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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC. Petitioner, vs. COUNTY BOARD OF KANE COUNTY, ILLINOIS, Respondent.	No. PCB 03-104 (Pollution Control Facility Siting Application)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on May 12, 2003, we filed with the Illinois Pollution Control Board, the attached **Respondent County Board of Kane County, Illinois' Response Brief in Support of its December 10, 2002, Siting Decision and Opposing Petitioner's Contest of that Decision**, a copy of which is attached hereto and served upon you.

RESPONDENT, COUNTY BOARD OF KANE COUNTY, ILLINOIS

By: _____
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC. Petitioner, v. COUNTY BOARD OF KANE COUNTY, ILLINOIS, Respondent.	No. PCB 03-104 (Pollution Control Facility Siting Application)

RESPONDENT COUNTY BOARD OF KANE COUNTY, ILLINOIS' RESPONSE BRIEF IN SUPPORT OF IT'S DECEMBER 10, 2002, SITING DECISION AND OPPOSING PETITIONER'S CONTEST OF THAT DECISION

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Respondent.	

RESPONDENT COUNTY BOARD OF KANE COUNTY, ILLINOIS' RESPONSE BRIEF IN SUPPORT OF IT'S DECEMBER 10, 2002, SITING DECISION AND OPPOSING PETITIONER'S CONTEST OF THAT DECISION

I. INTRODUCTION

On June 14, 2002, Petitioner Waste Management of Illinois, Inc. (WMII) filed an application with Kane County, seeking site location approval of a new pollution control facility, namely a solid waste transfer station. (C000001-C001159). WMII proposed to locate the transfer station in unincorporated Kane County, on the same site and within the boundaries of the existing Woodland Landfill. (C000145, Application Criterion 2 – Figure 2).

On September 12, 2002, a public informational meeting was held and, on September 17, 19, 24, 26 and 30, and October 1, 3, 9, and 10, a public hearing was held concerning WMII's siting application. (C003136-C004545). On November 19, 2002, the Kane County Board called a Special Meeting to begin its discussions concerning WMII's subject siting application. (C004546-C004639). No vote was taken at the November 19, 2002, meeting. Id. On December 10, 2002, the Kane County Board, at a regularly scheduled Board Meeting, deliberated and voted on WMII's siting application, determining to deny that application. (C004642, C004826-4883).

The written decision of the Kane County Board is comprised of Resolution 02-431, the local hearing officer's findings of fact and law, and a County Board Member, Dan Walter's, four page written summary. (C004826-C004883). Contrary to WMII's assertion, the local hearing officer's findings were not that the statutory criteria were met. (WMII Memorandum p. 1, 4, 24). Rather, the local hearing officer found that Criteria 1, 2, 3, 5, 6 and 8, were only "met" when subject to the imposition of conditions. (C004842, C004846, C004848, C004850, C004854, C004855). Interestingly, WMII only argues that the decision of the County Board was against the manifest weight of the evidence on Criteria 2, 3, 6 and 8. Thus, even on the face of WMII's arguments, the decision of the Kane County Board must be affirmed, as WMII does not contest the County Board's denial on Criteria 1 and 5[1].

WMII appeals the denial of its siting application by the Kane County Board, pursuant to Section 40.1(a) of the Illinois Environmental Protection Act (415 ILCS 5/40.1(a)), on what WMII alleges to be two grounds: fundamental fairness and manifest weight. However, WMII's fundamental fairness argument is nothing more than an attempt by it to seek a different standard of review and to remove the deference shown by a reviewing Court or Board to Kane County's decision.

Throughout its Memorandum, WMII misstates facts and references allegations (proposed by WMII to be facts) that are not in evidence, and for which WMII provides no citation to the record. In response, the Kane County Board requests certain "facts" and allegations be stricken as detailed in its Motion to Strike, filed contemporaneously with this Response Brief.

[1] Evidence concerning WMII's failure to meet Criteria 1 and 5 can be found in a written comment prepared by the

II. STANDARD OF REVIEW

There are two standards of review to be considered in this appeal. The first, is the standard applied to actual fundamental fairness issues raised on appeal, namely, *de novo.* Land & Lakes Co. v. Illinois Pollution Control Board, 319 Ill.App.3d 41, 48, 743 N.E.2d 188, 193-194 (3rd Dist. 2000). This standard is truly not applicable to this matter, as WMII has failed to raise a legitimate fundamental fairness issue, as further discussed below.

The second standard of review to be considered by the IPCB is whether the Kane County Board's decision denying WMII's proposed transfer station was against the manifest weight of the evidence. McLean County Disposal, Inc. v. County of McClean, 207 Ill.App.3d 477, 480-481, 566 N.E.2d 26, 28-29 (4th Dist. 1991). Under a manifest weight of the evidence review, the decision of the Kane County Board should be affirmed, unless the findings and conclusions of the Kane County Board are found to be contrary to the manifest weight of the evidence. Central Illinois Public Service Co. v. Department of Revenue, 158 Ill. App. 3d 763, 767, 511 N.E.2d 222, 110 Ill. Dec. 387 (4th Dist. 1987). A decision is contrary to the manifest weight of the evidence **only** when, after viewing the evidence in the light most favorable to the Kane County Board, the IPCB determines **that no rational trier of fact could have agreed** with the Kane County Board's decision. American Federation of State, County & Municipal Employees v. Illinois Educational Labor Relations Board, 197 Ill. App. 3d 521, 525, 554 N.E.2d 476, 143 Ill. Dec. 541 (4th Dist. 1990).

In bringing this appeal, WMII, as the Petitioner, has the burden of proof. (415 ILCS 5/40.1(a)).

County staff. (*See*, C002786-002790, C002804-002806).

III. ARGUMENT

Although the Kane County Board submits that WMII's fundamental fairness arguments are without merit; are raised as an attempt to change the standard of review for the same subject matter WMII raises under the manifest weight of the evidence argument and are not within the category or characterization of procedural due process issues to be raised, WMII's arguments are fully responded to, without waiver of these objections, herein. WMII attempts to attack the Kane County Board's decision based on manifest weight of the evidence. However, based on the evidence contained in this record, it is clear that the decision of the Kane County Board should be affirmed as it is not against the manifest weight of the evidence.

