BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Pollution Control Board

COUNTY OF KANKAKEE, ILLINOIS, and ED SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, Petitioner, v. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	No.: PCB 03-31 (Third-Party Pollution Control Facility Siting Appeal)
BYRON SANDBERG, Petitioner, v. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	No.: PCB 03-33 (Third-Party Pollution Control Facility Siting Appeal)
WASTE MANAGEMENT OF ILLINOIS, INC., Petitioners, v. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN AND COUNTRY UTILITIES, INC. and KANKAKEE REGIONAL LANDFILL, L.L.C. Respondents.	No. PCB 03-35 (Third-Party Pollution Control Facility Siting Appeal)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on November 27, 2002, we filed with the Illinois Pollution Control Board, the attached Waste Management of Illinois, Inc.'s **BRIEF IN SUPPORT OF PETITIONER WASTE MANAGEMENT OF ILLINOIS, INC.'S THIRD PARTY APPEAL** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
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PROOF OF SERVICE

Victoria L. Kennedy, a non-attorney, on oath states that she served the foregoing Waste Management of Illinois, Inc.'s Disclosure of Witnesses on the following parties by hand delivery to Ms. Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board and Brad Halloran at the addresses indicated below, by U. S. Express Mail delivery to Mr. Byron Sandberg and by Federal Express delivery to all other parties at their addresses indicated below on this 26th day of November, 2002:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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BRIEF IN SUPPORT OF PETITIONER
WASTE MANAGEMENT OF ILLINOIS, INC.'S THIRD PARTY APPEAL

Petitioner WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII"), by and through its attorneys Pedersen & Houpt, hereby submits this brief in support of its third party appeal of the August 19, 2002 decision ("Decision") of the City of Kankakee, Illinois City Council ("City") granting the application of Town & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. ("T&C") for siting approval of a new pollution control facility.

PROCEDURAL HISTORY

On March 13, 2002, T&C filed an application for local siting approval with the City pursuant to Section 39.2 of the Illinois Environmental Protection Act ("Act") for a new 400-acre sanitary landfill located in Otto Township at the southernmost limit of the City of Kankakee ("Siting Application"). A public hearing on the Siting Application was conducted over 11 days from June 17 to June 28, 2002. T&C presented six witnesses who testified in support of the Siting Application. Ten witnesses testified in opposition. In addition, numerous persons presented public comment opposing the proposed facility. The record was closed as of July 29, 2002.[1] On August 19, 2002, the City rendered its decision granting T&C local siting approval.

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[1] The transcripts of the June 2002 public hearing will be cited as "6/__/02 Tr. at __".

WMII filed its petition for a review of the Decision with the Illinois Pollution Control Board ("Board") on September 23, 2002 in accordance with Section 40.1(b) of the Act. On October 3, 2002, the Board consolidated WMII's petition for review with the separate petitions filed by Byron Sandberg ("Sandberg") and by the County of Kankakee and Edward D. Smith, State's Attorney of Kankakee County ("County").

WMII brings this petition for review of the City's Decision on two grounds. First, the procedures used by the City in the siting process were fundamentally unfair. Second, the City's findings that T&C satisfied Criterion Two and Criterion Eight of Section 39.2 of the Act were against the manifest weight of the evidence.

The Board conducted a public hearing on the petitions for review on November 4 and 6, 2002.[2] The members of the public who testified at the review hearing were Mr. Darrell Bruck Jr., Ms. Pam Grosso, Ms. Barbara Miller, Mrs. Betty Elliott, Mr. Keith Elliott, Mr. Keith Runyon, Mr. Ronald Thompsen, Ms. Doris O'Connor, Ms. Patricia O'Dell, Ms. Cheryl Blume and Mr. Charles Murray. Other witnesses who provided sworn testimony were Mr. Leonard Martin and Mr. Karl Kruse, members of the Kankakee County Board, Mr. Christopher Bohlen, corporation counsel for the City of Kankakee and the Hearing Officer for the June 2002 public hearing, Mr. Donald Green, Mayor of Kankakee, Anjanita Dumas, Kankakee City Clerk, Ms.

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[2] The transcripts of the Board's review hearing will be cited as "IPCB 11/4/02 Tr. at __" and "IPCB 11/6/02 Tr. at __".

Patricia Vonperbandt, George Mueller's secretary, Mr. Tom Volini, and Mr. Al Patrick Power, assistant attorney for the City of Kankakee.

