2006 is not a written decision because the transcript does not "specify[] the reasons for the decision." PDC Br. at 4, citing 415 ILCS 5/39.2(e) (2006). Further, contends PDC, the transcript of the May 3, 2006 meeting was not actually approved and adopted by the County until the June 8, 2006 meeting. PDC Br. at 4, 87. The Recommended Findings of Fact filed by the County staff on April 27, 2007, states PDC, also was not adopted as written by the County. *Id*.

PDC states that on April 6, 2006, the County allegedly voted that PDC had satisfied siting criterion v only on the condition that PDC pay to the County five dollars per ton of waste received during the life of the proposed expansion to establish a perpetual care fund. Mot. for PSJ at 3. PDC contends that the motion to amend the County's findings as to criterion v were never seconded and no minutes, resolutions, ordinances, or other written evidence of what occurred at the April 6, 2006 meeting exists. PDC states that a transcript of the meeting was recorded and posted on the Peoria County Government website. The transcript, however, according to PDC, was never made part of the public record. *Id*. On April 27, 2006, findings of fact with regard to criterion v were filed in the Peoria County Clerk's office, but the County claims that the findings do not conform to what happened at the April 6, 2006 meeting. *Id*.

PDC next contends that on May 3, 2006, the County met and voted on various issues regarding the PDC application. Mot. for PSJ at 4. The original movant, states PDC, stated "I move to adopt the findings of fact as presented this evening . . . ." *Id*. PDC states that immediately before the vote an assistant State's attorney stated "you're voting to support the finding of fact previously decided." *Id*. PDC claims that no findings of fact were presented on May 3, 2006, and that the proposed findings dated April 27, 2006 were not what was "'previously decided'" because they did not reflect what occurred at the April 6, 2006 meeting. According to PDC, the County has indicated that the transcript of the oral proceedings on May 3, 2006 constitutes the "record and transcript of Peoria County Board's decision and findings." Mot. for PSJ at 5, citing C133710-C13748. PDC asserts that the transcript was never part of the record available to the public in this case prior to PDC's petition for review. *Id*.

The County's Arguments

The County adopts and incorporates the facts and arguments set forth in its December 14, 2006 response to PDC's motion for partial summary judgment. In that response, the County contends that it voted against siting approval on May 3, 2006, and that no separate motion specifically denying the application was necessary. The caselaw cited by PDC, states the County, does not support PDC's position that an affirmative vote to deny the application was required. Resp. to Mot. for PSJ at 7, citing Hoesman, *et al.* v. City Council of the City of Urbana, Illinois, *et al*., PCB 84-162 (Mar. 7, 1985); Smith *et al*. v. City of Champaign, *et al.*, PCB 92-55 (Aug. 21, 1992). Hoesman, states the County, is inapplicable because it dealt with the Board's own procedural rules, rather than those of the Peoria County Board. The County states that Hoesman does, however, stand for the principle that to determine what constitutes "final action," the Board or courts look to the rules of procedure for that specific decisionmaking body. The County notes that the 2005-06 Rules of Order of the Peoria County Board provide that the State's Attorney, or an Assistant State's Attorney selected by the State's Attorney is the

parliamentarian of the County Board. *Id*. at 8. At the local siting hearings, Assistant State's Attorney William Atkins, acting as parliamentarian, stated that if the County Board voted to deny the motion to approve the application, it would be considered a denial. Further, Atkins stated on the record that there would be no need to make or vote on a separate motion to deny siting. *Id*.

The County states that Smith is also inapplicable because it involves the decision maker's rules and procedures, which differ from those of the County Board. Resp. to Mot. for PSJ at 8. The County contends that where Smith addresses the issue of a loss of quorum when a majority of the votes are abstentions, there is no dispute that a quorum of the County was present and voted at the May 3, 2006 meeting. *Id*.

The County states that the Board has previously addressed the question of whether a separate vote to deny is required. Resp. to Mot. for PSJ at 9. The County states that in a concurring opinion, the Board concluded that a vote denying a motion to approve is equivalent to a vote approving denial. *Id*., citing Guerrettaz, *et al.* v. Jasper County, *et al.*, PCB 87-76 (Jan. 21, 1988). The County opines that although Guerrettaz was resolved on a jurisdictional issue, the analysis in the concurring opinion, while dicta, accurately addresses the issue of what constitutes "final action." Resp. to Mot. for PSJ at 9. In Guerrettaz, the local siting authority's vote to deny the application resulted in a tie. The local siting authority voted considered the application at the following meeting, but chose not to vote again. The concurring opinion stated a vote that does not establish a grant of siting, constitutes a denial of the application. *Id*. at 9-10, citing Guerrettaz, slip op. at 10. The concurring opinion concluded, therefore, that the tie vote would have constituted a siting denial.

The County argues that the Guerrettaz concurrence, therefore, supports the argument that after the denial, no further motion to approve was necessary. Resp. to Mot. for PSJ at 10. The County states that the advice of counsel to the County was clear, and the vote to deny constituted "final action" pursuant to statute. *Id*. at 11.

The County next contends that PDC's argument that the written decision must be issued within the 180-day deadline must also fail. The County argues that PDC mistakenly equates "final action" with "decision" as those two terms are found in Section 39.2(e) of the Act. Resp. to Mot. for PSJ at 12; 415 ILCS 5/39.2(e) (2006). According to the County, the distinction between "final action" and "decision" was made clear by the Board's opinion and order in Clean Quality Resources, Inc. v. Marion County Board, PCB 91-72 (Aug. 26, 1991). In Clean Quality Resources, the local siting authority voted to deny siting two days before the 180-day statutory deadline expired. The county board issued a written decision 16 days later. The applicant appealed and the Board rejected the applicant's argument, finding that only "final action" is required to fulfill the statutory time limit. The Board further found that the Act does not require that the written decision specifying the reasons for the decision be issued within the 180 days. Resp. to Mot. for PSJ at 13; Clean Quality Resources, PCB 91-72, slip op. at 8.

The County contends that the Illinois Supreme Court has reached the same conclusion regarding this issue. Resp. to Mot. for PSJ at 14, citing Waste Management of Illinois v. PCB, 145 Ill.2d 345, 585 N.E.2d 606 (1991). The County asserts that in Waste Management, the local

siting authority issued an order within the statutorily required 180 days, but issued a written opinion and order after the expiration of that timeframe. The Illinois Supreme Court held that "final action" and "written opinion" were two separate occurrences. According to the County, the Court noted that there may be a "final action" that is not final and appealable for purposes of review. Waste Management, 145 Ill. 2d at 352.

Based on this caselaw, the County concludes that just because an administrative agency's decision is not in writing, the decision is not necessarily rendered void. Resp. to Mot. for PSJ at 14. The County contends that in this instance, the May 3, 2006 vote to deny siting clearly constituted "final action" within the 180-day deadline. Similarly, argues the County, the Recommended Findings of Fact and transcript of the May 3, 2006 meeting constitute the County's "written opinion" regarding the siting decision. *Id*.

The County admits that the documents constituting the County's written decision were not located in the landfill application files. Resp. to Mot. for PSJ at 16. The County asserts the documents were kept in the County Clerk's office and the transcript of the May 3, 2006 meeting was posted to the County's website. Even so, contends the County, there is no statutory requirement that the documents be kept in one specific location. *Id*.

The County also asserts that the written decision was timely regardless of which date the application is deemed filed. Resp. to Mot. for PSJ at 17. PDC presented its application on November 9, 2005. The County contends that the 180-day decision deadline, however, should run from the day it accepted the application for filing on November 14, 2005. The County states that throughout the local siting hearings, PDC referred to the application as deemed filed November 14, 2005. *Id*., citing C13461. The County concludes that PDC waived the argument concerning the filing date because at no time during the proceedings did PDC ever object to the filing date of November 14, 2005. Further, contends the County, PDC proposed restrictions and conditions at the public hearings on February 21, 2006, that constitute an amended application. An amended application, asserts the County, extends the decision deadline by 90 days pursuant to Section 39.2(e) of the Act. Resp. to Mot. for PSJ at 17-18; 415 ILCS 5/39.2(e) (2006). Under all circumstances, claim the County, the May 3, 2006 vote to deny siting was timely final action by the County.

The Opposition Groups' Arguments

Regarding the May 3, 2006 vote to deny siting, the Opposition Groups note that Section 39.2(e) of the Act states in part that:

> 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. AC Br. at 2-3, citing 415 ILCS 5/39.2(e) (2006).

At the May 3, 2006 County Board meeting, the application was denied by a vote of 12 opposed and 6 in favor. AC Br. at 3. With respect to PDC's argument that the County Board did not

create a written decision that would constitute a formal decision as required under the Act, the Opposition Groups point out that the entire decision was stated verbatim in the transcript of the May 3, 2006 meeting. *Id*. The transcript was then included in the record at the County Clerk's office, as well as posted on Peoria County's website for inspection and copying by the public. The Opposition Groups claim that the County Board could not have created a written decision that was more accurate and complete than the final meeting transcript, adding that it would be impossible for one to argue that a summary would be more exact than a transcript. The Opposition Groups also state that the May 3, 2006 County Board meeting was within 180 days of the request to approve the application. *Id*.

PDC's Reply

In reply, PDC maintains that even if the County's vote had effectively denied siting under the law, the County failed to produce a written decision within, or even after, the decision deadline set forth in Section 39.2(e) of the Act. PDC Reply at 2, citing 415 ILCS 5/39.2(e) (2006).