A. THE KANE COUNTY BOARD'S DECISION AND THE PROCESS RESULTING IN THAT DECISION WAS FUNDAMENTALLY FAIR AND SHOULD BE AFFIRMED

WMII makes no argument that the siting process itself was unfair. WMII's unfairness argument solely concerns the Kane County Board's written decision and, specifically, the four pages of it which were prepared by County Board Member Dan Walter. (C004880-C004883). WMII appears to argue that the four page portion of the Kane County Board decision prepared by Mr. Walter was an extra-judicial consideration which included facts not in the record or misstated facts, to which WMII was not given an opportunity to respond, thereby allegedly, rendering the process legislative rather than adjudicatory. While WMII does not identify how the four-page portion of the County Board's decision written by Mr. Walter changes the quasi-adjudicative and quasi-legislative function and character of the local siting process, WMII's contentions are focused on its claimed right to respond and alleged inaccuracies or out-of-record evidence, all of which are responded to, below.

First, Mr. Walter is a member of the quasi-adjudicatory and quasi-legislative body, namely the Kane County Board, and the document he prepared represents and is a product of his deliberations and is not evidence. It is simply his summary and his conclusions and opinions about the evidence, which he has a right to present to the other members of the Kane County Board. WMII has no right to inject itself into or respond to the thought process or written decision of a decision-maker in a quasi-adjudicatory process, such as a local government's decision on site location. WMII's "right to respond" to a decision arises during its statutory right to appeal the decision of the local government. There is no right to respond prior to the Kane County Board's decision being rendered.

Second, even if the Illinois Pollution Control Board (IPCB) were to characterize the four-page Walter document as "evidence" to which WMII had a right to respond, WMII waived any such right when it failed to object to the utilization of the four page document prepared by County Board Member Dan Walter in the Kane County Board's written decision, particularly when WMII spoke during the deliberations of the December 10, 2002, Kane County Board Meeting.

Third, the IPCB should reject WMII's attempt to have arguments concerning the accuracy and basis for the Kane County Board's decision reviewed under a fundamental fairness, *de novo*, standard of review, as it is only appropriately reviewed based on the manifest weight of the evidence.

Fourth, even if the IPCB reviews Dan Walter's four-page memorandum on a *de novo* basis, there are no inaccuracies of fact or misapplications of law which support a "reversal" as requested by WMII.

Fifth, even if the IPCB found unfairness in the four-page Walter document, the remedy would be to send the decision back to the Kane County Board to correct whatever alleged unfairness occurred and have the Kane County Board vote again concerning WMII's siting application; WMII is not entitled to a "reversal" of the decision as it seeks.

1. WMII has no right to respond to the decision of a local government prior to that decision being finalized and approved by vote

WMII argues, without citation to a single applicable or analogous authority for support, that the Kane County Board's decision was fundamentally unfair, because WMII was not given an opportunity to respond to that portion of the Kane County Board's written decision comprised of the four-page document prepared by Dan Walter. (WMII Memorandum p, 24). WMII's argument hopes to persuade the IPCB to declare that a party before a quasi-legislative and quasi-adjudicatory[2], or administrative body has a procedural due process right to *review* and apparently comment on the written decision of that body, prior to it being voted on and becoming final. In other words, WMII is essentially asserting that it has the right to review and comment on the fact-finder's or decision-maker's decision, prior to the fact-finder or decision-maker finalizing that decision. WMII's argument is completely without merit.

The concept of fundamental fairness during the local level siting process and hearings is based on procedural due process. In the case of the local siting procedure, the authority for the IPCB to review complaints related to fundamental fairness is derived from Section 40.1 of the Illinois Environmental Protection Act which, specifically, provides that the IPCB review the

[2] WMII incorrectly references the local siting process as only quasi-adjudicative (*See*, Memorandum p. 2), when it is a quasi-legislative and quasi-adjudicative process: "A local siting authority's role in the siting approval process is both quasi-legislative and quasi-adjudicative." Land and Lakes Company v. Illinois Pollution Control

"fundamental fairness of the **procedures used**" by, in this case, the Kane County Board, "in reaching its decision." (415 ILCS 40.1(a))(emphasis added). WMII is not complaining about the procedures and, in fact, other than its meritless claim that it has a right to comment on a written decision before it is issued by a local decision-maker, its sole focus is its complaint of inaccuracy of law and fact within the written decision of the Kane County Board, which complaints concern manifest weight rather than fairness.

Illinois Courts have related the procedural due process requirements of a local site location proceeding to that of an administrative hearing. *See*, City of Rockford v. The County of Winnebago, 186 Ill.App.3d 303, 311, 542 N.E.2d 423, 429 (2nd Dist. 1989), *quoting*, Waste Management of Illinois, Inc. v. Pollution Control Board, 175 Ill.App.3d 1021, 1036-1037, 530 N.E.2d 682, 693-694 (2nd Dist. 1988). The basic premise of procedural due process is that "the procedures be tailored, in light of the decision to be made, to the capacities and circumstance of those who are to be heard, to insure that they are given a meaningful opportunity to present their case." Petersen, *et al.* v. Chicago Plan Commission of the City of Chicago, *et al.*, 302 Ill.App.3d 461, 466, 707 N.E.2d 150, 154 (1st Dist. 1998), *quoting*, Telcser v. Holzman, 31 Ill.2d 332, 339, 201 N.E.2d 370 (S.Ct. 1964). Thus, having a right to comment on the written decision, or even the oral deliberation, of a County Board in its role as a local siting decision-maker falls outside the concept and law concerning procedural fundamental fairness.