STATEMENT OF FACTS

I. Facts Relevant To Fundamental Fairness Review

A. Prejudgment of the Merits of T&C's Siting Application

On February 19, 2002, the City held a pre-filing meeting wherein T&C presented and the City reviewed the substantive merits of the Siting Application.[3] City Council Mtg. 2/19/02, Tr. at 5-27; IPCB 11/4/02 Tr. at 272-275, 294, 296-297; IPCB 11/6/02 Tr. at 175-180. The February 19 meeting was a regularly scheduled City Council meeting at which the public was not allowed to speak. City Council Mtg. 2/19/02 Tr. at 5; IPCB 11/6/02 Tr. at 176. However, as a "special indulgence" to T&C, the City allowed T&C to make its "special presentation" concerning whether the Siting Application satisfied the nine criteria of Section 39.2 of the Act. City Council Mtg. 2/19/02 Tr. at 5, 7; IPCB 11/6/02 Tr. at 176, 180. The City gave T&C special indulgence because it perceived that the proposed landfill would correct the City's financial dilemma. IPCB 11/6/02 Tr. at 180.

During the meeting, T&C presented several experts, including Mr. Devin Moose and Ms. Jaymie Simmon, who provided information on the Siting Application and the siting process.

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[3] The transcripts of the February 19, 2002 City Council meeting will be cited as "City Council Mtg. 2/19/02 Tr. at __".

City Council Mtg. 2/19/02 Tr. at 5-8; IPCB 11/4/02 Tr. at 272-275; IPCB 11/6/02 Tr. at 180, 182. Mr. Moose gave expert opinion discussing each of the nine statutory criteria and detailing how T&C believed its proposal satisfied those criteria. City Council Mtg. 2/19/02 Tr. at 11-14; IPCB 11/4/02 Tr. at 273-275, 294. Ms. Simmon, who was introduced as an expert on how the organized environmental community involves itself in the hearing process, warned the City to expect that representatives of the organized environmental community would be present at the public hearing simply because "that's their job is [sic] to go around and oppose landfills wherever they are proposed" and that they cannot be trusted to tell the truth. City Council Mtg. 2/19/02 Tr. at 15; IPCB 11/4/02 Tr. at 288, 290-291; IPCB 11/6/02 Tr. at 198-199. Ms. Simmon further warned that the environmentalist's goal is to make the hearing an "emotional" issue and "create controversy and cause confusion." City Council Mtg. 2/19/02 Tr. at 15; IPCB 11/4/02 Tr. at 288-291.

In addition to listening to and questioning T&C's experts, the City was also provided with documentary evidence to review. IPCB 11/4/02 Tr. at 297. T&C's principal, Mr. Tom Volini, presented the packet of documents and described each item. The evidence included (City Council Mtg. 2/19/02 Tr. at 15-18):

- Meeting agenda
- Notice of Intent to File Siting Application
- List of nine statutory criteria
- Section 39 of the Act
- Aerial photograph identifying:
    - Facility boundary
    - Identification of landfill footprint

- Storm water management facilities including swales, letdown structures and ponds
- Location of scale houses, truck parking area and citizen drop-off area
- Alternate traffic patterns

- Landfill cross sections
- Operational screening diagram
- Property value protection program
- Schedule for landfill siting and development

The T&C presentation provided design information and methodologies for (City Council Mtg. 2/19/02 Tr. at 11-15):

- Need (Criterion 1)
- Location, Design and Operation (Criterion 2)
- Incompatibility and Surrounding Property Value (Criterion 3)
- Flood Plain (Criterion 4)
- Plan of Operation (Criterion 5)
- Traffic (Criterion 6)
- Hazardous Waste (Criterion 7)
- Plan Consistency (Criterion 8)
- Regulated Recharge Area (Criterion 9)

Neither the public, interested citizens, the County of Kankakee, nor any of their respective legal representatives, were given notice or permitted to attend and participate in the February 19 meeting. None of the expert opinions were subjected to public comment, cross-examination or scrutiny. In fact, Mr. Volini explained to the City that the purpose for the closed-door meeting was so that T&C could discuss "the concepts we've proved and environmental protection we've achieved" "without the filter of lawyers, without the rancor and back and forth that, unfortunately, the lawyers bring to the process." City Council Mtg. 2/19/02 Tr. at 7; IPCB 11/4/02 Tr. at 282, 296.

At no time after the February 19 meeting was the City instructed to disregard T&C's Section 39.2 presentation. IPCB 11/6/02 Tr. at 191-192. In fact, Mr. Christopher Bohlen, the City's corporation counsel and the Hearing Officer for the June 2002 hearing, thought that it was appropriate that T&C was attempting to present to the City what it hoped to prove at the hearing. IPCB 11/4/02 Tr. at 301. Mayor Donald Green, who participated in the February 19 meeting, actually advocated for the proposed landfill that night. IPCB 11/6/02 Tr. at 193.