PDC states that throughout this appeal, the County repeatedly claims that the transcript of the May 3, 2006 meeting, plus the findings of fact and other documentation, constitute the written decision of the County Board. PDC Reply at 5, citing Resp. to Mot. for PSJ at 44. The Opposition Groups as well, states PDC, argue that the May 3, 2006 transcript is the County Board's final written decision. PDC Reply at 5, citing AC Br. at 3-4.

PDC asserts that even if the County had taken final action on May 3, 2006, the transcript was nonetheless adopted and approved outside of the applicable decision deadline. PDC Reply at 5. PDC states that according to the Clerk of the County Board, JoAnn Thomas, the transcript must be adopted and approved by the County Board pursuant to the County Board's Rules of Order before they can be the official minutes of the May 3, 2006 meeting. *Id*. at 6, citing Exh. 16 at 15-16, 17. The County Board actually adopted and approved the May 3, 2006 transcripts on June 8, 2006. PDC Reply at 6. Even if adoption and approval of the minutes were not required to deem the transcripts minutes, argues PDC, the transcript was not available to the public until May 12, 2006, more than 180 days after November 9, 2005, the day PDC delivered the siting application to the County Clerk. *Id*. For all of these reasons, contends PDC, the Board should find the application is deemed approved pursuant to Section 39.2(e) of the Act. *Id*. at 7, citing 415 ILCS 5/39.2(e) (2006).

The Board's Discussion of the May 3, 2006 Vote

The Board finds that the County Board took final action within the 180-day statutory deadline. Further, the Board finds that the transcript and recommended findings of fact constitute the County Board's written decision and satisfy the requirements of Section 39.2(e) of the Act. 415 ILCS 5/39.2(e) (2006). To hold otherwise could elevate procedural form over the substance and intent of Section 39.2, which is to allow for local government to have meaningful say on issues of pollution control facility siting.

The Board finds, as the County correctly argued, that both the legislature and the courts are clear that a distinction exists between a decisionmaking body's "final action" and the formal "decision" memorializing that final action. Clean Quality Resources, PCB 91-72, slip op. at 8; Waste Management, 145 Ill. 2d at 352. The Board considers the date of filing with the County Board as November 14, 2005. The County has identified November 14 as the filing date of the application on the record without objection by PDC. *See e.g.* C13354. However, even assuming the filing date was November 9, 2006, the vote was timely. Based on a November 9, 2006 filing date, County "final action" was required within 180 days, *i.e.* on or before May 8, 2006. The County voted on May 3, 2006. The crux of the dispute between the PDC and the County and Opposition Groups is whether the vote constituted the "final action" "in writing" required by Section 39.2(e).

Section 39.2(e) of the Act does not, by its terms, specify the exact form a local government's decision "in writing" "within 180 days" must take. The County here states that its decision consists of the verbatim transcript (in lieu of summary minutes) of the May 3, 2006 meeting at which it voted not to approve the application and the Recommended Findings of Fact, dated April 27, 2006. While the County did not formally take action to adopt the transcript of the May 3 meeting as its official "meeting minutes" until June 8, 2007, the May 3 transcript makes clear that the County Board did in fact vote to disapprove PDC's application within 180 days.

Section 39.2 is similarly silent on the form of the motion made to the voting body concerning the application. The concurring opinion cited by the County in Guerrettaz, *et al.* v. Jasper County, *et al.*, PCB 87-76 (Jan. 21, 1988), while instructive, is not dispositive of the issue.

The Board is persuaded by the County that this procedural matter of the form of a vote lies within the discretion of the County and its Parliamentarian, so long as the nature of the motion is clear to those voting on it. Here, it is quite clear that those voting intended to deny the requested siting: the motion to approve the application with conditions failed to pass on a vote of 6 in favor and 12 against. A separate vote to deny the application was not necessary. Both cases cited by PDC, Hoesman, PCB 84-162 and Smith, PCB 92-55, are factually distinguishable from the situation here as appropriately argued by the County. In contrast to Hoesman, here the Board must consider the Peoria County Board's, rather than the Board's, procedural rules. Smith is also inapplicable because loss of quorum was not an issue with the Peoria County siting proceedings.

Having found that the County Board took timely action to deny PDC's application for siting as required by Section 39.2(e), the Board will next consider PDC's argument that the local siting hearings on the application were fundamentally unfair.

FUNDAMENTAL FAIRNESS

Applicable Law

Illinois courts have held that the public hearing before the local governing body is the most critical stage of the site approval process. Land and Lakes Co. v. PCB, 245 Ill. App. 3d

631, 642, 616 N.E.2d 349, 356 (3rd Dist. 1993). The manner in which the hearing is held, any opportunity to be heard, whether *ex parte* contacts existed, prejudgment of adjudicative facts, and the introduction of evidence are important, not rigid, elements in assessing fundamental fairness. American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (Oct. 19, 2000), citing Hediger v. D&L Landfill, Inc., PCB 90-163, slip op. at 5 (Dec. 20, 1990). The Board must consider the fundamental fairness of the procedures used by the City in reaching a decision. 415 ILCS 5/40.1(a) (2006).

An *ex parte* contact is one that takes place between a decisionmaker and a party with interest without notice to the other parties to the proceeding. Residents Agency a Polluted Env't (RAPE) v. County of LaSalle, PCB 96-243 (Sept. 1996); Citizens Opposed to Additional Landfills v. G.E.R.E., PCB 97-29 (Dec. 5, 1996). In determining whether improper contacts rendered the local siting proceedings fundamentally unfair, the Board must first determine whether an alleged contact is an improper *ex parte* contact.

In order to determine whether *ex parte* communications irrevocably tainted the decision making process, the Board must consider the following: (1) the gravity of the communications; (2) whether the contacts may have influenced the ultimate decision; (3) whether the party making the improper contacts benefited from the ultimate decision; (4) whether the content of the communications were unknown to opposing parties allowing them no opportunity to respond; and (5) whether vacating the agency's decision and remanding for a new hearing would serve a useful purpose. E&E Hauling, Inc. v. PCB, 116 Ill. App. 3d 586, 451 N.E.2d 555, 603 (2nd Dist. 1983), *aff'd* 107 Ill.2d 33, 481 N.E.2d 664 (1994). A court will not reverse an agency's decision because of improper *ex parte* contacts, however, without a demonstration that the complaining party suffered prejudice from the contacts. *Id*.

Elected officials are presumed to act objectively. *Id*.; Fairview Area Citizens Taskforce (FACT) v. PCB, 198 Ill. App. 3d 541, 548, 555 N.E.2d 1178, 1182 (3rd Dist. 1990), *appeal denied*, 133 Ill. 2d 554, 561 N.E.2d 689 (1990).. At the same time, a local siting authority is not held to the same standard of impartiality as a judge. Southwest Energy Corp. v. PCB, 275 Ill. App. 3d 84, 91, 655 N.E.2d 304, 309 (4th Dist. 1995).

PDC's Arguments

PDC contends that *ex parte* communications surrounding the application render the County's siting proceedings fundamentally unfair. PDC asserts that if *ex parte* communications occurred, then the issue becomes whether those communications irreparably tainted the decisionmaking process, thereby making the siting authority's decision unfair. Gallatin v. Fulton County Board, PCB 91-256, slip op. at 8-9 (June 15, 1992).

PDC restates the E&E Hauling 5-part test and the principle that the most crucial part of the test is a finding of prejudice. PDC Br. at 63, citing Fender v. School Dist. No. 25, 37 Ill. App. 3d 736, 745, 347 N.E.2d 270 (1st Dist. 1976); Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 1043, 530 N.E.2d 682, 697 (2nd Dist. 1988), *appeal denied*, 125 Ill. 2d 575, 537 N.E.2d 819 (1989); FACT, 555 N.E.2d at 1183.

PDC contends that the County Board members did not understand their roles as quasi-judicial decision-makers and, as a result, the County Board's decision should be reversed and the application approved. PDC Br. at 63, 66. According to PDC, ten members of the County Board believed they could receive communications from the public, but not from PDC, outside of the hearing process. PDC Br. at 63-64, citing Tr. Exh. 10 at 38-39; Tr. Exh. 7 at 9-10; Tr. Exh. 9 at 17. Further, PDC states that nine of the County Board members stated they did not file *ex parte* contacts they received with the County Clerk because they were not aware they were required to do so. PDC Br. at 64, citing Tr. Exh. 1 at 16-17; Tr. Exh. 2 at 10, 24; Tr. Exh. 4 at 19; Tr. Exh. 5 at 13; Tr. Exh. 6 at 22-23; Tr. Exh. 7 at 11; Tr. Exh. 8 at 46-47; Tr. Exh. 9 at 14, 15, 32-33; Tr. Exh. 10 at 16-17.

Moreover, states PDC, six County Board members stated they believed they could consider *ex parte* contacts they received in rendering their decisions on the application. PDC Br. at 64-65, citing Tr. Exh. 5 at 24, Tr. Exh. 7 at 37-28, Tr. Exh. 8 at 17-18, Tr. Exh. 11 at 13-14, Tr. Exh. 6 at 7-8, Tr. Exh. 1 at 13. PDC concludes that the record demonstrates a basic failure by the majority of County Board members to understand the concept of *ex parte* contacts. PDC Br. at 66, citing City of Rockford v. Winnebago County Board, PCB 87-92, slip op. at 15 (Nov. 19, 1987).

The Volume of *Ex Parte* Contacts Creates a Presumption of Prejudice

PDC states the County admitted that 309 documents received by members were not filed with the Peoria County Clerk. PDC Br. at 67. Many of these documents, states PDC, were filed after the close of public comment period as well as before the County Board vote denying siting. In reality, states PDC, there were significantly more written *ex parte* communications than revealed in discovery since 11 of the 12 members that voted against approval discarded some or all of the documents they received during the proceedings. *Id*.