Further, any alleged right to comment on written or oral deliberations or decisions of a local siting decision-maker is illogical and inconsistent with the general concept of administrative and adjudicative proceedings. Additionally, it is inconsistent with the specific

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Board, *et al.*, 319 Ill.App.3d 41, 47, 743 N.E.2d 188, 193 (3rd Dist. 2000)(citation omitted; emphasis added).

legislative provisions relating to a siting proceeding and not otherwise authorized by Section 39.2 of the Illinois Environmental Protection Act. For example, although Section 39.2(c) provides that the local siting authority can consider any written comment filed within 30-days of the last day of public hearing, there is no right of the siting applicant or other participant to respond to those written comments and, obviously, the written comments cannot be cross-examined. (415 ILCS 39.2(c); *see also,* Southwest Energy Corporation v. The Illinois Pollution Control Board, *et al.*, 275 Ill.App.3d 84, 93, 655 N.E.2d 304, 310 (4th Dist. 1995). If it is not fundamentally unfair to be precluded from responding to a written comment, why would it be fundamentally unfair to have no right to respond to the written decision of the siting authority?

WMII's claim of a right to respond makes less sense when it is considered in light of the fact that "[d]ue process of law does not encompass the right to appeal an administrative decision, and affording that right is the exclusive prerogative of the legislature." McHenry County Landfill, Inc. v. The Environmental Protection Agency, *et al.*, 154 Ill.App.3d 89, 94, 506 N.E.2d 372, 376 (2nd Dist. 1987). If an applicant would not have the right to appeal the decision of a local siting authority, absent such right being embodied in statute, it follows that there is no basis to assert that a right exists to comment on a local siting authority's written or oral deliberations or decisions, absent such right being enumerated in statute. Section 39.2 of the Illinois Environmental Protection Act does not provide WMII with the right to comment on a local decision-maker's deliberations and/or written decision, other than to take an appeal.

WMII contends that Southwest Energy Corporation, *supra*, and City of Rockford v. Winnebago County, PCB 87-92 (November 19, 1987), legally support its proposition that the four-page document prepared by County Board Member Walter was fundamentally unfair,

because WMII had no opportunity to respond. However, neither of these cases ruled in that manner. In fact, Southwest Energy Corporation, was not even an appeal initiated by an applicant, rather it was initiated by a citizen's group that correctly asserted that a trip paid for by the applicant to which the public was not invited and contacts between the hearing officer and the applicant were fundamentally unfair. Southwest Energy Corporation, 275 Ill.App.3d at 84, 96-97, 655 N.E.2d at 304, 312. Likewise, the IPCB decision in City of Rockford, (prior to the case being remanded and then appealed to the IPCB and Appellate Court), concerns bias and *ex parte* contacts, and an admission by county board members that they considered evidence outside the record in making their decision.

In this case, WMII has made no allegation concerning bias or *ex parte* communications rendering the process fundamentally unfair, nor is there any evidence in the record that County Board Members considered evidence outside the record. Additionally, City of Rockford which primarily concerned bias and *ex parte* communications from a citizen or citizen group, was decided *prior* to the amendment to Section 39.2, providing: "The fact that a member of the county board . . . had publicly expressed an opinion on an issue related to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue." Thus, it is not clear that if faced with a similar fact scenario post-amendment (a fact scenario which is *not* analogous to this matter), whether the IPCB would hold consistently with City of Rockford. Therefore, **neither** Southwest Energy Corporation **nor** City of Rockford is applicable to this case, and neither case is applicable to WMII's proposition that an applicant has a right to respond to a decision-maker's deliberations and/or written decision, prior to that decision being finalized and voted on (other than the applicant's right to appeal, pursuant to

Section 40.1 of the Act).

Therefore, WMII's assertion that the decision (rather than the procedure) of the Kane County Board was fundamentally unfair, based on WMII's inability to comment on a four-page document prepared by County Board Member Dan Walter as a part of deliberations, must be denied, as no such right exists.

2. If the IPCB determines that WMII has a right to object to or respond to the written document prepared by a decision-maker for deliberative purposes, WMII waived that right when it failed to raise the objection or request to respond at the time it was presented during deliberations

If the IPCB determines that WMII had a right to comment on or respond to that portion of the Kane County Board's written siting decision prepared by County Board Member Dan Walter, the IPCB should find WMII waived that right. WMII was in attendance at the December 10, 2002, Kane County Board Meeting at which the Kane County Board denied WMII's siting application and approved a resolution and written decision supporting that denial. (C003126). Additionally, Dale Hoekstra, a representative of WMII and one of its witnesses during the course of the public hearings, spoke to the Kane County Board concerning its pending decision and deliberations. Id.

On the issue of waiver, the Illinois Appellate Court, quoting the Illinois Supreme Court has stated:

> Generally, of course, a failure to object at the original proceeding constitutes a waiver of the right to raise the issue on appeal. People v. Carlson, 79 Ill. 2d 564, 576-77, 404 N.E.2d 233, 238-39 (1980). 'A claim of disqualifying bias or partiality on the part of a member of the judiciary or an administrative agency must be asserted promptly after knowledge of the alleged disqualification.' Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512, 515 (4th Dist. 1974). The basis for this can readily be seen. To allow a party to first seek a ruling in a matter and, upon obtaining

> an unfavorable one, permit him to assert a claim of bias would be improper. Fairview Area Citizens Taskforce v. The Pollution Control Board, *et al.*, 198 Ill. App. 3d 541, 546, 555 N.E.2d 1178, 1181 (3rd Dist. 1990).

Although WMII does not allege bias of County Board Member Dan Walter, its argument should be considered waived in the same manner as referenced above, since the same reasoning applies. WMII was present at the Kane County Board's December 10, 2002, deliberations and decision on WMII's siting application; WMII heard County Board Member Walter read substantial portions of his four-page written document which was ultimately incorporated as part of the written decision of the Kane County Board; WMII actually spoke to and addressed the Kane County Board during the December 10, 2002 meeting and prior to the Kane County Board voting on Resolution 02-431, and made no objection; WMII was present when the Kane County Board adopted Resolution 02-431, and made no objection; and WMII does not assert that it had no knowledge of the four-page Walter document, such that it was unable to object to it. (C003126; Petitioner's Hearing Exh.1, Respondent's Supplemental Response to Petitioner's Request to Admit No. 4).