B. Denial of Public Access to Attend and Participate in Public Hearing

The public hearing on T&C's Siting Application commenced on June 17, 2002 at City Hall. Prior to the hearing, the City knew that there was a substantial public interest in the siting hearing and expected a large public turnout. IPCB 11/4/02 Tr. at 319-321, 357-359. In fact, days before the hearing began, Ms. Doris O'Connor, as a concerned citizen, personally contacted Mr. Bohlen to inquire if the City had arranged for adequate acoustics and seating for the elderly. IPCB 11/4/02 Tr. at 320, 357-359. Even though it anticipated substantial public participation, the City failed to provide adequate accommodations on the first night of the hearing to allow all interested persons to attend and participate in the hearing. IPCB 11/4/02 Tr. at 319-321, 335.

Over an hour before the hearing began, every seat in the City Hall Chambers, the hearing room selected by the City, had been filled. IPCB 11/4/02 Tr. at 60, 62-63, 65, 122-123, 143. On the orders of Mr. Bohlen, in his capacity as the Hearing Officer, armed and uniformed police officers stood at the entrance of the hearing room and barred the public's access. IPCB 11/4/02 Tr. at 65-66, 102-103, 156-157, 170-172, 180-186, 324, 361-364; IPCB 11/6/02 Tr. at 48-50,

112. Although the City has allowed people to stand at the back of the City Hall Chambers during other public hearings, Mr. Bohlen refused to permit standing room on this occasion and ordered the police officers to direct anyone standing to leave the room at the start of the hearing. IPCB 11/4/02 Tr. at 143-147, 156-160; IPCB 11/6/02 Tr. at 41-44, 112, 211-213.

As a result, crowds of people were squeezed together starting from the first floor of the City Hall building and continuing up two flights of stairs to the second floor hallway outside of the hearing room. IPCB 11/4/02 Tr. at 60-64, 101-102, 123-125, 147, 158-159, 171, 179-183, 360-363; IPCB 11/6/02 Tr. at 39-41. Although the crowd outside the hearing room was not disruptive or unruly, on several occasions the police officers threatened to clear the hallway unless those outside the hearing room remained quiet. IPCB 11/4/02 Tr. at 69, 72, 103, 106, 128-134, 161; IPCB 11/6/02 Tr. at 58, 315-317.

Over the course of that evening, between 50 and 125 people were not permitted into the hearing room and were forced to remain standing in the hot and crowded hallway and stairways of the first and second floors of City Hall. IPCB 11/4/02 Tr. at 64, 78-79, 102, 105-106, 117, 127, 179-183, 322-323; IPCB 11/6/02 Tr. at 41. Many people who were forced to stand outside the hearing room were elderly. IPCB 11/4/02 Tr. at 78-79, 102, 143-144, 171-172, 361-363; IPCB 11/6/02 Tr. at 59. From outside the hearing room, the public could not hear or see what was transpiring. IPCB 11/4/02 Tr. at 71, 75, 77-78, 104-107, 125, 184, 323, 364; IPCB 11/6/02 Tr. at 45. The City did not inform the crowd at any time as to what was occurring during the hearing or provide sound amplifiers or video monitors in the hallway or stairways. IPCB 11/4/02

Tr. at 71, 75, 77-78, 104-107, 125, 184, 190, 323, 364; IPCB 11/6/02 Tr. at 45. The City never notified the crowd of their rights to participate or the rules of the proceedings. IPCB 11/4/02 Tr. at 77-78, 105, 110-111, 133, 195, 366-367; IPCB 11/6/02 Tr. at 55.

Those who were denied entry to the hearing room were visibly upset and frustrated that (i) they could not see or hear what was going on; (ii) those seeking to register to participate were not given the chance to do so; and (iii) adequate provisions had not been made for the public. IPCB 11/4/02 Tr. at 64, 66, 106, 128, 132-133, 146, 162-163, 183, 187, 364; IPCB 11/6/02 Tr. at 61-63, 68. Approximately 60-75 people left before the hearing was over that night. IPCB 11/4/02 Tr. at 76, 106, 191-192, 365-366; IPCB 11/6/02 Tr. at 50-52. Many did not return on following nights because they feared they would, again, be denied access to the hearing. IPCB 11/4/02 Tr. at 76, 132, 135-136, 148, 198; IPCB 11/6/02 Tr. at 65.

C. Unfair Procedures for Cross-Examination of Witnesses

At the hearing, the Hearing Officer ordered that cross-examination of T&C's witnesses would only be permitted after the close of its case-in-chief. 6/18/02 Tr. at 103. The Hearing Officer required that cross-examination occur in a roundtable format where all T&C witnesses were made available at once. Persons interested in questioning were required to ask all of their questions to all of T&C's witnesses until that questioner was finished. Questioners were not permitted to conduct any recross-examination on new issues raised by subsequent questioners.