In addition to written contacts, the County Board members state they received telephone contacts and were contacted at County Board meetings as well as at their homes. PDC Br. at 68. PDC also noted that opponents distributed fliers and posted yard signs and billboards in the community. PDC Br. at 69-70. PDC argues the effect of the contacts and public displays of opinion is irreparable and has tainted the County Board regarding PDC's application. According to PDC, the contacts received by the County Board in this case go far beyond what the Board has tolerated in the past as inevitable contacts.

Eight County Board Members Must be Disqualified as Biased

PDC notes that public officials are presumed to act without bias, but bias may be shown if a "disinterested observer" would conclude that a public official pre-judged an issue. PDC Br. at 72, citing E&E Hauling, N.E.2d at 668, 825; *see also* Land and Lakes Co. v. Randolph County Board of Comm'rs, PCB 99-69, slip op. at 19 (Sept. 21, 2000).

As evidence of bias, PDC states that County Board members Mayer and Thomas "concealed" their membership in the Sierra Club, which was an opponent to PDC's siting application, until the May 3, 2006 meeting. PDC Br. at 72. PDC contends that even in the event

this matter is remanded, Mayer and Thomas should be barred from voting on PDC's application. *Id*. at 73.

PDC contends that members Polhemus and O'Neil based their votes on the opinion of their constituents and should be barred from voting. PDC Br. at 76-77. Member Elsasser's vote was predetermined, asserts PDC, based on prior family health issues. *Id*. at 78. Elsasser, states PDC, admits to performing independent factual research during the proceedings on the application by calling both the Illinois American Water Company to inquire the location of the aquifer, and the Agency to ask about PDC's license. *Id*.

PDC asserts that members Phelan, Salzer, and Pearson admittedly considered facts from sources outside of the official record, such as *ex parte* communications. PDC Br. at 78-82. The votes of all of these members, contends PDC, should be stricken and, upon remand, the members should be barred from voting on the application. *Id*. at 83.

Proper Remedy in This Proceeding

PDC contends that in this proceeding it is clear that reversal is warranted. PDC Br. at 83. PDC asserts that while it was aware that some *ex parte* communications had occurred, PDC had no idea of the volume or content of the communications and had no opportunity to respond to the communications. *Id*.. citing City of Rockford, PCB 87-92 slip op. at 16, Waste Management, 530 N.E.2d 682; FACT, 555 N.E.2d 1178.

If, however, the Board remands the proceedings, PDC asks the Board to order the County to pay PDC's costs incurred during the first local siting review. PDC reasons that "PDC should not be compelled to pay twice for one fair hearing." *Id*. (emphasis in original). PDC "reasonably estimates" the costs incurred at $505,865.95. PDC Br. at 86. As discussed above in relation to the County's motion to strike, PDC attached an accounting of costs to its post-hearing brief as Exhibit 3.

The County's Arguments

The County states that an *ex parte* contact has been defined as one that takes place without notice and outside the record between one in a decisionmaking role and the party before it. RAPE, PCB 96-243.

The County emphasizes that the mere occurrence of *ex parte* contacts does not, alone, mandate reversal of the local siting authority decision. RAPE, PCB 96-243, slip op. at 8. Rather, the applicant must show that the *ex parte* contacts actually caused it some harm or prejudice. FACT, 555 N.E.2d 1178.

Understanding the Board Members' Role Not Relevant

The County disputes PDC's contentions that the local siting decision on PDC's application was fundamentally unfair. First, the County asserts that whether the County Board members understood their role in the siting proceedings is not relevant. The County contends

that there is no precedent for the proposition that a siting authority member must understand his or her role as "quasi-judicial" or that a failure to understand that role would render the siting proceedings fundamentally unfair. County Br. at 28.

No Presumption of Prejudice

Second, the County contends that PDC cannot show any presumption of prejudice resulting from the alleged contacts. County Br. at 29. The County states that elected officials are presumed to act without bias. *Id*., citing E&E Hauling, 481 N.E.2d at 668. The County contends that the mere presence of billboards and signs in the community cannot constitute improper *ex parte* contacts because they constitute traditional avenues of free public expression and do not create prejudice.

Not *Ex Parte* Contacts

Third, the County states that the contacts PDC describes are simply not *ex parte* contacts as defined by the Board and the courts. The County states that oral public comments made before the application was filed and after the end of the public comment period were recorded and available to the public. According to the County, the Board has found that such public comments were merely expressions of public sentiment and did not render the hearing fundamentally unfair. County Br. at 30, citing Land and Lakes, PCB 99-69, slip op. at 15.

Regarding the PFATW website, the County states that not one County Board member viewed the site. County Br. at 31.

No Bias

Fourth, the County disputes PDC's allegations of bias on behalf of the County Board members. The County states that the Board must determine "whether a disinterested observer might fairly conclude that the decision maker had adjudged the facts as well as the law of the case in advance of the hearing." County Br. at 31, citing Waste Management of Illinois v. Lake County Board, PCB 87-75, slip op. at 14 (Dec. 17, 1987); Cinderella Career Finishing Schools, Inc. v. F.T.C., 138 U.S. App. D.C. 152, 425 F.2d 583, 591 (D.C. Cir. 1970); E&E Hauling, 451 N.E.2d at 556. The County again notes that the Board has held that elected officials are presumed to be objective and act without bias and the mere fact that an official has taken a public position or expressed strong views on the issue does not overcome that presumption. Waste Management of Illinois, PCB 87-75, slip op. at 15.

The County Board claims that because PDC failed to raise the issue of bias during the local siting process, PDC has waived that argument on appeal. County Br. at 32, citing E&E Hauling, 481 N.E.2d 664 (1985); Concerned Citizens for a Better Env't v. City of Havana and Southwest Energy Corp., PCB 94-44, slip op. at 7, citing FACT, 555 N.E.2d 1178.

The County further contends that PDC's argument that County "Board members Mayer and Thomas were biased because they were members of the Sierra Club borders on the ridiculous." County Br. at 32. The County contends that Mayer and Thomas only paid annual dues, and did not attend meetings. Further, the County states that the assistant States Attorney

asked both members about their Sierra Club membership and the two members agreed to make their decision based solely on the record.

The County disputes PDC's contention that the members made any attempt to conceal their memberships. The County states not only did the County Board members disclose their memberships, but PDC waived the issue by failing to object to the members voting on the application. *Id*. at 33, citing FACT, 555 N.E.2d at 1182.

Finally, the County asserts that all of the County Board members stated that they would make their decision based upon the facts in the record. County Br. at 34, citing C13717-18. The County states that courts have found no fundamental unfairness even where local siting authority members received petitions, letters of personal contacts, and telephone calls from constituents expressing opposition to a siting application. County Br. at 35, citing Waste Management, 530 N.E.2d at 697-698.

The *Ex Parte* Contacts That Did Occur Did Not Make the Proceedings Fundamentally Unfair

The County does concede that some *ex parte* communications did occur. County Br. at 36. The County contends that an analysis of the facts using the five factors set forth in E&E Hauling shows that the *ex parte* contacts did not taint the decision making process. *Id*.

The County asserts that the content of the communications were not grave. According to the County, virtually all of the communications to which PDC cites involved mere statements of public opinion in which the person simply asks the County to "vote No." County Br. at 37. These types of communications, states the County, do not contain any factual information. The County contends these comments could not be prejudicial because PDC was aware of the public opinion before, during, and after hearing. *Id*.

Next, the County asserts that the *ex parte* contacts had no influence on the decision. The County addresses allegations that communications that took place between April 6 and May 3, 2006 affected the County Board's decision. The County points to consistent votes against the landfill, one at the April 6, 2006 meeting and the other at the May 3, 2006 meeting, as evidence that such communications had no appreciable affect on the decision. In fact, states the County, only one County Board member changed his vote, and that member testified in his deposition that *ex parte* communications did not influence his vote.

The County further states that none of the individuals who initiated communications with the County Board members benefited personally, financially, or professionally in any way from the communications. County Br. at 41.

PDC had a full and fair opportunity to be heard, states the County. County Br. at 41. The County contends that PDC has not identified a single communication that raises any new or prejudicial information that was not already in the public record. The County points to PDC's comment at the conclusion of the hearings:

> I think it's been a fair hearing. I think both sides will agree everybody had a chance to have their say, and that is what this hearing was for. County Br. at 42-43; C7881.

In addition to the public hearings, contends the County, PDC also had the 30-day public comment period after hearing to address any concerns raised in the alleged *ex parte* communications. County Br. at 43.

Regarding remedy, the County asserts that remand would not serve any useful purpose. Rather, the County argues that if the Board found that there was prejudice as a result of the communications, the proper remedy would be to remand the decision to the County to include the communications into the record and take a new vote based on the supplemented record. County Br. at 43, citing City of Rockford, PCB 87-92.

Finally, states the County, there is no support in the Act, the case law, or the Board's rules for PDC's request for money damages. County Br. at 43. PDC's request for money damages, argues the County, should be denied.

Opposition Groups' Arguments

The Opposition Groups state that although the nine criteria specified under section 39.2 of the Act must be satisfied before local siting approval can be granted, it does not mean that these are the only factors which may be considered. AC Br. at 2, citing Southwest Energy Corp., 655 N.E.2d at 309. The Opposition Groups acknowledge that a local governing body may, on one hand, find the application has satisfied the statutory criteria, but on the other hand, properly deny an application based upon legislative-type considerations. AC Br. at 2, citing Southwest Energy Corp., 655 N.E.2d at 309-310.