Therefore, even if the IPCB determines that WMII has a right to object or respond to the written document prepared by a decision-maker for deliberative purposes, the IPCB should find WMII waived the right to respond.

3. WMII's fundamental fairness argument amounts to no more than a manifest weight argument cloaked under fundamental fairness in an attempt to apply a different standard of review

Other than its alleged right to comment on or respond to the deliberative process of the Kane County Board and, specifically, to that portion of Resolution 02-431 (*i.e.*, the written

decision of the Kane County Board) prepared by County Board Member Walter, WMII contends that the Kane County Board's decision was unfair, due to alleged factual and legal inaccuracies in Mr. Walter's four-page document. As an initial matter, WMII's mischaracterization of County Board Member Walter's four-page document, Hearing Officer Kinnally's report, Resolution 02-431, and the testimony at the public hearings is, unfortunately, prevalent throughout its Memorandum. However, without addressing the specifics of allegations by WMII of misstatement of fact or misapplication of law, neither of these allegations relates to fundamental fairness and, instead, relate to whether the decision by the Kane County Board is against the manifest weight of the evidence (which it is not).

In fact, of those cases cited by WMII in support of the proposition where a local government relies on erroneous facts or conclusions, the applicant's right to a fundamentally fair hearing has been denied, none are analogous or applicable to WMII's theory of fundamental unfairness in this case. Besides the Southwest Energy Corporation, *supra*, and 1987 IPCB decision in City of Rockford, *supra*, WMII incorrectly cites two Land and Lakes Co. decisions as supporting authority. Land and Lakes Company v. Illinois Pollution Control Board, *et al.*, 319 Ill.App.3d 31, 743 N.E.2d 188 (3rd Dist. 2000) and Land and Lakes Company, *et al.* v. Illinois Pollution Control Board, *et al.*, 245 Ill.App.3d 631, 616 N.E.2d 349 (3rd Dist. 1993).

In the 2000 Land and Lakes Co. decision, the Court held that a report prepared by the local government's staff in conjunction with WMII (who was the applicant in that case) and submitted after the close of public comment did not render the proceedings unfair. WMII misstates and mischaracterizes the holding of this case (Memorandum p. 7), which had

absolutely no bearing on whether the applicant's right to a fair hearing had been violated.[3] This case is not an applicable authority for the holding WMII seeks. Likewise, the 1993 Land and Lakes Co. decision is inapplicable.

In the 1993 Land and Lakes Co. decision, the Appellate Court found that the applicant was not "given a full and complete opportunity to present evidence in support of their application," given that the local government made its decision based on the inability of the applicant to meet Criterion 1 (need), which relied on evidence presented at the public hearing by a participant, (Will County's), incorrectly asserted availability of Wheatland Landfill. The Court held that the IPCB should have remanded for a new hearing as a result of Will County's gamesmanship and misrepresentations during the first public hearings, as, at the time of the public hearings, Will County knew that Wheatland Landfill would not, necessarily, be available, due to the fact that it had filed an injunction action against it. The incorrect fact at issue in Land and Lakes Co., was pivotal to the local government's decision on siting, as the local government only denied on Criterion 1. Further, the gamesmanship of Will County played a crucial role in the Court's determination. Land and Lakes Co., 245 Ill.App.3d at 643.

Unlike the inaccuracy asserted in Land and Lakes Co., no alleged inaccuracy of fact or misapplication of law asserted by WMII is pivotal to the Criteria on which its application was denied. Further, WMII neither alleges, nor does the record show any misrepresentations or inaccuracies at the public hearings, like those in Land and Lakes Co., which was a critical

[3] WMII ironically asserts that the 2000 Land and Lakes Co. decision (which concerned a report that WMII helped prepare) stands for the proposition that "where a local government relies upon inaccurate facts or erroneous conclusions in denying a siting request, the applicant's right to a fundamentally fair hearing has been violated." (Memorandum p. 7). Instead, this referenced portion of this case actually states "we cannot conclude that the County Board failed to confine itself to the record developed during the public hearing and public comment period" based on a couple of vague references in the Olsen report to "other documents." Land and Lakes, 319 Ill.App.3d at

feature of the Court's holding in that case.

Therefore, the IPCB should deny WMII's claims of fundamental unfairness and affirm the December 10, 2002, decision of the Kane County Board.

4. There are no "inaccuracies" or "misapplications of law" or facts from outside the record within the four-page Walter document which warrant a "reversal" of the Kane County Board decision

If the IPCB agrees with WMII's fundamental fairness argument, it results in the Kane County Board's decision being reviewed *de novo* rather than pursuant to the manifest weight of the evidence standard. Without waiving its objection to such a holding, even under a *de novo* review, WMII's alleged inaccuracies of fact and misapplication of law fail to require the "reversal" of the Kane County Board's decision. Further, as discussed below, a reversal is not the proper remedy under a fundamental fairness argument.

WMII agues the Kane County Board applied the wrong legal standard to, and considered inaccurate facts concerning Criteria 2, 3, 6 and 8. WMII is incorrect on both counts and, in fact, misrepresents the appropriate legal standards in its own Memorandum.

(a) *The legal standards considered by the Kane County Board were correct*

Notwithstanding the fact that the local Hearing Officer educated and informed the Kane County Board orally and in writing that WMII had the burden of proving each of the statutory criteria, as written; WMII wants the IPCB to rely on WMII's paraphrased and out-of-context reiteration of portions of that portion of Resolution 02-431 comprised of County Board Member Dan Walter's four-page document. (C004880-004883). In actuality, WMII either fails to reference a legal standard or incorrectly cites the one used by the Kane County Board in

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51, 743 N.E.2d at 196.

presenting this argument.