II. Facts Relevant To The Sufficiency Of Evidence Review

A. Unrefuted Evidence That the Proposed Landfill Was Not Located and Designed to Protect the Public Health, Safety and Welfare

As described in the Siting Application, the design of T&C's proposed landfill is based upon the geologic and hydrogeologic conditions at the site. Siting Application, pp. 10232, 10130-10131; 6/20/02 Tr. at 89. The premise for T&C's landfill design is that it will be keyed into the existing Silurian Dolomite bedrock. Siting Application, p. 10137. On the basis of information obtained from a single boring which penetrated the underlying bedrock to a depth of 50 feet, T&C 's engineer, Mr. Moose, concluded that the Silurian Dolomite on which the landfill would be placed is an aquitard.[4] Siting Application, p. 10087, 10121-10122; 6/24/02 Tr. at 64-65, 70, 106; 6/25/02 Tr. at 119, 125-126; 6/26/02 Tr. at 141. By characterizing the existing Silurian Dolomite bedrock as an aquitard, T&C designed the landfill to be constructed directly on top of the bedrock without any barrier or other protective layer between the base liner of the landfill and the Silurian Dolomite so as to prevent contaminant migration in the event of a release. 6/18/02 Tr. at 63, 70; 6/25/02 Tr. at 89; 6/26/02 Tr. at 15, 65-66, 86-94, 134, 151. T&C relies upon the composite liner and its inward gradient design to protect against any releases or contaminant migration from the landfill. However, T&C did not evaluate how the liner will perform for any vertical or downward flow of contaminants. 6/25/02 Tr. at 89, 92-94; 6/24/02 Tr. at 151. Downward flow of contaminants is an important public health and safety

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[4] An aquitard is an area of low permeability that acts as a confining layer, and is not capable of supplying water to a well. 6/24/02 Tr. at 63, 102.

consideration especially, when, as here, the landfill will sit directly on and within the aquifer and there is no impermeable barrier between the landfill liner and the aquifer. If there is a release, the Silurian Dolomite is immediately at risk. 6/26/02 Tr. at 151. Because T&C's groundwater monitoring system assumes the Silurian Dolomite is an aquitard, it is not designed to monitor the bedrock directly under the landfill to detect any contaminants released from the facility. Siting Application, pp. 10229, 10256, 10257.

Despite Mr. Moose's characterization of the bedrock at the proposed site as an aquitard, the uncontroverted evidence presented at the hearing, which consisted of scientific reports, well water data and testimony from three hydrogeologists, conclusively established that the existing Silurian Dolomite is an aquifer, not an aquitard. 6/25/02 Tr. at 87-88, 106; 111, 125-126; 6/26/02 Tr. at 80, 82-84, 88-90, 145-147. The regional scientific publications and reports introduced into evidence consistently characterize the Silurian Dolomite as an aquifer.[5] 6/24/02 Tr. 15 106-110; 6/26/02 Tr. at 86. Even publications referenced in the Siting Application characterize the Silurian Dolomite as an aquifer. 6/24/02 Tr. at 106-110. When confronted with this evidence, Mr. Moose admitted that he could not cite to any written geologic study within

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[5] "Meeting the Growing Demand for Water: An Evaluation of the Shallow Ground-Water Resources in Will and Southern Cook Counties, Illinois", Illinois State Water Survey, Research Report 123, 1993; "Regional Assessment of the Ground-Water Resources in Eastern Kankakee and Northern Iroquois Counties", Report of Investigation 111, Illinois State Water Survey, Champaign 1990; "Potential for Aquifer Recharge in Illinois", map prepared and published by Illinois State Geological Survey, 1990; "Major Bedrock Aquifers within 300 Feet of Ground Surface", map database produced by Illinois State Water Survey and Illinois State Geological Survey, 1989; "Potential for Contamination of Shallow Aquifers in Illinois", Illinois State Geological Survey, Circular 532, 1984.

northern Illinois where the term aquitard was used in describing the Silurian Dolomite. 6/21/02 Tr. at 49-50; 6/24/02 Tr. at 60-61, 69, 106, 111-112; 6/25/02 Tr. at 134.

In addition to the published scientific reports, the water well data contained in the Siting Application confirms the characterization of the Silurian Dolomite as an aquifer. Siting Application, pp. 30013-30061; 6/24/02 Tr. at 69, 112-138. The Siting Application contains information establishing the presence of over 300 water wells within two miles of the proposed site. Siting Application, pp. 30013-30061. More than half of the 300 wells identified in the Siting Application are drawing water from that portion of the Silurian Dolomite that Mr. Moose characterized as an aquitard. Siting Application, pp. 10127, 30013-30054; 6/24/02 Tr. at 112-140; 6/26/02 Tr. at 134.