The Opposition Groups state that a local siting authority is not bound by a consultant report or a staff recommendation and that the Board has consistently held that a local siting authority is free to reject the findings of its consultants. AC Br. at 4, citing Hediger v. D & L Landfill, Inc., PCB 90-163 (Dec. 20, 1990); Sierra Club v. Will County Bd., PCB 99-136 (Aug. 5, 1999); McLean County Disposal Co., Inc. v County of McLean, PCB 89-108 (Nov. 15, 1989). Here, the Opposition Groups state that the County Board was free to reject the County Staff's recommendation. They note that nothing prevented the County Board from agreeing with the rationale for imposing conditions on approval, and then ultimately rejecting the conditions for not sufficiently resolving the underlying problem. AC Br. at 4.

The Opposition Groups claim that PDC fully knew all of the arguments and information to be raised by the Opposition Groups and others before the hearing even began, and took the opportunity to respond to the issues at the hearing and during the public comment period. AC Br. at 7.

Regarding allegations of improper *ex parte* contacts, the Opposition Groups claim that mere existence of *ex parte* communications does not make the proceedings *per se* fundamentally unfair. AC Br. at 8, citing Southwest Energy Corp., 655 N.E.2d at 310. The Opposition Groups state that if *ex parte* contacts occur, the important consideration is whether the party complaining

of such contacts was prejudiced by those contacts. AC Br. at 8, citing Land and Lakes, PCB 99-69.

The Opposition Groups state that many of the alleged *ex parte* communications occurred during the public comment period and were made available online by the County, virtually instantaneously with their submission. AC Br. at 8. Further, most of the alleged *ex parte* communications, claim the Opposition Groups, occurred during the public comment period and, therefore, were not made outside the public hearing. *Id*. at 9, citing Land and Lakes Co., PCB 99-69.

The Opposition Groups also state that the existence of strong public opposition does not render a hearing fundamentally unfair where the hearing committee provides a full and complete opportunity for the applicant to offer evidence and support its application. AC Br. at 9, citing Waste Management, 530 N.E.2d at 697. Here, claim the Opposition Groups, PDC had a full and fair opportunity to plead its case and did so by submitting a Response to Committee of the Whole. AC Br. at 9, citing C13461-13522.

The Opposition Groups state that at no time did PDC allege bias by any members of the County Board prior to filing its brief with this Board. AC Br. at 9. A claim of disqualifying bias or partiality on the part of a member of the judiciary or an administrative agency, state the Opposition Groups, must be asserted promptly after knowledge of the alleged disqualification, or it is deemed waived. *Id*. at 10, citing E&E Hauling, 481 N.E.2d at 666. To allow a party to first seek a ruling in a matter and, upon obtaining an unfavorable one, permit that party to assert a claim of bias would be improper. *Id*. The Opposition Groups state that PDC waived any right to raise allegations of bias on review because PDC knew of the claims, yet failed to state any objection at the May 3, 2006 meeting. AC Br. at 10.

The Opposition Groups state that 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. AC Br. at 10, citing 415 ILCS 5/39.2(d) (2006). The Opposition Groups also assert there is no evidence of any member of the County Board publicly expressing an opinion regarding the proposed expansion, thereby being even more conservative than the Act allows and not prejudicing the case. AC Br. at 11.

The Opposition Groups state that PDC filed a "Response to Committee of the Whole Vote" after the application denial. Because PDC failed to take the opportunity to object in that response as well, the Opposition Groups claim PDC waived any claim of actual prejudice. AC Br. at 11.

The Opposition Groups state that PDC argues the denial itself should be sufficient proof of the prejudice it suffered. The Opposition Groups respond, however, that the mere fact that County Board members voted against the application does not necessarily infer that PDC was prejudiced. AC Br. at 11, citing E&E Hauling, 451 N.E.2d at 566. The Opposition Groups further assert that the volume of *ex parte* contacts does not dictate whether the complaining party suffered prejudice. AC Br. at 11, citing Land and Lakes Co., PCB 99-69.

PDC's Reply

PDC maintains in its reply that the County, not PDC, has the burden under the due process guarantees of the United States and Illinois Constitutions to ensure that the proceedings on the application were fundamentally fair. Reply at 8. PDC states that "[q]uite simply, it was the responsibility of each and every County Board member to avoid *ex parte* contacts and to minimize the impact of any unavoidable *ex parte* contacts." *Id*. (emphasis in original).

PDC notes that the County and Opposition Groups admit that many *ex parte* communications occurred. For example, PDC contends the County admitted through discovery that 309 documents received by Board members were not filed with the County Clerk, not given to PDC, and not filed by the County as part of the local siting record. PDC Reply at 9, Exh. A.

PDC asserts that despite being duplicative, each contact with each Board member is a separate and individual *ex parte* contact. PDC Reply at 10. Further, states PDC, the 309 documents in attachment A do not include the hundreds of additional documents potentially destroyed by the County Board members prior to or during this appeal. *Id*. PDC states "[w]e will never know the actual volume and extent of the *ex parte* contacts in this case." *Id*. at 11. PDC explains that 11 of the 12 County Board members that voted against approval of the application stated they discarded some or all of the documents they received, and that 5 of those 12 members produced no documents in the course of discovery. *Id*. at 11-12.

In response to the County's contentions that all of the communications were mere statements of public opinion, PDC states that many communications were of a substantive nature addressing the landfill's proximity to the aquifer, health issues, environmental and ecological effects to the county, toxins, and air pollution. PDC Reply at 12-15. PDC states that the content and quantity of the *ex parte* communications in the local siting hearings had a grave effect on the outcome of the proceedings. *Id*. at 17.

PDC states that, while there may be no requirement that the County Board members understand their function as "quasi-judicial," they must understand that the decision is to be based only on the facts and evidence in the record. PDC Reply at 18. Here, contends PDC, the majority of the Board members did not so understand. *Id*.

PDC states that the County and Opposition Groups set a standard for finding prejudice "that would require spontaneous declarations from Board members that their consideration of materials outside the Record formed the basis of their decision." PDC Reply at 2.

The County admits, claims PDC, that County Board member Polhemus should not have been permitted to vote on the application. PDC Reply at 19, citing County Br. at 14. PDC states that the County also admits that Elsasser obtained information outside the record, which he relied on in forming his opinion on the application. PDC Reply at 3, citing County Br. at 18 (stating "[a]dmittedly, his method of trying to find out more information was inappropriate for a siting proceeding.").

PDC also disputes the County's argument that PDC waived challenges to Board members Mayer, Thomas, and Elsasser as biased. PDC Reply at 27.

Board Analysis of Fundamental Fairness

For the reasons set forth below, the Board finds that the improper *ex parte* communications did not render the County's proceedings fundamentally unfair, and that any unfairness in the proceedings does not merit reversal of the County's decision.

It is well-settled that a failure to object at the original proceeding generally constitutes a waiver of the right to raise an issue on appeal. E&E Hauling, 481 N.E.2d at 666. The Board has found that a claim of bias or prejudice on the part of a member of an administrative agency or the judiciary must be set forth promptly after knowledge of the alleged disqualification because it would be improper to allow a party to withhold a claim of bias until it obtains an unfavorable ruling. Waste Management, 530 N.E.2d 682. The requirement that an objection be raised at the local level has been applied in the context of claims of bias or predisposition by local decisionmakers. FACT, 555 N.E.2d at 1180-1181; Waste Management, 530 N.E.2d 682, 695 (holding that the applicant waived arguments of bias and prejudice because the applicant failed to raise objections at the local siting level); A.R.F. Landfill v. PCB, 174 Ill.App.3d 82, 528 N.E.2d 390, 394 (2nd Dist. 1988).

The Board has found that the requirement also applies to claims that the admission of certain evidence violated fundamental fairness. St. Clair County v. Village of Sauget, *et al.*, PCB 93-51 (Jul. 1, 1993). An objection must be raised at the local level, or the claim will be waived at the Board level. The Board in St. Clair County found that the County waived its claim of violations of fundamental fairness by failing to raise any type of objection to a videotape entered as evidence at the local hearing.

Here, PDC failed to object to the two County Board members having Sierra Club memberships and to the one member with family health issues during the local siting proceedings. PDC received this information on or before May 3, 2006 and did not object to the members voting on the application at the meeting or subsequently in its post-meeting response. PDC also did not object on May 3, 2006 or in its "Response to Committee of the Whole Vote" to O'Neil's vote on the application despite his statement as quoted in a local newspaper. Accordingly, the Board finds that PDC waived any right to object to the alleged bias in this petition for review.

Even assuming PDC had raised an objection during the local siting proceedings, the Board would nonetheless find that neither the quote of Mr. O'Neil nor the Sierra Club memberships overcome the presumption that administrative officials are objective and are capable of fairly judging a particular issue on the merits. *See* A.R.F., 528 N.E.2d at 394.

Both parties agree that *ex parte* contacts occurred during the local siting process. However, in order to find fundamental unfairness, the Board must first find that the contacts prejudiced PDC. E&E Hauling, 481 N.E.2d 586. In this instance, the Board finds that PDC was not prejudiced by the contacts.

The Board finds that many of the *ex parte* contacts PDC describes were either not e*x parte* contacts or were not improper. For example, the oral public comments made at hearing, and before and after hearing, yet made part of the record, are not considered *ex parte*. Further, the Board does not consider the yard signs and billboards posted in the community *ex parte* because they were posted in public in plain view of all siting participants. Several of the contacts, however, were improper. For example, the Board considers the many emails sent to Board members by constituents expressing their opinions and attempting to influence the County Board's decision to be improper *ex parte* contacts. However, even though several of the *ex parte* contacts in this case were improper, the question remains whether the contacts were such as to require reversal of the County's decision.