With respect to Criteria 2 and 3, WMII alleges that untrue or irrelevant facts (which the Kane County Board denies WMII correctly references or repeats in its Memorandum) were referenced in County Board Member Walter's four-page document concerning WMII's failure to meet Criterion 2 (Memorandum pp. 8-10). However, WMII fails to allege any misapplication of a "legal standard," as respects this Criterion, thus, its argument should be denied.[4] As respects Criterion 6, WMII alleges the four-page Walter document misapplies standards of "adequacy" for one of "minimization," since the Walter document makes reference to all existing routes having been shown to be inadequate by expert testimony. (Memorandum p. 11). WMII is splitting hairs in an effort to create an inaccuracy where one does not exist.

The four-page Walter document correctly references Criterion 6 as "require[ing] the applicant to prove that they had minimized impact of existing traffic flows." (C004880). After a lengthy recitation of evidence presented, including evidence with respect to each possible route for transfer trailers that WMII could not meet Criterion 6, the document states "[a]ll existing routes have been shown to be inadequate by expert testimony." There is no basis for WMII's assertion based on this phrase that the Kane County Board considered "adequacy" rather than "minimization." In fact, taken in context with the entire Criterion 6 discussion in the Walter document, the "adequacy" references WMII's inability to meet the Criterion. Therefore, WMII's "legal standard" argument with respect to Criterion 6 should be denied.

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[4] Ironically, WMII misstates the legal standard as respects Criterion 2 in its Memorandum (p. 8), wherein it alleges Industrial Fuels & Resources v. Pollution Control Board, 227 Ill.App.3d, 592 N.E.2d 148 (1st Dist. 1992) stands for the proposition that Criterion 2 requires a demonstration that the "design or operation of the proposed facility does not pose an unacceptable risk to the public health and safety." This is not the holding of Industrial Fuels and it fails to reference "location" which is an integral and specifically included aspect of Criterion 2.

The final "legal standard" complaints by WMII relate to Criterion 8. WMII asserts that a determination of inconsistency with Solid Waste Management Plan cannot rely on the failure of an applicant to meet specific requirements of that Plan; and that a siting authority cannot consider an applicant's failure to comply with the analysis and content requirements for a siting application contained in a siting ordinance, in determining whether the application meets the statutory Criteria. Neither of these complaints by WMII concerns the correct application of the Criteria; both of these complaints by WMII concern allegations that the decision of the Kane County Board is not supported by the evidence. Not only are these complaints, individually and *in toto*, concerning "legal standards" not an appropriate fundamental fairness argument (as they have nothing to do with, and WMII alleges no inability of its right to be heard), none of them amount to allegations of an actual "inaccuracy" as asserted by WMII. Therefore, WMII's contentions concerning incorrect "legal standards" should be denied, and the Kane County Board's decision upheld.

(b) ***Evidence referenced in the four-page Walter document is accurate***

Prior to addressing WMII's alleged inaccuracies in the Walter document, there are two problems inherent in the IPCB even considering WMII's inaccuracy argument under a fundamental fairness review. First, the standard of review is *de novo* rather than the manifest weight of the evidence. If a *de novo* review is conducted by the IPCB, it would be contrary to well established case law requiring a manifest weight of the evidence standard of review, when considering whether a local government's decision is supported by the evidence and should be affirmed.

Second, when conducting its review under the manifest weight of the evidence standard, the IPCB does not consider the written decision of the local government alone, it considers it in connection with the transcribed record of the public hearings. (415 ILCS 40.1(a)). Thus, much like an appellate court considering the rulings of a trial court, the appellate court turns to the trial court's written rulings as a guideline, but even if the written rulings are incorrect and the basis for the decision to be affirmed is contained in the testimony or record of the trial court, the appellate court will affirm the rulings of the trial court. Hux v. Raben, 38 Ill.2d 223, 224-225, 230 N.E.2d 831, 832 (S.Ct. 1967), *citing*, S.Ct. Rule 366. Therefore, the Kane County Board submits that the inquiry WMII seeks is not consistent with fundamental fairness, and is an attempt to duck the well-established law on the standard and scope of review. Thus, WMII's argument should be denied by the IPCB.

Without waiving this position, however, the allegations of WMII of inaccuracies are without merit and individually addressed herein. Further, an "inaccuracy," if any, was insignificant (particularly in a record that is almost 5000 pages long); is not of a substantial enough fact to reverse the decision of the Kane County Board on a manifest weight of the evidence argument; and did not interfere with the procedural due process of the hearings and WMII's right to be heard. WMII alleges the following "inaccuracies" in the Walter four-page memorandum:

- WMII apparently alleges that Walter's statements referencing an historical average traffic volume at the landfill of 227 (in and 227 out) and existing traffic count of 160 (in), and concluding that WMII's assertion that truck traffic would *decrease* with the proposed transfer station, opposed to the

landfill is incorrect. WMII is simply, wrong.

First of all, Walter cites Miller's testimony stating that the 160 was from an actual count and the 227 was an historical 5-year average he obtained from WMII, and Walter accurately repeats those numbers in his document. (C004880; C003840-3842 (Tr. 9/30, 28-30)). Further, WMII's traffic expert Miller testified inconsistently on the issue of whether when the proposed facility initially opens it would increase or decrease truck traffic.

The application states "[a]s shown, when the facility opens, there would be an approximately 40 percent drop in the average daily tonnage to approx. 1000 tpd," yet Miller testified that even assuming the current landfill was 1000 tpd and the proposed facility would be 1000 tpd, the truck traffic of the proposed facility, would be greater, as it adds transfer trailers to a mix of vehicles and transfer trailers that are <u>not</u> part of the truck traffic which existed to Woodland Landfill at the time of Miller's study and the time of the public hearings. (C000700; C003846-003847(9/30 p.34-35)). Thus, Walter's reference is accurate.

- WMII contends that Walter's reference to Miller's testimony that IDOT informed Miller that it would not change the traffic signal phasing at the Rt. 25 and Dunham Rd. intersection is incorrect. However, that is specifically what Miller testified to, as quoted below. WMII attacks Walter's document on the basis that, since no application was pending to IDOT, IDOT could not

have made such a determination. However, WMII's assertion attempts to skew the focus of what its witness stated, and Walter's reference to that statement is accurate, despite WMII's dislike of that testimony.