Finally, Mr. Moose's characterization of the Silurian Dolomite as an aquitard was refuted by the testimony of Mr. Steven Van Hook, Mr. Stuart Cravens and Ms. Sondra Sixberry, who are all hydrogeologists with extensive education and training in geology and hydrogeology. 6/25/02 Tr. at 84, 157; 6/26/02 Tr. at 8, 21. Mr. Van Hook testified that the groundwater use and the depth of the private water wells surrounding the proposed site conclusively establish that the Silurian Dolomite is an aquifer. 6/25/02 Tr. at 87-88. Mr. Cravens also testified that the Silurian Dolomite is, in fact, an aquifer and stated that T&C's characterization of Silurian Dolomite as an aquitard is totally contradicted by reliable scientific publications. 6/26/02 Tr. at 65-66, 86, 145-147, 151, 164-165. Ms. Sixberry confirmed that the Silurian Dolomite is an aquifer and warned that the "(t)o ignore the plethora of water well logs available surrounding the proposed landfill as

well as the published data and solely rely on one site specific boring to determine the potential for the Silurian Dolomite to transmit water would be a huge error." Sixberry Exhibit No. 1; 6/25/02 Tr. at 111, 125-126; 6/26/02 Tr. at 82-84.

Mr. Moose was the only witness at the hearing to characterize the existing Silurian Dolomite as an aquitard. T&C did not present any expert testimony from a hydrogeologist or geologist for the purpose of identifying the geologic and hydrogeologic conditions at the proposed site, confirming Mr. Moose's characterization of the existing Silurian Dolomite as an aquitard or refuting the published scientific reports, the water well data in the Siting Application and the testimony of Mr. Van Hook, Mr. Craven and Ms. Sixberry.

B. The Proposed Landfill's Inconsistency with the Plain Language of the Kankakee County Solid Waste Plan

The Kankakee County Solid Waste Management Plan ("County Plan") describes the existing Kankakee Landfill ("Kankakee Landfill") as the facility that is managing the municipal waste generated in the County. County Plan, p. 339. The plain language of the County Plan expressly provides that the Kankakee Landfill "would have positive impacts on the County, including ... the continued availability of reliable, convenient disposal capacity", and that an expansion of the Landfill would "satisfy the County's waste disposal needs for at least an additional 20 years." County Exhibit 2 at 1-2. In the event the Kankakee Landfill is expanded, "no new facilities would be necessary." County Exhibit 2 at 2. The Kankakee Landfill has filed its request for approval to expand the existing landfill, which is currently pending.

The County Plan also identifies several prerequisites that must be addressed before a proposed landfill can be considered to be consistent therewith. First, the County Plan requires that a host community fee must be negotiated with the County and that an agreement with respect to said fee must be reached prior to the filing of a siting application. County Exhibit 2 at 6. While T&C negotiated a host agreement with the City of Kankakee, that agreement makes no provisions for the payment of a host fee to the County.

Second, for any plan to be consistent with the County Plan, it must provide for the reservation of 20 years of disposal capacity for total waste (*i.e.*, municipal waste and industrial waste) generated in Kankakee County. According to the February 19, 2002 Agreement for Operation of Landfill in Kankakee, Illinois ("Host Agreement") between T&C and the City of Kankakee, 30 years of disposal capacity will be provided for the City of Kankakee, but not to Kankakee County. Siting Application, p. 20117.

Third, the County Plan requires that the owner/operator of any new or expanded regional pollution control facility post and maintain for the life of such regional pollution control facility either: (1) an environmental contingency escrow fund of a minimum $1 million dollars based upon an annual payment not to exceed 5 years, or (2) some other type of payment or performance bond or policy of onsite/offsite environmental impairment insurance in a form and amount acceptable to the County. County Exhibit 2 at 3. T&C has not established any such environmental escrow fund.

STANDARD OF REVIEW

Section 39.2 of the Act vests authority in local governments to approve or disapprove siting for each new pollution control facility. 415 ILCS 5/39.2. A local government's decision is reviewable by the Board for jurisdiction, fundamental fairness, and compliance with the nine statutory criteria for siting approval found in Section 39.2 of the Act. CDT Landfill Corp. v. City of Joliet, No. PCB 98-60 slip op. at 8 (March 5, 1998).