As discussed above, in making this decision, the Board must consider: (1) the gravity of the communications; (2) whether the contacts may have influenced the ultimate decision; (3) whether the party making the improper contacts benefited from the ultimate decision; (4) whether the content of the communications were unknown to opposing parties allowing them no opportunity to respond; and (5) whether vacation and remand would serve a useful purpose.

The Board finds that PDC has failed to show that the improper *ex parte* contacts influenced the County's decision regarding the proposed expansion. Most importantly, PDC has not shown that it has suffered any prejudice from these contacts since the County Board members have all testified that any time they were contacted about the landfill, they would refuse to discuss the issue, and that they only considered the facts and evidence in the record in making their final decision. *See* Tr. Exh. 4 at 23-24, 40.

While the County admitted that conducting independent research outside of the record was inappropriate, the County did not concede that Elsasser should not have been permitted to vote. In fact, the County stated no Board members were biased because each one stated they could make a decision on the application based on the record. Board member Elsasser concedes that he did independent research outside the record by contacting the Illinois American Water Company and the Agency in order "to have the full understanding of what's going on." Exh. 1 at pg. 26. However, when asked whether he could be "fair and impartial and decide based solely on the evidence" when voting on PDC's application, Elsasser said that he could. C13718.

Illinois courts have acknowledged that *ex parte* contacts between the public and elected officials are inevitable. Southwest Energy Corp., 655 N.E.2d 304, 310. The Second District Appellate Court has upheld a siting proceeding despite the fact that several members of the local siting authority received a petition, letters, personal contacts, and telephone calls from constituents expressing opposition to a landfill application. Waste Management, 175 Ill.App. 3d at 1043.

PDC has presented no authority for the proposition that the sheer volume of contacts creates a presumption of prejudice. The Board finds here that it does not. The record shows that many of the contacts PDC describes are duplicate emails, telephone calls, flyers, and billboards. While each one may be considered a separate contact, the Board will not assume that the volume alone creates a presumption of prejudice.

In discussing letters sent to members of the local siting authority, the court in Rochelle Waste considered whether the letters contained information or sentiment not given in the form of public comment during the hearing. Rochelle Waste Disposal, L.L.C. v. City Council of the City of Rochelle, PCB 03-218, slip op. at 71-72 (Apr. 15, 2004). The court determined that the telephone calls, letters, and personal contacts merely expressed public sentiment and, accordingly, found that no prejudice resulted as a result of these contacts. *Id*. at 72.

The Board finds that even if discarded rather than entered into the record, the telephone calls, letters, emails, and personal contacts in this case as in Rochelle Waste, merely repeated public sentiment expressed during the local siting hearing regarding PDC's application, and resulted in no prejudice for or against PDC.

The Board finds that for all of these reasons, the contacts described in the record do not rise to the level of fundamental unfairness. Accordingly, the Board will next discuss whether the County's decisions regarding siting criteria i, ii, iii, and v were against the manifest weight of the evidence.

SECTION 39.2 CRITERIA

Standard of Review

A party seeking siting approval for a pollution control facility must submit sufficient details of the proposed facility to meet each of nine statutory criteria. 415 ILCS 5/39.2(a) (2006). Here, the County found that PDC failed to meet its burden of proof under criteria i, ii, iii and v. PDC argues that the County's decision was against the manifest weight of the evidence with respect to those criteria.

The Board will not disturb the County's decision to deny PDC's application unless the decision is against the manifest weight of the evidence. Land and Lakes, 743 N.E.2d at 197. A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, plain, or indisputable. *Id*. A decision is contrary to the manifest weight of the evidence only when, after reviewing the evidence in the light most favorable to the local siting authority, the Board determines that no rational trier of fact could have agreed with the local siting authority'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 County argues that by voting to approve the written Recommended Findings of Fact, the siting decision was based on and supported by the record developed during the siting process. For this reason, contends the County, the County's decision was not against the manifest weight of the evidence. County Br. at 44.

In its reply, PDC contends that a recent Illinois Supreme Court decision has changed the standard of review applicable pollution control facility siting appeals. PDC Reply at 36, citing Town & Country Utilities, Inc. v. PCB, Nos. 101619, 101652 (cons.) (S. Ct. Ill. Mar. 22, 2007). PDC contends that the Town & Country decision did not require the Board to apply a manifest

weight of the evidence standard, but rather to determine whether the local decision on the substantive criteria is technically sound and whether that decision is supported by competent evidence. PDC Reply at 38, citing Town & Country, Nos. 101619, 101652 (cons.) at 14. PDC states that in the instant case where the County's siting denial is "based on PDC's inability to disprove the impossible, the Pollution Control Board's new role becomes particularly relevant." PDC Reply at 38.

The Opposition Groups state that with regard to the criteria, PDC argues that it presented unrebutted testimony and called several more witnesses than did PFATW and Sierra Club during the local siting proceedings. The Opposition Groups state, however, that PDC's contention that it "wins" because no one testified in opposition to some of the criteria fails to recognize that testimony adverse to PDC's position was obtained during extensive cross-examination. AC Br. at 14. The Opposition Groups state that witness' testimonies are many times rebutted by simple cross-examination. *Id*. at 15. Furthermore, even if uncontroverted, pursuant to Board precedent, the County Board can nevertheless find PDC's expert testimony deficient and deny the application. *Id*., citing CDT Landfill Corp. v. City of Joliet, PCB 98-60 (Mar. 5, 1998).

The Board disagrees with PDC's interpretation that the Illinois Supreme Court's recent decision in Town & Country changed the standard of review applicable to siting review proceedings before the Board. Town & Country by no means changed the standard the Board must apply in reviewing local siting decisions, which is whether the local siting authority's decision was against the manifest weight of the evidence. Rather, the Illinois Supreme Court clarified that the Board's role is to apply "technical expertise in examining the record to determine whether the record supported the local siting authority's conclusions." Town & Country, Nos. 101619, 101652 (cons.) at 14. Accordingly, below the Board considers whether the County Board's decision was against the manifest weight of the evidence with respect to criteria i, ii, iii, and vi.

Criterion i

PDC's Arguments

First, PDC challenges the County's decision that PDC's proposed expansion is not necessary to accommodate the waste needs of the area that it is intended to serve. PDC Br. at 25. PDC contends that no witness other than PDC's experts testified regarding this criterion. PDC Br. at 88. Further, PDC states that the County is not free to disregard the absence of credible evidence in making its decision, but rather must find rebuttal evidence in the record in order to rule against the applicant on the siting criteria. *Id*., citing Indus. Fuels & Resources/Illinois, Inc. v. PCB, 227 Ill. App. 3d 533, 592 N.E.2d 148 (1st Dist. 1992).

PDC asserts that it presented three separate needs analyses to the County Board because it receives three separate waste streams: hazardous waste, non-hazardous process waste, and manufactured gas plant remediation waste. PDC Br. at 92-93. PDC states that Sheryl Smith, a waste planner testifying on behalf of PDC, testified that based on the analyses, there would be significant shortfalls in available disposal capacity for hazardous waste and non-hazardous process waste. *Id*. As for manufactured gas plant remediation waste, PDC is the only facility in

Illinois that receives this waste and, as of June 2005, 92 manufactured gas plants in Illinois remain to be remediated. *Id*. at 93, citing C7297.

PDC contends that the County's findings were untrue or did not accurately represent the facts in many instances. For example, Sheryl Smith's report used the most recent data available at the time. New data was released in November or December 2005, but PDC submitted the application on November 9, 2005. PDC Br. at 93. Further, the County's findings of fact state that "USEPA [United States Environmental Protection Agency] data from 2003 reported in 2005 shows a significant decline in hazardous waste generation ranges in their hazardous waste service area." *Id*. The County contends, however, that a 16,000-ton decline represents a decline of 0.73% where the total projected hazardous waste shortfall is 2.2 million tons. *Id*. PDC asserts that the County had made no findings of fact regarding need for the expansion to accommodate the capacity shortfalls for non-hazardous process waste and manufactured gas plan remediation waste. *Id*. at 95.

The County's Arguments

The County contends that PDC's proposed expansion is not necessary to accommodate the area's waste needs because there has been a gradual reduction in the amount of hazardous waste generated in the area that would reduce the capacity shortfall that PDC estimates. The County also contends that PDC's analysis under criterion i failed to include potential substitutes for an expanded hazardous waste landfill such as increased recycling, continued waste reduction, and increased disposal in landfills outside of the service area. County Br. at 50.

The County states that the local siting authority is not under an obligation to accept any and all expert testimony presented. County Br. at 45. "Even where the evidence on a criterion is unrebutted or unimpeached, the trier of fact is not required to find that the applicant has met its burden on that criterion." *Id*. The County further argues that a local siting authority may decide that even uncontroverted evidence or testimony is insufficient if it did not factor relevant information into the analysis or the analysis is invalid or otherwise not credible. *Id*.; CDT Landfill, PCB 98-60, slip op. at 23-24.

After considering the testimony of Smith on criterion i, the County concluded that the witness had failed to take into account important market trends of the waste industry. County Br. at 47. This seriously undermined the credibility and usefulness of the witness' report and testimony in the eyes of the County. *Id*.

Opposition Groups' Arguments

The Opposition Groups claim thatthe County Board was free to find Smith biased and question her credibility and adequacy of her report. AC Br. at 15. The Opposition Groups state that PDC receives waste from 27 Indiana generators and notes that without the expansion, the landfill could extend its lifespan from 4 years to 33 years by only accepting local waste. *Id*. The Opposition Groups state that receipt of local hazardous waste is declining, and that by making an effort to expand into new markets in order to attract more waste, PDC directly contradicts the requirement of criterion i. *Id*.

According to the Opposition Groups, PDC chose to use an assumption that may have affected its credibility with the County Board when it claimed that a decrease in the number of hazardous waste landfills in both the service area and the nation increased the need for the PDC expansion. AC Br. at 16. Alternatively, the Opposition Groups suggest the fact that there is a decreasing number of such facilities may relate to the decrease in demand for such facilities, and that a more conservative assumption would have been a gradual decrease in such waste generation. *Id.*

In addition, the Opposition Groups claim that PDC and Smith excluded Indiana from the intended service area, even though PDC accepted significant quantities of waste from Indiana during the 1999-2004 study period. AC Br. at 16. The Opposition Groups note that Indiana and Ohio, another state from which PDC receives waste, have both recently received expansion permits, with no data provided that these expansions could not provide disposal services for Peoria County generators. The Opposition Groups state that 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 and that it was reasonable for the County Board to find that there was no need to expand PDC facility. *Id.*

The Opposition Groups highlight a previous case, CDT Landfill, in which the Board upheld the city's decision that criterion i had not been satisfied where the testimony was shown to be deficient as well as finding deficiencies in the need analysis. AC Br. at 16; CDT Landfill Corp. v. Joliet, PCB 98-60 (Mar. 5, 1998). The Opposition Groups state that, in the present case, PDC failed to establish a need to expand the facility and, as a result of the foregoing inconsistencies and manipulations, the County Board's decision to reject Smith's conclusions is not against the manifest weight of the evidence. AC Br. at 17.

PDC's Reply

PDC contends that the County's argument that evidence of downward price pressure on hazardous waste tipping fees demonstrates no need for additional capacity is bizarre. PDC Reply at 39. The basis for this conclusion, states PDC, was a newspaper article in which a PDC executive is quoted as saying that there had been some decrease in tipping fees. *Id.*

PDC states that the County's criticism of Ms. Smith's need analysis is misplaced. The County states Ms. Smith's analysis was deficient because it did not consider the potential for development of other new disposal capacity, contends PDC. However, the fact is, states PDC, no additional hazardous waste disposal capacity has been proposed.

Board Discussion of Criterion i

An applicant for siting approval does not have to show absolute necessity. Clutts v. Beasley, 185 Ill. App. 3d 543, 541 N.E.2d 844, 846 (5th Dist. 1989); A.R.F. Landfill, 528 N.E.2d at 396; Waste Management of Illinois v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d 542, 546 (3rd Dist. 1984). The Illinois Appellate Court for the Third District has defined "necessary" as connoting a "degree of requirement or essentiality" and not just that a landfill be "reasonably

convenient." Sierra Club v. City of Wood River, PCB 98-43, slip op. at 4 (Jan. 8, 1998), citing Waste Management of Illinois, 461 N.E.2d at 546. The Illinois Appellate Court for the Second District has adopted this construction of "necessary," further specifying that the applicant must demonstrate both an urgent need for, and the reasonable convenience of, the new facility. Waste Management, 530 N.E.3d at 689; A.R.F. Landfill, 528 N.E.2d at 396; Waste Management, 463 N.E.2d at 976.

The Board finds that the evidence presented by PDC is not sufficient to persuade the Board to reverse the County's decision on criterion i. The Board notes that PDC has presented expert testimony on criterion i, while the County has not. The Board is not convinced by each and every one of the County's arguments, such as the significance of the declining price of disposal. Nonetheless, the Board finds the County has shown that the uncontroverted evidence is flawed enough so that a result opposite to the County's decision is not clearly evident, plain, or indisputable. The County has shown that Ms. Smith's report and testimony did not take into consideration critical need information.

For example, Smith reviewed USEPA and/or Army Corps of Engineers reports regarding whether there is adequate hazardous waste landfill capacity in the U.S. over the next 15 to 20 years, but she did not factor the reports into her report or testimony. County Br. at 47, citing C7499. Further, in questioning Smith about alternatives for an expanded hazardous waste landfill in the service area, Smith stated she did not consider substitutes such as increased recycling of the type of waste codes accepted by PDC, continued waste reduction in the service area, and increased disposal of hazardous waste in landfills outside of the service area. County Br. at 50.

Considering that PDC's report and expert testimony regarding need were based on incomplete information, the County found that PDC did not meet the need criterion. Therefore, the Board finds that the County's decision that PDC did not meet its burden of proof on the need criterion is not against the manifest weight of the evidence.

Criterion ii

PDC's Arguments

PDC challenges the County's finding that the proposed facility is not designed so as to protect public health, safety, and welfare. PDC asserts that it called five expert witnesses to testify regarding this criterion, and the testimony totals over 700 pages of transcripts. PDC Br. at 96. As an example, PDC highlights the testimony of Dr. David Daniel, an expert in the United States on solid waste disposal technology and engineering. *Id*. PDC states that Dr. Daniel "peer-reviewed the engineering and geologic aspects of the proposal and concluded, without reservation, that the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." *Id*., citing C7487-88.

PDC states that in its analysis, the County ignored the fact that PDC has been operating the facility for thirteen years, and has not had a single violation of State or Federal law. PDC Br. at 96, citing C7287. PDC boasts that the Peoria landfill has the best record in the hazardous

waste disposal industry nationwide, and that courts have found that mere compliance with minimum government regulations, together with a good plan of operations, was enough to satisfy criterion ii. PDC Br. at 96, citing Indus. Fuels & Resources/Illinois, Inc., 592 N.E.2d at 157.

PDC describes Charles Norris, who testified on behalf of the PFATW, as "an itinerant, self-employed geologist" who is obviously biased. PDC Br. at 97. PDC further states that Norris' theories about rapid water flow through fractures and interconnected sands are unsupported by evidence in the record. *Id*. at 98. PDC points to incorrect statements in Norris' post-hearing public comment and emphasizes that public comments should be given lesser weight than sworn testimony. For example, states PDC, Norris incorrectly referred to a large volume of leachate having been removed from a secondary leachate collection system, when, states PDC, the volume he referred to is actually the total leachate removed from both the primary and secondary leachate collection systems.

PDC discounts the remaining witnesses that testified on behalf of the County and public comments submitted on behalf of the County regarding criterion ii as generic in nature, rather than site-specific, based on fear, and/or not supported by facts. PDC Br. at 99-101.

Finally with regard to criterion ii, PDC contends that the perpetual care fund proposal guarantees long-term safety. PDC Br. at 102. PDC states that the unrebutted groundwater impact assessment for the PDC site shows no impact for 500 years. PDC argues that based on all of the evidence presented supporting the lack of threat to the Sankoty aquifer, a perpetual care fund at the site is unnecessary and redundant. However, states PDC, PDC agreed to a $3,375,000 perpetual care fund "to calm hysteria generated by the opposition group's *ex parte* pressure on the County Board members." *Id*. at 104.

Based on all of the testimony and public comments entered into the record regarding criterion ii, PDC states that many of the Recommended Findings of Fact are based on pseudo-science and irrational fear and speculation. PDC Br. at 102. For example, the findings of fact state "[t]here is evidence that the existing landfill may already be leaking into the aquifer." *Id.* PDC states, however, that this statement is contradicted by the testimony of all of PDC's witnesses, by the County Staff's report, and also by the sworn testimony of Norris, the County's own witness. *Id*. Norris changed his statement, states PDC, in an unsworn post-hearing public comment. Moreover, asserts Liss on behalf of PDC, the landfill is in full compliance with the Agency and United States Environmental Protection Agency permit standards. *Id*., citing C7372.

The County's Arguments

The County contends that PDC's proposed facility is not protective of public health, safety, and welfare for many reasons, but the "number one issue" the County considered was protecting the groundwater aquifer below PDC's site. County Br. at 51. The County states, based on the testimony of Dr. Barrows who testified on behalf of PDC, that this aquifer is hydraulically connected to the Sankoty aquifer, which is a drinking water source for central Illinois, including the City of Peoria. *Id*.; C7782 (stating the closest instance of Sankoty sand, based on the water well drillers' logs available, is 2,500 feet southeast of the facility boundary); PDC Br. at 103.

The County states that PDC's own witnesses testified that eventually the engineered barriers that are part of the current landfill design will fail. County Br. at 51. The County states that PDC's witness, Dr. Daniels, testified that the heavy metal contaminants found in much of the hazardous waste disposed of at the landfill are stable and will persist for thousands of years. *Id*. Further, the record contains no evidence or testimony that the need to use the aquifer for drinking water will diminish or disappear in the future. *Id*.

The County contends that PDC cannot presume it meets criterion ii because the landfill currently operates in the proposed location of the expansion. County Br. at 52. The County states the landfill did not go through the siting process when SB172 was initially passed and this is the first opportunity the County had to evaluate the location of the landfill pursuant to Section 39.2 of the Act. *Id*.

The Opposition Groups' Arguments

The Opposition Groups state that determination of criterion ii depends solely on the assessment of the credibility of testifying experts. AC Br. at 17, citing FACT, 555 N.E.2d at 1185. The Opposition Groups state that there was conflicting evidence during the hearing between the testimony of Charles Norris for PFATW and Sierra Club, and Dr. Barrows for PDC. In this case, the County Board chose to accept Norris' testimony over Dr. Barrows. The groups claim that 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. *Id*., citing FACT, 555 N.E.2d at 1185. The Opposition Groups allege that PDC misplaced emphasis on its five experts since it is the quality, not the volume, of testimony that the County Board must evaluate. AC Br. at 17.

The Opposition Groups note that PDC cites Industrial Fuels for the proposition that mere compliance with minimum governmental regulations, coupled with a good plan of operations, demonstrates compliance with criterion ii. AC Br. at 17. The Opposition Groups point out that the last sentence of the supporting texts reads, "Nothing indicates that Industrial's controls and procedures, safety features, training of personnel, or security systems are substandard or create a significant safety hazard." *Id*. at 17-18, citing PDC Br. at 97. According to the Opposition Groups, that there has been a plethora of testimony in this case indicating that the expansion would create safety hazards, and therefore, Industrial Fuels is not on point with the current case. AC Br. at 18.