> **Q:** Has the State of Illinois or IDOT or KDOT given approval to changing that to a two-phase?
>
> **(David Miller)**
> **A:** Unfortunately, no.
> We had discussions -- or I had discussions with Illinois Department of Transportation. They realized that that intersection does not operate as efficiently as it should. What they had told me as to the reasons they do not want to change it at this point are twofold: Number one, because they are anticipating this realignment of Stearns Road hopefully coming in a short period of time, was one reason; and the second is that there is a hill or an incline from both northbound 25 and northbound Dunham. So there is some site distance issues right at that intersection, and they were concerned with changing that, unless there was a detailed safety study that was done that could prove to them that that could be handled without any potential safety issues. So for those two reasons, they told me that they were reluctant to change that, even though they realized that that is an inefficient way of handling that intersection right now.
>
> (C003844-003845; Tr. 9/30, 32-33).

- WMII twists the context of Walter's four-page document when it argues that Walter's statements in the document concerning traffic signal warrants are erroneous and misrepresent the evidence. *First*, despite the fact that a traffic signal was included in a proposed condition for the transfer facility and WMII's representative, Dale Hoekstra, agreed to the conditions (C003126), WMII contends that there was no evidence that WMII would agree to a traffic signal. *Second*, whether or not WMII would agree to it is not the point of Walter's reference. WMII takes the reference to signal warrants on which

WMII chooses to pick out of context. The context in the Walter document concerns utilizing Rte. 25 north to West Bartlett Rd. and the testimonial conflicts concerning whether this particular route for transfer trailers would meet Criterion 6.

Walter's point, if you read the entire paragraph from which WMII's pulled quotation resides, is that a signal at the site entrance will not cure the inherent problems associate with and testified to by Miller with making a left turn from the facility. (C004881). Thus, Walter's document is, again, accurate.[5]

- WMII contends that Walter's document incorrectly asserts that WMII did not consider schools. WMII is, again, wrong. While WMII witnesses testified they were "aware" of the schools, as cited in Walter's document, Walter's document (if read in context) references WMII's failure as specific to the fact its traffic expert, Miller, did not consider the bus routes of the subject schools and, in fact, went on to state that he was not familiar with the "specifics" of what was occurring with those schools.[6] (C003853-3854 (Tr. 9/30, 41-42)). Mr. Lannert testified in the same manner: he knew the schools were in the

[5] It needs to be pointed out that WMII's reference to Coulter's testimony is inaccurate. (Memorandum p. 17). Coulter provided sound technical basis and rational for his opinion concerning a traffic signal warrant. (C004270-004271, C004279-004281, C004340).

[6] **Q:** In your traffic studies, did you take into consideration the new U46 high school and middle school under construction off Kenyon Road?

(Miller) A: Not directly. I'm aware of those proposed facilities which are located to the north and kind of west of the site. I've not seen any traffic studies that were prepared for those, so I'm not aware of where any of that traffic would be going as it relates to this area. But I am aware of those facilities. (C003853 (Tr. 9/30, p. 41)).

area, but he did not take then into consideration. (C003268 (Tr. 9/17 p. 81)).[7] Therefore, again, WMII is the one who is incorrect, not Walter's document.

- WMII complains that the statement in Walter's four-page document that the end use plan for Woodland Landfill was not considered in Criterion 2 or that portion of Criterion 3 concerning incompatibility with the surrounding area is false. At best, WMII's witnesses' testimony is inconsistent on this topic, but regardless, Walter's references are accurately reflected in the record. Specifically, one of WMII's Criterion 2 witnesses, **Mr. Nickodem** testified:

> **Q:** South Elgin has referenced and discussed that there is an end use plan that they have factored into their east side development plans and the well-known end use plan design that's been circulated throughout this hearing and discussed included a driveway where, I believe, the driveway currently is situated for the existing facility. In your design layout, did you give any consideration to the possibility that that end use plan would be as diagrammed fourteen years ago?
>
> **A:** No, I did not.
>
> (C003487 (Tr. 9/19 p. 145).

Nickodem testified further, consistent with Walter's statements, that he never considered having another access point to the Woodland Landfill or the proposed transfer station. (C003665). Additionally, Lannert testified that he looked at the end use plan (C003282-003283 (Tr. 9/17, 95-96)), however, no

[7] Further, since the school issues as well as a number of the other alleged "inaccuracies" or statements "outside the record" as alleged by WMII were made during the public hearing, the IPCB should find WMII waived its objections, since it did not object at the time these were raised during the public hearing, and did not object when the

reference to the end use plan is included in Lannert's report. (C00572-00600).

Further, the hours of operation are proposed to be 96 hours a week as stated in Walter's document and, although waste would not be accepted for 24 of the 96 operating hours, transfer trails may still be leaving the site after having been loaded. (CC003742-003743 (Tr.9/26, p. 67-69); C000701 (Table 2 of Metro's report showing projection of 4 transfer trailers leaving after 6:00 p.m.)). Also, regardless of the hours of waste acceptance or operation, Walter's statement concerning hundreds of trucks per week remains accurate. Finally, the statement in the Walter document regarding the conflict between the proposed transfer station and the end use for Woodland Landfill is his stated opinion, which has been adopted as the Kane County Board's opinion, in Resolution 02-431. There is nothing in the record to prove, by manifest weight of the evidence, that this opinion is incorrect, given the evidence presented.[8] Again, the references in the Walter memo are accurate.

- WMII takes issue with that portion of Walter's document referencing the

four-page Walter document was presented at the December 10, 2003, County Board Meeting (*See*, C004537 (Tr. 10/10 189)).