Section 40.1 of the Act requires the Board to ensure that the procedures used by the local authority in reaching a decision were fundamentally fair. Daly v. Pollution Control Board, 264 Ill. App. 3d 968, 970, 637 N.E.2d 1153, 1154-55 (1st Dist. 1994). The Board may hear new evidence relevant to the fundamental fairness of the proceedings where such evidence necessarily lies outside of the record. Land & Lakes Co. v. Pollution Control Board, 319 Ill. App. 3d 41, 48-49, 743 N.E.2d 188, 194 (3d Dist. 2000). The Board should review the issue of whether the proceedings in this matter were fundamentally unfair *de novo*. Id.

When reviewing a local government's compliance with the nine criteria, the Board must determine whether the local decision is against the manifest weight of the evidence. CDT Landfill Corp., No. PCB 98-60 slip op. at 9-10. A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain or indisputable from a review of the evidence. Land & Lakes Co., 319 Ill. App. 3d at 48, 743 N.E.2d at 193.

ARGUMENT

I. THE CITY'S DECISION APPROVING LOCAL SITING SHOULD BE REVERSED BECAUSE THE PROCESS AND PROCEDURES USED IN REACHING A DECISION ON T&C'S SITING APPLICATION WERE FUNDAMENTALLY UNFAIR

Although local siting procedures are not required to comply with constitutional guarantees of due process, the procedures must comport with due process standards of fundamental fairness. Daly, 264 Ill. App. 3d at 970, 637 N.E.2d at 1154-55; E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 596, 451 N.E.2d 555, 564 (2d Dist. 1983). A fundamentally fair hearing must include impartial rulings on the evidence, the opportunity to be heard and the right to cross-examine witnesses. Daly, 264 Ill. App. 3d at 970-71, 637 N.E.2d at 1155; Sierra Club v. Will County Board, No. PCB 99-136 and 99-139 (cons.), slip op. at 3 (August 5, 1999).

A. The City's Substantive Review of T&C's Siting Application at the February 19, 2002 City Council Meeting Constituted an Impermissible Prejudgment of the Merits Prior to the Public Hearing

Because the local siting authority's role in the siting approval process is quasi-adjudicative, prejudgment of the merits of the application in advance of the hearing is fundamentally unfair. Waste Management of Illinois, Inc. v. Pollution Control Board, 175 Ill. App. 3d 1023, 1040, 530 N.E.2d 682, 695-96 (2d Dist. 1988). The presumption that a decision maker is unbiased can be overcome upon a showing that members of the local authority prejudged the adjudicative facts, *i.e.*, the relevant criteria of Section 39.2 of the Act. Fairview

Area Citizens Taskforce v. Pollution Control Board, 198 Ill. App. 3d 541, 548, 555 N.E.2d 1178, 1182 (3d Dist. 1990).

The February 19, 2002 meeting between the City and T&C occurred for the direct purpose of having the decision makers review the substance of T&C's Siting Application against the Section 39.2 criteria in advance of the hearing. Indeed, the stated purpose of the meeting was to let the City hear the merits of T&C's request for local siting approval "without the filter of lawyers," "the back and forth" of the process, and the "half-truths" that would occur at the post-filing public hearing. The fact that the City indulged in a fact-finding preview of the evidence supporting T&C's Siting Application clearly suffices to overcome the presumption that the City acted fairly and objectively in the siting process. Given that the February 19 meeting was specifically designed to take place outside of the presence of the lawyers, citizens and other interested persons, thus depriving them of the opportunity to cross-examine witnesses or question the information presented therein, "a disinterested observer might conclude that the administrative body, or its members, had in some measure adjudged the facts as well as the law of the case in advance of the hearing." Waste Management of Illinois, Inc., 175 Ill. App. 3d at 1040, 530 N.E.2d at 695-96. Even if T&C's pre-hearing presentation did not actually influence the City's decision, it undeniably gave the appearance of an improper prejudgment of the adjudicative facts.

B. The City's Failure to Provide Sufficient Accommodations for Public Attendance and Participation at the Hearing Resulted in the Denial of the Public's Fundamental Right to be Heard

In its review of fundamental fairness, the Board has held that "the public hearing before the local governing body is the most critical stage of the site approval process." American Bottom Conservancy v. Village of Fairmont City, No. PCB 00-200, slip op. at 6 (October 19, 2000). A fundamentally fair hearing places a premium on the right of the public to be heard. Daly, 264 Ill. App. 3d at 970-71, 973, 637 N.E.2d at 1155-56.

In the instant case, anywhere between 50 and 125 interested persons, many of whom had preregistered, were denied the opportunity to attend and participate on the first night of the hearing as a direct result of the City's refusal to provide adequate accommodations. Even though it was evident long before the hearing began that the accommodations were insufficient, the Hearing Officer refused to permit members of the public to stand at the back of the hearing room and refused to reconvene the hearing to arrange for alternate accommodations, including, at a minimum, placing extra seating and sound speakers in the hallway outside the hearing room.

Instead, the Hearing Officer directed police officers to bar the public's entrance into the hearing room. The crowd of people, including elderly citizens, who were clearly interested in the hearing, were forced to stand in the unairconditioned and uncomfortable hallway and stairways where the proceedings could not be heard or seen. Disgruntled and frustrated, many people left and did not return.

The fact that adequate accommodations were made on subsequent hearing nights, or that a transcript of the first hearing night was eventually available for review, does not cure the fundamental unfairness that occurred. Many people came to the first night of the hearing for the purpose of registering in accordance with the public notice that indicated persons desiring to participate in the hearing were required to register at the start of the hearing. Those who were turned away and never returned were effectively denied the opportunity to participate. Furthermore, a mere review of the transcript does not give the public the opportunity to question the witness who was only available on the first night of the hearing.

Simply put, because a large constituent of the public was denied access to the hearing, the hearing process was fundamentally unfair. The Hearing Officer later acknowledged at the review hearing that the City failed to adequately accommodate the public on the first night of the hearing even though a large turnout was anticipated. Under the circumstances, the City's flagrant refusal to provide sufficient accommodations for public attendance and participation rendered the hearing fundamentally unfair.

C. The Irregular Procedures Imposed by the Hearing Officer Concerning the Cross-Examination of Witnesses Were Unreasonable and Unfair

In addition to the right to be heard, fundamental fairness requires that parties have an adequate opportunity to cross examine witnesses. Waste Management of Illinois, Inc., 175 Ill. App. 3d at 1036, 530 N.E.2d at 693. When governmental agencies adjudicate or make binding determinations which directly affect the rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.

People ex rel. Klaeren v. Village of Lisle, 2002 Ill. LEXIS 941 at 29 (Ill. Sup. Ct. October 18, 2002). However, the Hearing Officer in this case precluded participants from effectively cross-examining T&C's witnesses by requiring a roundtable format for cross-examination. In other words, participants were required to wait until T&C finished its case before they were allowed to question any of the witnesses.

This irregular method of cross-examination was unfair to participants in a number of ways. First, it placed an unfair burden on questioners, particularly lay persons, to prepare and ask all of their questions on all of the criteria at one time. Cross-examination of one witness is difficult enough without imposing the requirement that all witnesses be examined simultaneously as a group. Second, the method denied cross-examination to those questioners who were not available at the end of T&C's case. Third, it destroyed the continuity of the question-and-answer process that occurs when the normal cross-examination format is employed. Even if the Hearing Officer believed that the roundtable format would facilitate cross-examination, the reality was that it severely impeded the participants' attempts to elicit information in a cohesive and efficient manner and, therefore, did not comport with due process notions of fundamental fairness.

Because the City prejudged the adjudicative merits of T&C's Siting Application, denied the public access to the hearing and impeded the ability to effectively cross-examine T&C's witnesses, the August 19, 2002 decision should be reversed and remanded for a new local siting hearing in order to permit an unbiased review of the siting request with sufficient accommodations for full public attendance, participation and cross-examination.

II. THE CITY'S DECISION APPROVING LOCAL SITING SHOULD BE REVERSED BECAUSE THE FAVORABLE FINDINGS ON CRITERION TWO AND CRITERION EIGHT ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

An applicant seeking local siting approval for a pollution control facility must submit sufficient evidence that the proposed facility meets the nine criteria set forth in Section 39.2 of the Act. A review of the record clearly establishes that the City's findings that T&C satisfied Criterion Two and Criterion Eight are against the manifest weight of the evidence.

A. The City's Finding that The Proposed Landfill Was Located and Designed to Protect the Public Health, Safety and Welfare Was Satisfied Is Against the Manifest Weight of the Evidence

Criterion Two requires that the applicant show that: "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii). Based upon the undisputed evidence in the record that T&C mischaracterized the Silurian Dolomite as an aquitard, it is manifestly evident that T&C failed to establish that the proposed facility was located and designed to protect the public health, safety and welfare.

The entire premise for T&C's landfill design is that the Silurian Dolomite on which the landfill would be placed is an aquitard. However, the uncontroverted evidence presented at the hearing conclusively establishes that the Silurian Dolomite is an aquifer. In order for the City to have accepted Mr. Moose's characterization of the site, it had to ignore numerous regional studies, the uncontradicted testimony of three hydrogeologic experts, data from hundreds of water wells in the Kankakee area and the undisputed fact that the Silurian Dolomite is providing

billions of gallons of water annually to residential, industrial and agricultural users in northeastern Illinois. Therefore, no matter how Mr. Moose's credibility on design issues is assessed, his testimony on the hydrogeologic characterization of the Silurian Dolomite is plainly and directly contradicted by all of the other evidence presented, including the well log data from the Siting Application.

T&C's proposal to build a landfill on top of and within the aquifer presents a significant threat to the public health and safety. The proposed landfill was designed without any barrier or other protective layer between the base liner of the landfill and the aquifer, which is necessary to prevent contaminant migration in the event of a release. Without such protection, any release or leak from the landfill would go right into the aquifer being utilized, thereby presenting an increased risk to the aquifer and the public health of those who use it. In addition, the proposed groundwater monitoring system is not designed to monitor the bedrock aquifer, and thus fails to provide an early warning for any release of contaminants from the facility to the aquifer.

The City's finding that Criterion Two was satisfied is plainly and evidently wrong. With the exception of Mr. Moose's testimony, all the expert testimony and scientific evidence presented at the hearing, including data in the Siting Application itself, established that the bedrock is an aquifer.

B. The City's Finding that The Proposed Landfill Was Consistent with Kankakee County's Solid Waste Plan Is Against the Manifest Weight of the Evidence

Criterion Eight of Section 39.2 of the Act requires a showing that: "if the facility is to be located in a county where the county board has adopted a solid waste management plan

consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan." 415 ILCS 5/39.2(a)(viii). The plain language of the County Plan clearly demonstrates that the development of T&C's proposed landfill is inconsistent with the County Plan.

In evaluating whether the proposed facility is consistent with the County Plan, the City was required to look to the plain language of the plan and to consider any language indicating that the plan does not support the proposed facility. T.O.T.A.L. v. City of Salem, No. PCB 96-79 and 96-82 (cons.), slip op. at 24 (March 7, 1996). If the intent of the plan does not allow or provide for the proposed facility, consistency cannot be established. Waste Hauling, Inc. v. Macon County Board, PCB No. 91-223, slip op. at 17-18 (May 7, 1992).

The County Plan clearly provides that the existing Kankakee Landfill is the facility to manage the municipal waste generated in the County. No other landfills in the County are necessary or appropriate. If the Kankakee Landfill is expanded, it will provide the necessary disposal capacity for at least an additional 20-year planning period. No other landfills would be needed to provide disposal capacity for this period. Therefore, in light of the provisions in the County Plan, T&C's proposed landfill would be duplicative.

While the proposed expansion of the Kankakee Landfill has not yet been approved, that does not make the proposed facility consistent with the County Plan. The currently pending request to expand the Kankakee Landfill must be finally denied before the T&C landfill might be found to be necessary and appropriate, and therefore, consistent with the County Plan.

Therefore, to comply with the intent of the County Plan, a determination as to whether the proposed landfill is consistent with the County Plan may not properly be made until a final decision is rendered on the expansion of the Kankakee Landfill. So long as the expansion of the Kankakee Landfill remains a possibility, no finding of consistency for T&C's proposed facility may be made, because a subsequent expansion of the Kankakee Landfill will render such a finding baseless and violative of the County Plan's plain language and intent.

In addition, the Siting Application is not consistent with the County Plan in three other significant respects.

First, the Siting Application does not address the issue of a host community fee which must be negotiated with the County prior to the Siting Application. While T&C negotiated a Host Agreement with the City of Kankakee, there are no provisions for payment of a host fee to Kankakee County. Second, T&C does not address the reservation of 20 years of disposal capacity for waste generated in Kankakee County. According to the February 19, 2002 Host Agreement, 30 years of disposal capacity will be provided for the City of Kankakee, not Kankakee County. Third, the County Plan requires that the owner/operator of any new or expanded regional pollution control facility post and maintain for the life of such regional pollution control facility either: (1) an environmental contingency escrow fund of a minimum $1 million dollars based upon an annual payment not to exceed 5 years, or (2) some other type of payment or performance bond or policy of onsite/offsite environmental impairment insurance in

a form and amount acceptable to the County. T&C has not established this environmental escrow fund.

Because (1) the County Plan provides for a single landfill; (2) the County Plan identifies the expansion of the existing Kankakee Landfill as the preferred alternative; (3) there is no evidence in the record that an expansion of the Kankakee Landfill has been denied; and (4) T&C has not complied with three County Plan requirements, the City's finding of plan consistency is against the manifest weight of the evidence.

CONCLUSION

Because the local siting process and procedures used by the City in making its decision to approve local siting were fundamentally unfair, and because the City's determinations that Criterion Two and Criterion Eight were satisfied are against the manifest weight of the evidence, the City's August 19, 2002 decision granting local siting approval to T&C for its proposed landfill should be reversed.

Respectfully Submitted,
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