The Opposition Groups state that representatives of PDC overreached in declaring that the entire landfill was designed in a manner that met or exceeded any standards existing today. AC Br. at 18. For example, the County Staff did not recommend any expansions over Trench C-1 because of the minimum technology liner design that the staff determined is not protective of the groundwater. *Id*., citing C12096-97. Additionally, state the Opposition Groups, expert testimony indicated that the landfill's leachate had reached the groundwater. AC Br. at 18. Norris testified that PDC's groundwater impact assessment modeling was flawed and that the results were inconsistent with site observations. *Id*. at 19, citing C7608.

The Opposition Groups state that, because the County Board is to assess each witness' credibility, it was reasonable for the County Board to determine that criterion ii was not satisfied because of inconsistencies and unreliability of PDC's evidence. AC Br. at 19. The Opposition Groups acknowledge that public comment is not accorded the same weight as facts admitted into evidence, but that 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. *Id*., citing City of Geneva v. Waste Management of Illinois, Inc., PCB 94-58 (July 21, 1994), slip op. at 17. The Opposition Groups also state that the parties were well informed during the hearing that Norris would be submitting public comment. AC Br. at 19, citing C7610.

The Opposition Groups state that a County Board's finding with regard to criterion ii is not against the manifest weight of the evidence. The Opposition Groups state the County Board was correct in finding that criterion ii was not met, in part, because PDC had not established that the facility would provide adequate protection for water wells in the area. AC Br. at 20, citing McLean County Disposal, Inc. v. County of McLean, 207 Ill. App. 3d 477, 566 N.E.2d 26 (4th Dist. 1991).

The Opposition Groups state that the recent Town & Country case has enormous factual precedential value for the instant case. AC Br. at 20, citing Town & Country, Nos. 101619, 101652 cons.. The Opposition Groups further explain that, in that case, the Board reversed the local siting authority's decision granting approval on criterion ii based solely on the issue of groundwater. AC Br. at 20. Criterion ii concerns much more than groundwater issues, including location, proximity to population, and presence of toxic substances, note the Opposition Groups. *Id*. Nonetheless, in Town & Country the Board found the evidence, that the bedrock may constitute an aquifer, sufficient to deny the application based on criterion ii. *Id*. In the present case, the Opposition Groups claim that PDC's experts testified that the proposed expansion is located over the interconnected and interfingered Sankoty aquifer. AC Br. at 20, citing C7781-83. The Opposition Groups state, therefore, that the facts in the present case, even more so than those in Town & Country, suggest that PDC has not satisfied criterion ii. AC Br. at 20.

The Opposition Groups assert that, in deciding to deny a petition to site a landfill, the Board cannot review on a *de novo* basis the public health evidence relied upon by a county board. AC Br. at 21, citing City of East Peoria v. PCB, 117 Ill. App. 3d 673, 452 N.E.2d 1378 (3rd Dist. 1983). The groups further state that 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. AC Br. at 21. Thus, the Opposition Groups state, the finding that criterion ii was not satisfied is not against the manifest weight of the evidence. *Id*.

PDC's Reply

PDC first asserts that the County's contention that the proposed facility is located "directly over a drinking water aquifer" is erroneous. PDC Reply at 40. In reality, states PDC, the facility is positioned over "an average of 55 feet of unweathered massive clay with an average hydraulic conductivity three times lower than the state standard for the hydraulic

conductivity of engineered clay liners." *Id*. at 41, citing C7365. Underneath the clay, states PDC, is the lower sand. Below the sand is the uppermost aquifer, which is not, states PDC, the Sankoty aquifer. PDC Reply at 41.

PDC concedes that the Sankoty aquifer is hydraulically connected with the lower sand at the site, but states that no one offered evidence into the record about how far away the Sankoty aquifer might be. *Id*. The record does identify the nearest down-gradient community water supply well as 1.6 miles away in the Pleasant Valley Public Water District. *Id*. PDC asserts that the water district performed its own study to identify potential threats to the water quality and that PDC's facility was assigned a threat level of zero.

According to PDC, it is clear from a technical perspective that the facility poses no threat to drinking water supplies. PDC Reply at 42. This has been proven, states PDC by the results of the groundwater impact assessment showing no negative impact fifty feet from the facility boundary throughout a 500-year analysis. *Id*. PDC asserts that the County never challenged PDC's data, methodology, or conclusions about the facility's design.

The County's contention that the county staff had issues with the design of the older units in the C area, claims PDC, is also overly broad. PDC Reply at 43. PDC contends that the staff's issue was with the design of Unit C1, but referred to Units C2 through C5 as "state of the art." *Id*., citing C139558-59. The parties resolved the issue, asserts PDC, by agreeing that PDC would not expand over Unit C1. PDC Reply at 43.

PDC states that the County's post-hearing brief overstates the evidence in contending that "there is evidence that the existing landfill may already be leaking into the aquifer." PDC Reply at 44, citing Resp. at 58. PDC states it is true that chloride was found in some monitoring wells proximate to the facility. The County staff agreed with PDC, however, that chloride is naturally occurring and could even result from sources outside the landfill, such as from road salt. Reply at 44. PDC states that counsel for the County acknowledged on April 3, 2006 that the Agency has concluded that the chloride found in the groundwater has not come from the facility. *Id*. Ultimately, however, the County did not rule out Unit C-1 as a possible contributor. C139578.

PDC states the County's fear that doctors testified as to the potential health effects is misleading because the doctors were not familiar with the technical aspects of the application and they could not identify an exposure pathway by which hazardous waste would be ingested. PDC Reply at 46. PDC states that the County identifies air as a feared exposure pathway for the first time in its post-hearing brief. *Id*. Nonetheless, PDC states that it called witnesses that testified there are minimal permitted air emissions from the PDC waste treatment facility. Further, PDC states that monitoring of air emissions at the facility boundary showed no releases and that all of the results were less than Agency screening levels. *Id*., citing C7292.

In conclusion, PDC states that the County's denial was not based on competent evidence, but rather "the result of uninformed public comment, speculation and expressions of fear with no evidentiary basis." PDC Reply at 47.

Board Discussion of Criterion ii

In reviewing the evidence presented, the Board finds that the County's decision on criterion ii was not against the manifest weight of the evidence. "Determination of this question is purely a matter of assessing the credibility of expert witnesses." CDT Landfill, PCB 98-60, slip op. at 13, citing FACT, 555 N.E.2d at 1185. PDC provided the testimony of expert witnesses and states in its siting application that the design, location, and proposed operation will not jeopardize public health, safety, or welfare. The County argues that PDC has not met this burden through the testimony provided.

The Board does not agree with all of the County's conclusions regarding the design of the landfill. For example, the County's recommended finding that the "landfill may already be leaking into the aquifer" is speculation rather than fact. As noted by PDC, the Agency has concluded that the chloride found in the groundwater in monitoring wells close to the facility did not come from the facility. Further, the County states it is including Trench C-1 as a possible source of the increasing historical trends in chloride concentrations at downgradient monitoring well R138 because the County staff "has not had an opportunity to independently verify the change in sensitivity (i.e. liner leakage rates) analysis of the model set forth in PDC's Supplemental Report." C139578.

Nonetheless, the Opposition Groups did identify deficiencies in PDC's groundwater impact assessment. PDC's groundwater impact statement concluded that the landfill expansion will have no impact for 500 years. Norris, on behalf of the PFATW, did not present evidence of his own, rather he interpreted PDC's site data. C7622. Norris' interpretation was that the method PDC used to do groundwater impact modeling was flawed and the results inconsistent with site observations. C7609. Norris states that the model was never calibrated against site conditions and never verified with a new set of data. *Id*. Norris stresses that the landfill containment system will fail, but does not estimate how long that may take. C76109-7610.

Norris also identified flaws in the Hydraulic Evaluation of Landfill Performance (HELP) model conclusions made by Armstrong to analyze liner performance. C7625. Norris opined that Armstrong used the appropriate methods and protocols, but made significant errors in his calibration. For example, states Norris, the HELP modeling factored a climate representative of Chicago rather than Peoria, which was a less conservative assumption based on the purpose of Armstrong's calculations. C7626.

Therefore, the Board finds the County may have reasonably relied on the testimony of Norris in finding that PDC did not meet its burden of proof under the landfill design criterion. The Board finds the County's conclusion regarding criterion ii was not against the manifest weight of the evidence.

Criterion iii

PDC's Arguments

PDC challenges the County's finding that the proposed facility is not located so as to minimize incompatibility with the character of the surrounding area, and to minimize the effect on the value of surrounding property.

With respect to this criterion, PDC states that the opposition presented no witnesses to rebut the expert testimony offered by Gary DeClark, a licensed real estate appraiser, and Chris Lannert, a landscape architect and land use planner. PDC Br. at 111.

The County's Arguments

Under the compatibility criterion, contends the County, PDC "did not even attempt to propose any efforts or actions to minimize the impacts on nearby (within a few hundreds feet) surrounding neighborhoods." County Br. at 66. PDC proposes to locate a hazardous waste landfill, contends the County, within a few hundred feet of residential housing and directly over the drinking water aquifer that supplies drinking water to the majority of residents. *Id*. Some of the closest residences are within 300 feet of the landfill. *Id*. at 69. Based on these facts, the County found that the applicant failed to prove the proposed expansion is designed to minimize the incompatibility with the existing and surrounding land uses. *Id*. at 66.

The County notes that PDC described the landfill expansion as being a "dirt project" until it is finished and then covered. County Br. at 67, citing C7521. However, the County states that PDC did not even propose screening berms or vegetation to minimize conflicts with surrounding properties. *Id*. at 67-68, citing Waste Management, 463 N.E.2d 969 (affirming the Board's decision affirming the local siting authority's finding that a proposed expansion that would consist of a 30-acre mound 70 to 90 feet above grade where several homes within 500 feet of the site did not meet the compatibility component of criterion iii). For these reasons, argues the County, the County's determination on this criterion is consistent with the manifest weight of the evidence. County Br. at 70.

The Opposition Groups' Arguments

In response to PDC's contention that no witnesses were presented by opponents to rebut DeClark and Lannert's testimony, the Opposition Groups assert that cross-examinations were sufficient to rebut and raise doubt as to DeClark and Lannert's testimonies and reports. AC Br at 21, citing PDC Br. at 11. The Opposition Groups state that the County Board could have reasonably concluded that PDC and DeClark were only presenting half of the picture due to DeClark's failure to analyze 52 percent of the land to the west of the site. AC Br. at 22. Furthermore, the groups find DeClark's opinion that there is no impact on property values "defiant" considering that every real estate salesperson has a duty to disclose the existence of the landfill to their clients and customers. AC Br. at 22, citing C7530.

The Opposition Groups also note that Lannert essentially testified that since the landfill is already in existence, the surrounding uses must be compatible. AC Br. at 23. The Opposition Groups state, however, that the application must be treated as if proposing a new pollution control facility, and compatibility standards must be applied as if the facility is not yet in

existence. AC Br. at 23. The Opposition Groups claim that just because a landfill is already in existence does not automatically ensure that Criterion iii is satisfied. AC Br. at 23.

PDC's Reply

PDC disputes the County's assertion that proximity of residences to a hazardous waste landfill is inherently bad. PDC Reply at 47. PDC contends the facility will have fewer compatibility issues than a municipal solid waste landfill because the proposed expansion is small compared to municipal waste standards. The proposed expansion would be 8.2 acres and an additional 45 feet in height. *Id*. Disposal volumes as well, states PDC, are a fraction of what is received at a municipal waste landfill. PDC contends that the facility is well-screened and visible from only a few points in the offsite residential areas. *Id*. at 48. In fact, states PDC, residential development has grown toward the facility after the facility was already established. This, asserts PDC, supports a finding that the facility has not impaired residential development. *Id*. PDC adds that no witnesses testified to contradict PDC's testimony on this criterion.

Board Discussion of Criterion iii

This criterion requires the applicant to demonstrate more than minimal efforts to reduce the landfill's incompatibility. File v. D&L Landfill, 219 Ill. App. 3d 897, 907, 579 N.E.2d 1228, 1236 (5th Dist. 1991). The applicant must demonstrate that it has done or will do what is reasonably feasible to minimize any incompatibility. *Id*. "An applicant cannot establish compatibility based upon a pre-existing facility, and the compatibility of an expansion must be considered as a new and separate regional control facility." CDT Landfill, PCB 98-60, slip op. at 17, citing Waste Management, 463 N.E.2d at 979.

The Board finds the County's decision on this criterion was also not against the manifest weight of the evidence. The County has shown that PDC has not proposed even minimal efforts to reduce incompatibility with neighboring properties such as providing landscaping or screening berms.

In response, PDC does not dispute these facts, but rather attempts to argue that the landfill expansion will be relatively small in comparison to expansions of municipal solid waste landfills, and that incompatibility is subjective. PDC also contends that residential development has grown toward the existing facility. However, as held in CDT Landfill, an applicant cannot establish compatibility based upon a pre-existing facility. For these reasons, the Board finds the County's finding that PDC has not met its burden of proof under the compatibility criterion, criterion iii, was not against the manifest weight of the evidence.

Criterion v

Both PDC and the County adopt and incorporate by reference the facts and arguments set forth in PDC's Motion for Partial Summary Judgment (filed September 8, 2006) and the County's response (filed October 5, 2006), respectively. In PDC's motion, PDC claims that the alleged finding of the County, that PDC met siting criterion v only if certain special conditions were imposed, is against the manifest weight of the evidence and not supported by the evidence.

Mot. for PSJ at 2. PDC primarily disputed the condition to criterion v that imposed a $5 per ton perpetual care fund fee.

In a December 7, 2006 order, the Board noted that Section 40.1(a) of the Act does not contemplate conditions on a denial and, therefore, found that PDC's motion for partial summary judgment on a condition of a siting denial was not ripe for review.

As a result of the Board's findings above that the County's decision was in fact a denial, the Board will not consider the perpetual care fund condition. Rather, the Board will only consider the parties' arguments as to whether the County's decision that PDC did not meet criterion v was against the manifest weight of the evidence. The Board finds below that the County's decision was not.

PDC's Arguments

PDC challenges the County's decision to deny siting based on criterion v. Criterion v of Section 39.2(a) of the Act provides: "the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills or other operational accidents." 415 ILCS 5/39.2(a)(v) (2006).

PDC claims that the alleged finding of the County, that PDC has proven siting criterion v only if certain special conditions were imposed, is against the manifest weight of the evidence and not supported by the evidence. Mot. for PSJ at 2.

Regarding criterion v, PDC first states that PDC's evidence that criterion v is unconditionally satisfied was neither rebutted nor impeached. Mot. for PSJ at 2. In fact, states PDC, no evidence other than PDC's was offered as to this criterion. *Id*. at 3. PDC cites to the County's own April 6, 2006 summary of PDC's witnesses regarding criterion v:

> The testimony and documents submitted by Applicant [PDC] demonstrate that it is fully in compliance with its regulatory requirements for financial assurance for closure and post-closure care, and in fact has more funding in its trust than is presently required by the IEPA. Mot. for PSJ at 9-10, citing C13744.

PDC contends the County is required to accept unrebutted or uncontradicted expert testimony. Mot. for PSJ at 10, citing Industrial Fuels, 592 N.E.2d at 157; CDT Landfill, PCB 98-60, slip op. at 12-13. In Industrial Fuels, states PDC, the Illinois Appellate Court overturned the Board's decision upholding the denial of siting (on siting criterion ii) by a local siting authority, because the conclusions of the applicant's expert witnesses were never contradicted or rebutted.

PDC also cites to CDT Landfill for the principle that a local siting authority's decision contrary to unrebutted expert testimony on siting criterion v was against the manifest weight of the evidence:

> In the instant case, the evidence before the City was clear and unrebutted. CDT presented testimony from four qualified expert witnesses. Expert testimony was given that the proposed expansion meets the requirements of criterion (ii). Expert testimony was provided that the proposed expansion complies with the requirements of the Act and associated regulations. In its brief, the City identified a number of alleged flaws with the evidence provided by CDT, but offered no expert opinion that any particular design feature or operating procedure might increase the risk of harm to the public. *Id*. at 13.

PDC states that as in CDT Landfill, PDC's expert evidence was uncontradicted and unrebutted. Mot. for PSJ at 11-12.

The County's Arguments

The County contends that there were clearly issues of material fact as to whether PDC met criterion v. For example, states the County, the record shows that leachate removal from the manhole sumps was inadequate, there was a lack of monitoring of storm water discharges, and there was a lack of information or adequate planning for coordinating emergency response with local agencies responsible for emergency response activities for both the landfill and residential neighborhoods, some of which were within 300 feet of the landfill property. Resp. to Mot. for PSJ at 10. The County states that PDC does not contest these findings. *Id.* The County further asserts that the decision was certainly not against the manifest weight of the evidence. *Id*. at 11.

PDC's Reply

In reply, PDC states that the County "failed to cite a single piece of evidence contradicting PDC's proof on criterion v." PDC Reply to Mot. for PSJ at 4. PDC notes the County's own finding that "[t]here was no evidence presented which demonstrated Applicant's plans for fires, spills, or accidents were insufficient . . . ." *Id.*, citing C13744.

Board Discussion of Criterion v

Based on the testimony of Armstrong, there appears to be some doubt as to whether additional secondary containment is necessary for the primary leachate collection sumps. C7274. Armstrong testified that the Agency has permitted the manholes the way they currently exist, but that PDC will discuss the issue with Agency permit engineers while they are in the permit process. C7320; *see also* C7820. The groundwater system for the PDC landfill does not provide for monitoring wells downgradient of sediment basins for the management of non-contact storm water. C7462. Edwards, an expert on behalf of PDC, contends however that there are no requirements for groundwater monitoring of non-contact storm water. *Id*.

The Board finds that the County could have reasonably believed, based on the testimony presented at the local siting hearings, that PDC did not meet its burden on criterion v. The Board finds the County's decision regarding criterion v was not against the manifest weight of the evidence.

CONCLUSION

A review of the County's record of decision demonstrates that the County's May 3, 2006 vote to deny PDC's siting application was both timely and valid. The Board further finds that the procedures the County followed to address the merits of the application were fundamentally fair. Additionally, the Board finds that the County's determination that PDC failed to meet the requirements of criteria i, ii, iii, and v of Section 39.2 of the Act was not against the manifest weight of the evidence.

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

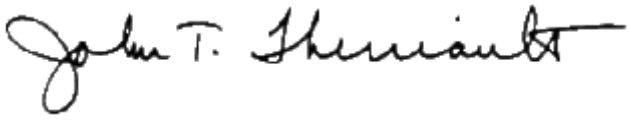
ORDER

The decision of the Peoria County Board denying PDC's application to expand an existing hazardous waste pollution control facility is affirmed for the reasons expressed in the Board's opinion.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 21, 2007, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board