[8] Lannert's testimony, whether or not he was the only one to testify concerning compatibility, can be weighed by the County Board in making its decision. Contrary to WMII's assertion, the local hearing officer made no specific finding as to the credibility of Lannert, instead, the hearing officer found Lannert's testimony to be "probative." (C004847). Further, to the extent any finding of credibility is inferred from the local hearing officer's findings, such finding is off-set by the Walter document, which references inconsistency or unbelievability of the findings on Criterion 3, including compatibility of a transfer station and the planned Woodland Landfill end-use park. However, given that Lannert testified that he also believes a leaking Superfund space is a compatible use with open/recreational space, it is easy to see how Mr. Lannert's testimony was not given full weight by the Kane County Board. (C003324 (Tr. 9/17, p. 137)).

closure of Woodland Landfill and its relationship to a reduction in in-bound waste collection trucks, as being a statement concerning the "state of the public in South Elgin, Wayne and St. Charles" (Memorandum p. 21), which is outside of the record. Contrary to WMII's reference, Wayne, South Elgin and St. Charles commented on the proposed siting application and their comments are in the record. (C002740-002742, C002764-002769, C002770-2780, C002890-002894, C002895-2897). Further, the reduction in the numbers of inbound collection vehicles once Woodland Landfill closes is, again contrary to WMII's assertion and completely illogical, because as per WMII's own sworn testimony concerning the service area, these trucks are not just coming from the area immediately surrounding the proposed facility. (C004074-004075 (Tr. 10/3, p. 40-41)). Thus, WMII's assertion must be denied.

- WMII argues that a reference in the four-page Walter document that 24 of 29 townships are west of the river, and that the transfer station's location requires hundreds of trucks to cross the river is based on evidence outside the record. WMII's assertion is not accurate. WMII's own maps and diagrams show the location of the Fox River in a manner where it is easily compared to the service area geography and the Walter document makes no reference to "transfer trailers" as alleged by WMII, instead it references "trucks." Given WMII's testimony that the Woodland Landfill was, at the time of the public hearings, accepting approximately 1,000 tons per day (before the December

10, 2002, decision, however, Woodland Landfill reached capacity and stopped accepting waste), and that the transfer station was being proposed to accept more than double that amount, it is reasonable and logical to conclude that additional trucks will be coming into the site from the proposed service area, including those portions of the service area west of the Fox River. (C003846-C003847 (Tr. 9/30, p. 34-35); C004057 (Tr. 10/3 p. 23)).

- WMII asserts that Walter's accurate statement that WMII did not consider use of a rail line, combined with the logical extension that the same throughput with use of rail for output would necessarily reduce transfer trailer output, is somehow unfair. *First,* WMII's lack of consideration to rail lines and Walter's statement of such is in the record. (C003736 (Tr. 9/26 p. 62)). *Second,* it is not fundamentally unfair to WMII that a County Board Member or Members draw conclusions from the evidence presented. For example, in a negligence trial, no one generally testifies as to whether the defendant was "negligent," instead, persons testify concerning the elements and the conclusion is left up to the trier of fact to determine. The same holds true in this instance, even though this proceeding is not and is not held to the same standards as a purely judicial or adjudicatory proceeding.

- WMII's next gripe is that the four-page Walter document makes reference to South Elgin's comprehensive plan having been ignored by WMII, and that Walter references the 1988 siting approval of Woodland Landfill. WMII

contends that Lannert testified that the proposed transfer station was consistent with South Elgin's Comprehensive Plan; and, that the local hearing officer ruled that the County Board could not consider its conditions on the 1988 expansion of Woodland in making its decision on the proposed transfer facility. WMII is wrong on both counts. To what extent Lannert considered South Elgin's comprehensive plan is a matter of the credibility of and statements made during his testimony. This, like the rest of the "inaccuracy" or "outside the record" allegations brought by WMII, is an issue of whether the Kane County Board's decision is against the manifest weight of the evidence and is not a fundamental fairness issue.

Lannert testified that a transfer station minimizes incompatibility with open space and recreational uses, like a bike path and the end use for Woodland. (C003314, C003321 (Tr. 9/17, p. 127, 134)). He also testified that a leaking Superfund site is a compatible use with open space/recreational use, because it is an "open space." If nothing else, this shows that Mr. Lannert's study was surficial and did not take into account actual or planned uses only "spaces."

> **Q:** So in your expert opinion, you categorize a leaking superfund landfill as open space; is that your opinion?
>
> **(Lannert)**
> **A:** Yes.
>
> (C00324 (Tr. 09/17 p.137)).

Further, WMII mischaracterizes and misstates the local hearing officer's ruling on the issue of evidence concerning the 1988 agreement between WMII and

South Elgin and the 1988 siting of Woodland Landfill: the hearing officer found that evidence concerning it was admissible during the hearings, but that the County Board had to consider the Section 39.2 Criteria and could not base its decision on whether WMII was violating either its 1988 agreement with South Elgin or the 1988 Woodland Landfill siting conditions (C004566-004567).

Moreover, WMII waived any issue it may have had with admissibility, as it opened the door to the discussion on both these 1988 topics, not only from statements contained in its application, but from its opening statement and testimony as well. (C000015; C003205-003208 (Tr. 9/17 18-21)). Thus, WMII's contention of this information effecting fundamental fairness should be denied.

- WMII argues that the statement in Walter's four-page document that "[w]e are being asked to relieve Waste Management of the obligations already agreed to and imposed upon them by the Board" was outside the record. It was not. It is a logical conclusion of what the application requested. Rather than the entire Woodland site becoming open space and recreational use, a portion of it would be relieved of that obligation and become a transfer facility under WMII's proposal. However, the fact that this statement was made is hardly "fundamentally unfair" since WMII opened the proceedings with the opposite statement, *i.e.,* that it was not asking to be relieved of the obligations it agreed to during 1988 concerning

the Woodland landfill and/or site. (C003205-003208 (Tr. 9/17, 18-21)). Therefore, WMII not only responded to it, WMII was the first to bring it up. Finally, the hearing officer instructed the Kane County Board on what factors it should consider in making its decision (*i.e.*, the Section 39.2 Criteria) and there is no evidence that the Kane County Board did not follow those instructions. WMII's obligations in 1988 (its agreement not to "expand" Woodland and its end-use agreement for Woodland) are relevant, as so ruled by the hearing officer, as pertained, at least, to Criterion 3 (and even if they were not, WMII waived this issue), and, therefore, they were properly considered within and as part of the evidence concerning the Criteria. (C004566-4567).

Therefore, WMII's stretched assertions that Walter's four-page document was "fundamentally unfair" because the specific items WMII identifies are allegedly "inaccurate" or "outside the record" is not only incorrect from a factual standpoint, but far a field from unfairness, even if Walter's statements were not correct. Walter's document was correct and nothing about it, and the remainder of the written decision of the Kane County Board deprived WMII of its right to be heard or was fundamentally unfair. Therefore, WMII's Petition should be denied and the decision of the Kane County Board affirmed.

5. Even if the IPCB finds in WMII's favor concerning its allegations of unfairness, the remedy is not "reversal" of the Kane County Board decision as sought by WMII, rather it is to return the decision to the Kane County Board to cure any alleged unfairness and take another vote of the Kane County Board

Even if the IPCB finds in WMII's favor concerning WMII's meritless allegations of unfairness, WMII's requested relief of "reversal" of the Kane County Board's decision is not an

appropriate remedy. The remedy for a lack of fundamental fairness is a remand to the Kane County Board to provide it with an opportunity to correct the problem. Land and Lakes Company, *et al.* v. Illinois Pollution Control Board, *et* al., 245 Ill.App.3d 631, 644, 616 N.E.2d 349 (3rd Dist. 1993), City of Rockford v. Winnebago County Board, PCB 87-92 p. 2-3 (November 19, 1987), McLean County Disposal Co. Inc. v. County of McLean, PCB 89-108 p. 5 (November 15, 1989).

WHEREFORE, Respondent respectfully requests that the Illinois Pollution Control Board find that the proceedings before the Kane County Board were fundamentally fair, and affirm the December 10, 2002 decision of the Kane County Board. Alternatively, should the Illinois Pollution Control Board find that either WMII has a right to respond to that portion of Resolution 02-431 comprised of County Board Member Walter's four-page memo, or that facts or legal standards referenced in that document are not accurate and somehow interfere with WMII's right to be heard (fundamental fairness), that the Illinois Pollution Control Board remand the proceeding, give WMII and any other participant (as defined in the Kane County siting ordinance) 30-days or less to file a written response which will be made available to the Kane County Board, and then hold a meeting to deliberate and vote, again, on WMII's siting application.[9]

[9] WMII has simply alleged no unfairness or denial of its right to be heard at the public hearings, therefore, there is no need, nor is there alleged to be a need by WMII, for requiring new public hearings be held.

B. THE KANE COUNTY BOARD'S DECISION IS SUPPORTED BY THE EVIDENCE IN THE RECORD, IS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND SHOULD BE UPHELD

WMII challenges the Kane County Board's decision on Criteria 2, 3, 6 and 8. In doing so, WMII misstates the local hearing officer's findings, which are attached to the Resolution denying siting approval, by stating that the local hearing officer found that WMII met the Criteria. In fact, that is not the case. The local hearing officer found that WMII only met Criterion 1, 2, 3, 5, 6, and 8 subject to conditions. This means, without the conditions being imposed, (which they were not, as the four-page Walter document and Resolution 02-431 states specifically that the findings of the local hearing officer are adopted except to the extent they are inconsistent with the four-page Walter document), WMII did not meet its burden of proof with respect to the aforementioned Criteria.

Additionally, WMII's assumption that the Kane County Board adopted the local hearing officer's findings of credibility is flawed, as the Resolution embodying the County Board's decision specifically states that it adopts the local hearing officer's findings, except to the extent they are inconsistent with the four-page Walter document. (C004828). Therefore, to the extent the Walter document criticizes the credibility of WMII's witnesses or the inconsistency of their testimony or the testimony as a whole, credibility was at issue and not merely accepted as proposed by WMII.

Finally, when the IPCB reviews the decision of the Kane County Board, its reviews the record on appeal, particularly all the sworn testimony from the public hearings, in determining whether to affirm the Kane County Board's decision. In other words, while the written decision

of the Kane County Board provides a guideline as to the basis for the decision, the IPCB can find other rationale from the record to uphold the decision and is not limited to looking at only what is included in the Kane County Board's written decision (Resolution 02-431, with attachments). The Supreme Court has held that a "'reviewing court may, in its discretion, and on such terms as it deems just...give any judgment and make any order that ought to have been made,'" and "it is the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent..." Hux v. Raben, 38 Ill. 2d 223, 224-225, 230 N.E.2d 831, 832 (S.Ct. 1967), *citing,* S. Ct. Rule 366.

1. The Kane County Board's decision denying WMII's site location request on the basis of Criterion 2 should be upheld, as that decision was not against the manifest weight of the evidence

WMII focuses on the four-page Walter document and the testimony of only its own witnesses. WMII not only ignores the record which supports the Kane County Board's decision, but also the testimony of: Mr. Lynch, a professional engineer working with the Village of Wayne; Mr. Gary Deign, an environmental consultant hired by Kane County; Brent Coulter, a consultant hired by Kane County; and Chief Joseph Cluchey, from theSouth Elgin & Countryside Fire Protection District, the agency that would be an emergency responder to the proposed facility, all of whom also **testified** on Criterion 2.

For at least the following reasons in addition to those touched on in County Board Member Walter's four-page document, the Kane County Board had ample reason to deny on Criterion 2. Evidence presented either through testimony of the WMII's own witnesses or other witnesses, which call into question the reliability or accuracy of the WMII's application and testimony in support of meeting the design, location and operation portions of Criterion 2.

- There is no National Fire Protection Association (NFPA) code or standard, which specifically identifies transfer stations. (C003617-003618 (Tr. 9/24, 108-109)). Therefore, the proposed activities of the transfer station have to be compared with the standards provided in the NFPA to coordinate the best-suited standard with the proposed activity. (C004403-C004407 (Tr. 10/10 55-59)).

- The air ventilation system and CO monitoring system, as presented by WMII, were at very early, conceptual stages of design. (C003519-003521, C003557-003558 (Tr. 9/24 10-12, 48-49)). