BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB 07-113
THE CITY OF ROCHELLE, an Illinois municipal corporation, and THE ROCHELLE CITY COUNCIL,	)	(Third-Party Pollution Control Facility Siting Appeal)
	)	
Respondents.	)	

AMICUS BRIEF OF CONCERNED CITIZENS OF OGLE COUNTY

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NOW COMES Concerned Citizens of Ogle County, by and through its attorneys, David L. Wentworth II and Emily R. Vivian of Hasselberg, Williams, Grebe, Snodgrass & Birdsall, and as and for its Amicus Brief, respectfully states and submits as follows:

INTRODUCTION

On October 16, 2006, The City of Rochelle, by its City Manager, as Applicant (the "City" or the "Applicant"), filed an Application with The Rochelle City Council (the "City Council") for site location approval pursuant to § 39.2 of the Environmental Protection Act (the "Act") for a vertical and horizontal expansion of the City's existing municipal landfill located in Ogle County, Illinois (the "Application"). Concerned Citizens of Ogle County ("CCOC") participated actively as an objector in the local pollution control facility siting public hearings ("hearings"). As a participant in the local siting proceedings, CCOC believes that its views in the form of an Amicus Brief would be beneficial to the Illinois Pollution Control Board (the "Board").

On April 11, 2007, the City Council held a special meeting to consider the Application, and at that time, the City Council passed a resolution to approve the Application with thirty-seven (37) special conditions ("Special Conditions"). On April 20, 2007, the Operator filed a Motion for Reconsideration which requested reconsideration of the Special Conditions imposed by the City Council. Both the City and CCOC filed responses to said Motion. The City Council held a special meeting on May 8, 2007, to

consider the Operator's Motion for Reconsideration. At this meeting, the City Council affirmed thirty-six (36) of the thirty-seven (37) Special Conditions, and slightly amended one (1) of the Special Conditions (Condition No. 34).

Petitioner, Rochelle Waste Disposal, L.L.C. (the "Petitioner" or "Operator"), filed its Petition for Review on May 16, 2007, requesting the Board to refuse to affirm eight (8) of the Special Conditions, namely Nos. 8, 13, 22, 23, 26, 28, 33 and 34. Petitioner alleges that the eight (8) aforementioned conditions are not reasonable and necessary to accomplish the purposes of § 39.2 of the Act, are inconsistent with the Board's regulations, and would significantly alter the terms negotiated by the City and the Operator in the Restatement of the Host Agreement (Petitioner's Brief at 5). In addition, Petitioner claims that the Special Conditions would dramatically increase the costs of operation and unreasonably interfere with operation of the proposed expansion and the economic feasibility of the project (Petitioner's Brief at 5). Moreover, Petitioner claims that the Special Conditions are not supported by the record (Petitioner's Brief at 5-6). However, as discussed more fully throughout this Brief, all of the Special Conditions imposed by the City Council, including the eight (8) contested by Petitioner, should be upheld by this Board.

On November 30, 2007, Petitioner filed a Motion for Partial Summary Judgment. In its Motion for Partial Summary Judgment, Petitioner sought to have five (5) of the eight (8) Special Conditions struck down of as a matter of law. Petitioner alleged that Special Conditions 13, 22, 23, 33 and 34 were against the manifest weight of the evidence, were unsupported by any expert testimony and were arbitrarily imposed. On December 4, 2007, Petitioner filed an Amended Motion for Partial Summary Judgment, which sought only to *modify* Special Conditions 13, 23, 33 and 34, but still sought to strike Special Condition 22. For this Operator, with its operating history, to quibble about the nature and extent of admittedly necessary and reasonable conditions is remarkable. The City Manager's testimony during the hearing was a de facto invitation for the City Council to impose conditions. (C-21; Tr. 2/8/07, Alberts). As a result, Petitioner has waived the ability to now object to the imposed Special Conditions.

On December 7, 2007, the Board denied Petitioner's Amended Motion for Partial Summary Judgment as untimely unless the decision deadline was waived. CCOC has not been informed by the Applicant that such a decision waiver is forthcoming. Therefore, CCOC files its Amicus Brief without specifically addressing any motion for summary judgment.

ARGUMENT

I. All of the thirty-seven (37) Special Conditions imposed by the City Council are reasonable and necessary to accomplish the purposes of the Act and not inconsistent with Board regulations.

The decision of the City Council regarding the Applicant's compliance with the statutory siting criteria, including the imposition of any conditions, cannot be disturbed unless its decision is contrary to the manifest weight of the evidence. *See Land and Lakes v. PCB,* 319 Ill. App. 3d 41, 53, 743 N.E.2d 188, 197 (3d Dist. 2000). A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, plain, or indisputable. *Id.* at 53, 197; *Turlek v. PCB,* 274 Ill. App. 3d 244, 249, 653 N.E.2d 1288, 1292 (1st Dist. 1995). The City Council's decision cannot be set aside merely because the City Council could have drawn different inferences and conclusions from conflicting testimony or because this Board could have reached a different conclusion. *See File v. D & L Landfill,* PCB 90-94, slip op. at 2-3 (August 30, 1990). That a different conclusion may be reasonable is insufficient; the opposite conclusion must be clearly evident, plain or indisputable. *See Turlek,* 274 Ill. App. 3d at 249, 653 N.E.2d at 1292; *Concerned Adjoining Owners v. PCB,* 288 Ill. App. 3d 565, 576, 680 N.E.2d 810, 818 (5th Dist. 1991).

In reviewing the local siting authority's imposition of a special condition, the Board must determine whether the special condition to a site approval is reasonable and necessary to accomplish the purposes of the Act and not inconsistent with Board regulations. 415 ILCS 5/39.2(e). Moreover, it is for the local siting authority to determine the credibility of witnesses, to resolve conflicts in the evidence, and to weigh the evidence presented. *Concerned Adjoining Owners,* 288 Ill. App. 3d at 576, 680 N.E.2d at 818. The Board is not in a position to reweigh the evidence, but must determine if the decision is against the manifest weight of the evidence. *See Fairview Area Citizens Taskforce v. PCB,* 198 Ill. App. 3d 541, 555 N.E.2d 1178 (3d Dist. 1990). In this case, not only is there a genuine issue of material fact concerning each of the

eight (8) Special Conditions at issue, but there was also direct, conflicting testimony concerning each. The Board cannot re-examine the testimony from the hearings to determine which witnesses were most credible. Rather, it must solely determine whether the City's decision was against the manifest weight of the evidence. In order for Petitioner to succeed, the Board would have to reweigh the evidence, utilize its technical expertise, and thereby adopt a new standard of review, the very standard which was rejected by this Board in *Town & Country,* as affirmed by the Illinois Supreme Court. *See Town & Country Utilities, Inc. v. PCB,* 225 Ill. 2d 103, 866 N.E.2d 227 (2007).

Whether by oversight or deliberate omission, on page 3 of its Opening Brief, when setting forth the nine (9) siting criteria imposed in Section 39.2(a) of the Act, the Petitioner omitted the second sentence of criterion (ix). (Petitioner's Brief at 3). Petitioner's Brief states, "(ix) if the facility will be located within a regulated recharge area, any applicable requirements specified by the Board for such areas have been met." The second sentence of criterion (ix) states, "The county board or the governing body of the municipality may also consider as evidence the ***previous operating experience*** and ***past record of convictions*** or ***admissions of violations*** of the applicant (and any subsidiary or parent corporation) in the field of solid waste management when considering criteria (ii) and (v) under this Section." (415 ILCS 39.2(a)(ix)) (emphasis added). Criterion (ii) relates to the facility being designed, located and proposed to be operated such that the public health, safety and welfare will be protected, while criterion (v) relates to the plan of operations for the facility being designed to minimize the danger to the surrounding area from operational accidents. There was a plethora of fact and opinion witness testimony and documentary evidence presented at the hearings concerning the poor operating history of the Petitioner. Although the Operator fails to acknowledge that the City Council was allowed to consider such past operating history in analyzing criteria (ii) and (v), criterion (ix) expressly allows for such consideration.

Petitioner expressly acknowledges that Special Conditions 8, 13, 22, 23, 26 and 28 concern criterion (ii) (Petitioner's Brief at 7); therefore, the operating history of the Operator is pertinent when analyzing said conditions. In addition, Petitioner states that Special Conditions 33 and 34 are associated with criterion (vi), which concerns traffic patterns. Although Special Conditions 33 and 34 are associated

with criterion (vi), they are also associated with criteria (ii) and (v), especially where there was a train-transfer trailer crash on the road in question. (C-20; Tr. 1/26/07, CCOC Group Exhibit 2, p. 213-214). Just because a condition affects one (1) criterion does not mean that it cannot affect another criterion. In other words, the Special Conditions can be associated with more than one (1) criterion.

In preparing the Application and during the hearings, the Applicant and Operator attempted to conceal past violations of the Operator. Section 78-109(6)(l) of the City of Rochelle Siting Ordinance requires the Applicant to provide "documentation regarding the previous operating experience and past record of convictions or admissions of violations of the application at the Rochelle Landfill since 1995." To satisfy this requirement, Mr. Hilbert, the engineering manager for Winnebago Reclamation Service was asked to create a summary table of the violation notices and any other notice that the Operator had received from Ogle County. (C-21; Tr. 2/8/07, Hilbert, p. 28). Although the Operator disclosed a few of the violations it had received over the past several years in Table 10-1 of the Application, it failed to incorporate all of its violations in its summary table and failed to provide accurate descriptions of several of the disclosed violations. In fact, even after CCOC questioned the completeness and accuracy of Table 10-1, neither the Applicant nor the Operator created a full operating history. Rather, Steve Rypkema, Director of the Ogle County Solid Waste Management Department, on the last day of the continued hearing, submitted a complete operating history of Rochelle Municipal Landfill #2 ("RML"). By describing some violations and omitting others, the Operator and Applicant represented that what was provided in the table reflected the full extent of the violations. However, because such was not the case, the summary table was deceptive.

The Operator has received a plethora of violations, so many in fact that it did not want to disclose all of said violations in the Application. By omitting certain violations and relevant details associated with disclosed violations, the Operator provided a deceptive history, which indicates how RML was being run. The City Council was entirely justified in implementing the Special Conditions to ensure that the Operator complies with all rules and regulations and to help promote a more successful future operating history.

Although the City Council adopted the Special Conditions, said Conditions were initially drafted by Patrick Engineering, Inc. ("Patrick Engineering"), the City Council's retained consultants, and were approved by the Hearing Officer. In his recommendation, the Hearing Officer stated, in part:

"**IV. PREVIOUS OPERATING EVIDENCE**

> Section 39.2(a) of the Act provides, in part, that the governing body of the municipality may also consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent corporation) in the field of solid waste management when considering criteria (ii) and (v) under this Section. The siting ordinance contains similar language.
>
> The landfill facility is owned by the City of Rochelle and is operated by Rochelle Waste Disposal, L.L.C. Rochelle Waste Disposal has operated the existing landfill facility since July, 1995 through an operating agreement with the City of Rochelle.
>
> *There can be little doubt that the operator has had a less than ideal compliance history*. CCOC is correct when it takes the position that there have been a large number of violations at the site.
>
> At the public hearing, the operator called Mr. Thomas Hilbert to testify concerning the operating history of Rochelle Waste Disposal. Mr. Hilbert has been the engineering manager of Winnebago Reclamation Service for fourteen years and, in that capacity, has been responsible for the construction, permitting and compliance of the Rochelle Municipal Landfill. He holds a master's degree in environmental engineering from the University of Arizona and a bachelor's degree in geophysics from the University of Western Washington. He is a licensed landfill operator in the State of Illinois and holds a certification from the Solid Waste Association of North America as a manager of landfill operations. In his testimony, *Mr. Hilbert candidly conceded that the operator was not happy with its operating record* and had made some changes to make improvements in the future. These changes include recently hiring a new site manager to insure compliance.
>
> In its report to the Rochelle City Council, Patrick Engineering, Inc. has recommended a *substantial number of special conditions which will encourage compliance by the operator* and assist in minimizing the concerns of CCOC. ***I find all of the special conditions recommended by Patrick Engineering, Inc. to be reasonably necessary, supported by the record and necessitated by the previous operating experience***."

(C-243-44; Hearing Officer's Findings of Fact, Conclusions of Law and Recommendations) (emphasis added).

Although the Petitioner accuses the City Council of imposing the Special Conditions to "minimize the concerns" of CCOC (Petitioner's Brief at 5), the Petitioner fails to accept that the City Council imposed the Special Conditions to address the issues raised from conflicting testimony, some elicited on cross-examination, and by its previous operating history. Rather than addressing such issues during the hearings, Petitioner hid and waited until after the hearings had ended to dispute such issues. Although Petitioner had ample opportunity during the hearings, it chose to address such issues on two (2) different occasions after

the hearings, namely in its Motion for Reconsideration (C-1819-27), and its Operator's Response to Public Comments (C-1828-30).

During the hearings, Mr. Moose, one of the Applicant's experts, testified that a number of citations and violations issued to the Petitioner caused him concern. (C-20; Tr. 1/24/07, Moose, p. 234-250). In addition, Mr. Moose stated that if the facility is not built right, it will not protect the public health, safety and welfare. (C-20; Tr. 1/24/07, Moose, p. 218). More importantly, Mr. Moose testified that if the facility is not *operated* correctly, it may not be protective of the public health, safety and welfare. (C-20; Tr. 1/24/07, Moose, p. 218). Thus, even if the design is followed perfectly and the facility is built exactly as designed, poor operations could disrupt the protection of the public. In its Opening Brief, the Petitioner discusses at great length the facts and analyses found in the Application. However, neither the Application nor the Opening Brief addresses the poor operating history of the Petitioner. Rather, the Application assumes that the Petitioner will comply with all applicable rules and regulations. Therefore, the Petitioner's detailed discussion of the "exhaustive, comprehensive Application" in its Opening Brief is rendered meaningless if the poor operating history of the Petitioner continues into the future.

As discussed at the hearings, landfill operations at RML have been less than ideal. Surrounding citizens have legitimate concerns about the future of such operations, especially given the fact that the Operator managed to receive a violation notice for inadequate amounts of daily cover, refuse in standing water, and landscape waste within a load of waste *only a month before* the Application was filed. (C-21; Tr. 2/8/07, Hilbert, p. 66-67). Thus, even on the eve of filing the Application for an expansion of RML, the Operator did not think it necessary to ensure sufficient operations. Most landfill cases, including the instant case, have some public comment evidence about nuisance related issues, such as sights, smells and sounds, including uncovered waste, blowing waste and litter; this one, in addition, has actual volumes of violations and documented substandard past operating experience. (See e.g., C-20; Tr. 1/22/07, Lannert, p. 137-139; C-20; Tr. 1/23/07, Public Comment, p. 181-182, 184-185; and C-21; Tr. 2/8/07, Public Comment, p. 198-201).

Mr. Hilbert readily admitted that he is not pleased with the operating record of the past several years. Mr. Hilbert stated, "No, no, we're not happy with it. We've had some what I would call concerns over some of the operations there and we've actually made some changes to hopefully make some improvements – not hopefully – make improvements for the future." (C-21; Tr. 2/8/07, Hilbert, p. 106). One such change involved hiring a new site manager, who began the first of the year. (C-21; Tr. 2/8/07, Hilbert, p. 106-107). Mr. Hilbert testified that he was confident in the new site manager's ability to properly address and comply with applicable regulations. (C-21; Tr. 2/8/07, Hilbert, p. 164). However, since Mr. Hilbert began working for RML, in 1995, three (3) different site managers have been replaced, and Mr. Hilbert undoubtedly had confidence in each when he hired the replacements. (C-21; Tr. 2/8/07, Hilbert, p. 11; 148-149). In other words, merely replacing the site manager does not appear to improve the operations. Thus, even though Mr. Hilbert expressed that RML is undergoing improvements, there is no guarantee that such improvements will better the future operations of RML.

Furthermore, in his closing, Mr. Cooper, the Applicant's attorney, admitted, "It is clear that the operation needs to be improved over what has been in the past." (C-21; Tr. 2/8/07, Cooper, p. 272). Thus, there was more than one admission by the Applicant that the prior operating history of RML is less than adequate. Given such evidence surrounding the previous operating experience, past record of convictions and admissions of violations, the City Council was certainly justified in implementing the Special Conditions. The previous violations and poor past operating history established the need for the Special Conditions. As such, the Special Conditions were imposed by the City Council to help ensure proper operation of RML in the future. Without the thirty-seven conditions, the Operator will be allowed to jeopardize the public health, safety and welfare of the surrounding citizens.

In addition, the City Council drafted the Special Conditions with the support of qualified, experienced outside consultants. Patrick Engineering, as well as the Hearing Officer, recommended the imposition of the Special Conditions. Patrick Engineering has the technical expertise, while the Hearing Officer has years of experience in landfill siting procedures, to determine that the Special Conditions are reasonable and necessary to accomplish the purposes of the Act. Moreover, Patrick Engineering and the

Hearing Officer recommended the Special Conditions, knowing that any condition imposed had to be supported by the Record. All of the Special Conditions are supported by the Record given the poor operating record of the Operator.

II. The Record supports the imposition of all thirty-seven (37) Special Conditions, including the eight (8) attached by Petitioner.

Petitioner has requested that the Board delete Special Conditions 8, 13, 22, 23, 26, 28, 33 and 34. However, the Record supports the imposition of all eight (8) Special Conditions contested by the Petitioner. Each of the eight (8) Special Conditions will be discussed more fully below.

1. Special Condition 8:

> The Operator shall, at a minimum, inspect on a daily basis the public rights of way, and areas adjacent to these rights of way, from the landfill facility gate North on Mulford Road and along Route 38 West to the Interstate 39 interchange and Route 39 East through Creston to Woodlawn Road. Litter collection along these rights of way shall be performed at least once per week, and more often if the City Manager determines from review of evidence that the Operator is responsible for the litter.

Special Condition 8 requires the Operator, in part, to control litter along Route 38 east through Creston to Woodlawn Road. Petitioner alleges that "waste hauling cannot even occur along the expanded route required by Condition 8." (Petitioner's Brief at 16). However, Petitioner is incorrect. As explained by Petitioner in its Brief, Special Condition 35 mandates that "*transfer trailers* going to and from the facility shall be contractually obligated to do so utilizing Route 38 West of Mulford Road to the Interstate 39 interchange." (Petitioner's Brief at 16) (emphasis added). Thus, waste hauling by *transfer trailers* cannot occur along the "expanded route" expressed in Condition 8; however, Special Condition 35 does not prohibit waste hauling by packer trucks and roll-off container haulers along the "expanded route." Rather, waste hauling by *packer trucks* and *roll-off container haulers* is allowed along the "expanded route." That being said, litter may escape packer trucks and roll-off container haulers in route to RML. Because the Operator benefits from these packer trucks traveling along the "expanded route," it should be the responsibility of the Operator to ensure that the roads traveled upon by trucks frequenting its facility are kept clean and free of litter.

Although Mr. Moose testified that if the operating plan within the Application is followed, then it would be protective of the public health, safety and welfare, he also stated that "historical operating experience" should play a role. (C-20; Tr. 1/24/07, Moose, p. 223-224). Mr. Moose explained that the people governing the community and the people who drive by RML every day know better than he does whether litter is leaving the facility. He also testified, "No, it [litter] should not be leaving the site." (C-20; Tr. 1/24/07, Moose, p. 224). In addition, Mr. Moose stated, "[Y]ou don't have to be an engineer to see the litter. So that's an issue that's easily [monitorable] by the City Council, by the constituents and certainly the County." (C-20; Tr. 1/25/07, Moose, p. 50-51). The City Council took Mr. Moose's advice and established a plan to monitor litter control by imposing certain conditions, such as Special Condition 8.

Contrary to the Petitioner's position that the Record contains no evidentiary support for the litter control requirements imposed by Special Condition 8 (Petitioner's Brief at 17), Mr. Moose testified during the hearings that the Operator should be responsible for litter collection. "On a well-run landfill that garbage should be contained to the landfill site and should not go off property. It does happen occasionally. If it does it should immediately be picked up which means *they should deploy their own litter pickers* that day and if it's overwhelming for them *they're going to have to call in some temporary work force and get it taken care of quickly*." (C-20; Tr. 1/25/07, Moose, p. 75) (emphasis added). Thus, Mr. Moose, Petitioner's own expert, *suggested* that a condition similar to Special Condition 8 be implemented. Thus, the Record contains sufficient information to support the imposition of Special Condition 8, and it should, therefore, be upheld.

2. Special Condition 13:

> The Operator shall complete the exhumation and redisposal of waste from Unit 1 as soon as practicable, but in no event later than six (6) years from the date an IEPA permit is issued for the expansion, except as otherwise provided by the City Council for good cause shown. The waste exhumation and redisposal shall be restricted to the months of November, December, January, February and March unless it is demonstrated to the City Council that the process can occur in other months without off-site odor migration or other impacts associated with the process.

As acknowledged by the Petitioner, Shaw Environmental, the engineering firm that designed the expansion of RML, anticipated that the relocation of Unit 1 could be accomplished over a five to ten (5-10)

year period. (See Petitioner's Brief at 19; and C-1; Application, Section 2.6, 2.6-24). In addition, Mr. Moose testified, "We want to get that waste out of that unlined area ***as soon as possible***." (C-20; Tr. 1/24/07, p. 177) (emphasis added). Given the prior operating history of the Operator, the City Council implemented a Special Condition requiring the Operator to complete the exhumation and redisposal of waste from Unit 1 "as soon as practicable, but in no event later than six (6) years . . ." (Special Condition 13). Six years is within the estimated time period suggested by Shaw Environmental, which, as aforementioned, was five to ten (5-10) years. Thus, it would have been entirely reasonable for the City Council to require the Operator to have Unit 1 exhumed within six (6) years. However, the City Council did not impose such a stringent requirement.

Special Condition 13 allows the Operator to request extra time from the City Council to exhume the waste in Unit 1 if *good cause* is shown. Therefore, the Operator is granted an alternative course of action if it is impracticable to have Unit 1 exhumed within six (6) years: the Operator need only seek additional time from the City Council. The mere fact that the Petitioner is prematurely attempting to have Special Condition 13 deleted tends to support the imposition of the same. The Petitioner is trying to avoid having to abide by the guidelines established by the City Council, without even first *attempting* to abide by such guidelines. Until the Operator begins the exhumation process, Petitioner will not know how long it will take, and thus, cannot argue that six (6) years is not "commercially reasonable." As Mr. Moose testified, "We don't know how much is in there (Unit 1), we don't have exact records." (C-20; Tr. 1/24/07, Moose, p. 176). Because there are no records indicating how much waste currently occupies Unit 1, the Operator should not be prematurely excused from complying with the City Council's flexible deadline. Once the exhumation process begins, the Operator will know precisely how much waste occupies Unit 1. If there is less waste than anticipated, the Petitioner should have no problem meeting the six (6) year deadline. However, if there is more waste than anticipated, the Petitioner can seek additional time from the City Council by proving "good cause." If no good cause exists, then Petitioner should be obligated to meet the deadline initially established by the City Council.

Furthermore, Petitioner attempts to evade the timeline established by Special Condition 13 by stating that the Host Agreement provides that the "timing, sequence, and manner of exhumation will be determined by the IEPA." Clearly, if the IEPA determines that six (6) years is not a sufficient amount of time in which to complete the exhumation, or if it determines additional safeguards are required which will slow down the exhumation, such a finding is de facto "good cause," and the Operator will be granted additional time in which to exhume Unit 1. In other words, Special Condition 13 has a built-in provision that satisfies the Host Agreement.

By the Applicant's own admission, Unit 1 must be exhumed because it poses a potential threat to the public health, safety and welfare. (C-21; Tr. 2/8/07, Cooper, p. 220-21) ("I suggest to you that there are very, very good reasons to think that siting this expansion will enhance the public health, safety and welfare, primarily because it provides the opportunity to exhume what I think evidence shows overall is really the most serious potential threat to public health, safety and welfare, mainly the unlined Unit 1. I think you all could determine from the testimony that if Unit 1 is going to be exhumed and placed in a lined landfill then that threat is going to be thereby averted."). Petitioner self-imposed the condition requiring Unit 1 to be exhumed if the siting for the expansion were approved. Because the present condition of Unit 1 does indeed pose a threat to the public health, safety and welfare, the City Council has a big role in making sure the exhumation gets done as quickly as possible.

Mr. Moose's statement that the full exhumation process could take "on the order of about ten years to achieve that," is entirely consistent with Special Condition 13. Although Special Condition 13 requires the Operator to complete the exhumation of Unit 1 within six (6) years, it also allows for an option to extend for good cause shown. Thus, if good cause is shown, the Operator may be able to extend the exhumation process for ten (10) years. Because there is no way to predict with complete certainty how long the exhumation process will take, Special Condition 13 adequately sets a deadline and provides for extensions if the deadline is found to be commercially impracticable. The Operator should not be excused from meeting the initial deadline before an impracticability of meeting such deadline has been adequately shown. Once again, the Operator is attempting to avoid following established guidelines. Given its past

operating history, and the conflicting testimony of the same witness, Special Condition 13 should be upheld.

3. Special Conditions 22 and 23:

Condition 22 states:

> The plan of operations shall include the construction of operational screening berms of between six (6) and eight (8) feet in height along the Southern edge and partially along the East and West edges of operating cells to help to block the operations from view from Creston Road as well as help contain litter and reduce noise impacts. The Operator shall propose, and the City Manager shall consider for approval, the placement and limits of the operational berms prior to each cell's development. Final approval must be obtained prior to new cell construction. The City Manager shall consider the height of the active face, the distance from the site boundary, and the presence of other visual barriers (such as Unit 2) and the effectiveness of other litter and noise control strategies (such as littler fences and permanent perimeter berms) in making its determination.

Condition 23 states:

> Perimeter berms shall be built in advance of the cells in order to screen operations to a reasonable extent. It is recommended to require the berms to be built at least 500 feet in advance of the Easternmost edge of the cell being constructed. By way of example, prior to completion of Cell 3's liner, the southern berm along Creston Road shall be constructed from E 4,200 to E 6,500, which extends approximately 600 feet East of the cell. The vegetation shall be established (with at least a one-year growing period) prior to waste being placed within 400 feet of a cell with active waste placement. The berm shall be at least 14 feet in height, placed between the waste footprint and Creston Road, and located between E 4,500 and E 7,500.

For the Operator, used to only having a three (3) foot wire fence, any berm must seem as large. For the surrounding residents of the facility, having a fourteen (14) foot berm with this Operator's track record must seem small. Conflicting testimony, coupled with past operating history, dictates the City Council must be upheld.

The Application states that the landscape plan is "based on the objectives of providing an attractive visual buffer along the Facility perimeter and at the entrance." (C-1; Application, Section 3.1, p. 8). Such landscape plan calls for a ten (10) to twelve (12) foot screening berm to be planted adjacent to Creston Road with a variety of plant material, including masses of conifer trees, canopy trees and ornamental trees. (C-1; Application, Section 3.1, p. 8). The plantings will be installed to provide "immediate impact and mature over time," with the conifers reaching a height of thirty-five (35) feet to fifty (50) feet and the

ornamental trees reaching a height of fifteen (15) to twenty-five (25) feet upon maturity. (C-1; Application, Section 3.1, p. 8). In addition, Mr. Lannert, the Applicant's expert, testified that the berm that is proposed along the southern edge of the facility along Creston Road would be a *minimum* of eight (8) feet and in some cases ten (10) feet. (C-20; Tr. 1/22/07, Lannert, p. 106-107).

The Petitioner contends that Special Conditions 22 and 23 are "financially and technically impracticable and infeasible." (Petitioner's Brief at 24). In its brief, Petitioner alleges that the City Council imposed Special Conditions 22 and 23 for purely punitive reasons, based on the Operator's "past operational shortcomings." (Petitioner's Brief at 27). However, again the Petitioner fails to acknowledge that the City Council may take into account the *previous operating experience* and *past record of convictions* or *admissions of violations* of the applicant when considering criteria (ii) and (v) under § 39.2(a) of the Act. Over the past seven (7) years, the Petitioner has received numerous Violation Notices, Administration Citations, and Pending Violations Letters for failing to maintain adequate daily cover. Such inadequate daily cover fails to protect the public's welfare as it subjects the surrounding property to exposed litter. Therefore, contrary to Petitioner's assertion, the additional berm requirements would offer an "additional benefit to the public health, safety and welfare," and the imposition of a fourteen (14) foot berm is necessary to protect the public health, safety and welfare.

In addition, the Operator argues that Special Condition 22 is "unnecessarily duplicative and redundant" in light of Special Condition 23. However, Special Condition 22 concerns operational screening berms around each *cell*, while Special Condition 23 requires a permanent perimeter berm around the *entire footprint*. Therefore, Special Conditions 22 and 22 are necessary, separate, and distinct, albeit complementary of each other.

Petitioner objects to the fourteen (14) foot berm, in part because the Administrative Code only requires a barrier of eight (8) feet. However, as cited by Petitioner, the law requires a barrier "*no less than* 8 feet in height." (35 Ill. Adm. Code 811.302(c)). In other words, the minimum is eight (8) feet, and even an Operator who has a flawless operating record and who provides adequate daily cover on a regular basis must construct an eight (8) foot berm. On the other hand, an Operator with a substantially inadequate

operating record should be required to provide a greater screen from its operations as its operations are less protective of the public health, safety and welfare.

Furthermore, the fourteen (14) foot berm is only required to be built around *part* of the site. Specifically, the fourteen (14) foot berm is only required to be placed between the waste footprint and Creston Road. Thus, a fourteen (14) foot berm must only be constructed along the southern boundary of the waste footprint.

The Application does not anticipate any plantings or screening on the east end of the landfill. Although a current berm covers a portion of the eastern boundary, there is no requirement to maintain or increase the height of such berm. (C-20; Tr. 1/22/07, Lannert, p. 111-114). During the hearing, the Village of Creston, as a party, raised concerns relating to the screening of the landfill from a new subdivision in the Village of Creston. (C-20; Tr. 1/22/07, Lannert, p. 170). Said subdivision is located at a high point in the area, and the present berm does not extend to completely buffer the addition of the new property. (C-20; Tr. 1/22/07, Lannert, p. 170-171). In addition, said berm is out of the control of both the Applicant and the Petitioner. (C-20; Tr. 1/22/07, Lannert, p. 171-172). Thus, the new subdivision may be exposed to the open face of the landfill.

Contrary to the Operator's belief, the existing physical site conditions necessarily *require* the imposition of such a perimeter berm. Given the extensive testimony and information in the Application about the need for buffers, the Operator cannot possibly be complaining that the site does not need a perimeter berm, rather, the Operator is complaining about the size and time required to build to such berm. The landfill is going to increase in height by seventy (70) feet. (Tr. 1/22/07, Lannert, p. 109). Thus, a fourteen (14) foot perimeter berm is anything but impracticable, and there is no evidence that a fourteen (14) foot perimeter berm is either technically or financially impracticable. *See Waste Mgmt. of Ill., Inc. v. Will County Bd.,* PCB 99-141 (Sept. 9, 1999) (holding that the Board is required to decide a siting appeal based solely on the record before the local siting authority).

4. Special Condition 26:

> The City Manager, and its legal and technical consultants, shall have the right to be involved in the permitting for the horizontal and vertical expansion of the Rochelle Municipal Landfill. As part of this involvement, the City Manager and its consultants may attend meetings between the Operator and its consultants and the IEPA. The City Manager and its consultants may also review and comment on the Operator's applications (provided such technical review and comment is conducted within 30 days of receipt of the information) prior to the Operator's submission of the applications to the IEPA. The technical review comments shall be incorporated into the applications or addressed to the satisfaction of the City Manager. The Operator agrees to reimburse the City for reasonable costs of its consultants to review and comment on the Operator's applications and submissions.

Given the prior operating record of the Petitioner, Special Condition 26 is necessary to protect the public's health, safety and welfare, and it is also necessary to ensure that the Operator performs in a satisfactory manner. By requiring the Operator to reimburse the City for the reasonable costs of its consultants to review and comment on any applications and submissions, Special Condition 26 provides an incentive for the Operator to comply with any and all rules and regulations. The more complete and thorough the Operator's applications and submissions, the less time and money the City will have to spend reviewing and evaluating such documents.

Again, the imposition of Special Condition 26 is necessary in light of the Operator's poor operating history. If the Operator had a clean, or even decent, operating record, it may be less necessary for the City Manager to be as actively involved in any permitting procedures. It is because of the poor operating history that the City Council determined that the City Manager must be actively involved in the Operator's permitting procedures. Therefore, Special Condition 26 is not "manifestly unfair." Rather, it would be manifestly unfair to require the City to expend its time resources at the City's expense because of the Operator's poor operating history.

Moreover, it is appropriate for the siting body to impose technical conditions related to reporting, sampling, monitoring, and the like and such technical conditions can be used by a community as a means to continue to play a role in facility development after the siting process has concluded. *See Tate v. PCB,* 188 Ill. App. 3d 994, 544 N.E.2d 1176 (4th Dist. 1989); *Lake County v. PCB,* 120 Ill. App. 3d 89, 457 N.E.2d

1309 (2d Dist. 1983). Therefore, regardless of the Operator's history, the City Council had the authority to impose Special Condition 26.

Although the costs imposed by Special Condition 26 were not specifically provided for in the Host Agreement, the Host Agreement was executed prior to the hearings. In other words, the poor operating history of the Operator was not fully exposed until after the Host Agreement was executed. It is inconceivable that the City Council should be prevented from imposing additional costs upon the Operator that were not specifically included as part of the Host Agreement when the Operator deliberately concealed the facts that necessitated the imposition of such costs. Due to the extensive evidence regarding the prior operating record of the Operator, the City Council was well justified in implementing Special Condition 26.

5. Special Condition 28:

> The Operator shall submit the groundwater impact assessment (GIA) planned to be submitted to the IEPA as a permit application to the City Manager for review. The City Manager and its consultants may provide the Operator comments (within 30 days of receipt of the information) that must be incorporated or addressed prior to submitting the GIA to the IEPA as a permit application.

Once again, Special Condition 28 was created, in part, based on the Operator's poor operating history. The extent of the Operator's poor operating history was not exposed until the hearings, which was after the Host Agreement had been executed. With such a poor prior operating record, the City Council found it necessary to employ additional oversight.

Contrary to the Petitioner's position, Special Condition 28 does not abate the cooperative relationship described in the Host Agreement. If anything, Special Condition 28 enhances the cooperative relationship by providing the Operator and the City Manager with the opportunity to work together. In other words, the City Manager is relegated the task of assisting the Operator in preparing its GIA.

Special Condition 28 directly affects the public health, safety and welfare by requiring additional assurance that the groundwater impact assessment is satisfactory. *See Tate,* 188 Ill. App. 3d 994, 544 N.E.2d 1176; *Lake County,* 120 Ill. App. 3d 89, 457 N.E.2d 1309.

6. Special Conditions 33 and 34:

Special Condition 33 states:

> The following roadway improvement shall be made to Mulford Road, at the expense of the Operator, prior to acceptance of waste within the expanded facility waste footprint: - The reconstruction of Mulford Road between Route 38 and the existing landfill entrance shall be designed to a rural standard with a dust free, all weather surface, provide a design weight limit of 80,000 pounds and shall be at least two lanes wide.

Special Condition 34 states:

> The improvement to Mulford Road as described in special condition 33 above shall be completed from the existing landfill entrance to Creston Road no later than the date on which the proposed new entrance for the expansion is built and completed as required in Special Condition 16. The Operator shall pay all costs of said improvements to the new landfill entrance, and a portion of the cost of the improvements from the new landfill entrance to Creston Road proportionate to the anticipated traffic attributable to the expanded facility, as determined by a traffic study.

Special Condition 33 and 34 relate to both criteria (ii) and (vi). Petitioner acknowledges that Special Conditions 33 and 34 relate to criterion (vi) (Petitioner's Brief at 7), but they also relate to criteria (ii) and (v) as the road improvements were imposed, in part, to minimize traffic backing up along the railroad tracks, which concerns the public safety. (C-20; Tr. 1/23/07, Werthmann, p. 91-93). Thus, Petitioner's operating history may also be considered in analyzing Special Conditions 33 and 34.

Although the Petitioner acknowledges that the road improvements noted in Special Conditions 33 and 34 are necessary, the Petitioner challenges the City Council's decision to hold the Petitioner accountable for the costs associated with such road improvements. However, the road improvements to Mulford Road would not have to be made *but for* the expansion of the landfill. The existing Mulford Road is not designed to handle the volume of heavy transfer trailers that will be traversing the road due to the expansion. If the use of Mulford Road was limited to packer trucks, the road improvements may not have been necessary. Thus, because the road improvements are required because of the presence of transfer trailers, which are present *solely* at the request of the Operator, it is only fair and reasonable that the Operator bear the cost of such improvements.

In addition, Petitioner objects to Special Condition 34, in part, because "transfer trucks" cannot use the stretch of road from Mulford Road southbound to Creston Road. However, once again, Petitioner fails to acknowledge that packer trucks can and will use such route. Mr. Curtis Cook, P.E., the Ogle County Engineer, opined that Creston Road should be improved to an 80,000-pound road. Thus, it is reasonable for the Operator to pay the cost of improving a road which is mainly used by traffic going to or coming from its landfill.

Moreover, Special Condition 34 only requires the Petitioner to *pay that portion* of the cost of improvements from the new landfill entrance to Creston Road that is proportionate to the anticipated traffic attributable to the expanded facility. Thus, the Petitioner will not be responsible for paying the costs of improvement to the road attributable to traffic benefiting "warehouse and industrial sites." By seeking to eliminate Special Condition 34, the Petitioner is attempting to avoid costs for which it is directly responsible.

CONCLUSION

Although the Petitioner contends (without citation to any fact in the Record) that the City Council implemented the Special Conditions as a way to "punish the Operator for perceived shortcomings in the past," in truth, the City Council imposed the Special Conditions to ensure that the Operator's future operating history does not comport to its past operating history. As the eight (8) the Special Conditions contested by Petitioner relate to criterion (ii), they are reasonable and necessitated by the previous operating history of the Operator. In addition, the eight (8) Special Conditions contested by Petitioner are supported by the Record, independently, and in light of the operating history of the Operator.

WHEREFORE, CONCERNED CITIZENS OF OGLE COUNTY, respectfully pray that the Illinois Pollution Control Board deny all of Petitioner's requests for relief, affirm the decision of The Rochelle City Council imposing the thirty-seven (37) Special Conditions, and for such other and further relief as is just and proper.

Concerned Citizens of Ogle County

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STATE OF ILLINOIS)
) SS
COUNTY OF PEORIA)

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the Amicus Brief was served upon the following persons via email on the 10th day of December, 2007, before 5:00 pm, addressed as follows:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB 07-113
THE CITY OF ROCHELLE, an Illinois municipal corporation, and THE ROCHELLE CITY COUNCIL,	)	(Third-Party Pollution Control Facility Siting Appeal)
	)	
	)	
Respondents.	)	

NOTICE OF FILING

The undersigned hereby certifies that the Amicus Brief of Concerned Citizens of Ogle County was filed with the Illinois Pollution Control Board via electronic filing as authorized by the Clerk of the Illinois Pollution Control Board, on the 10th day of December, 2007.

Concerned Citizens of Ogle County

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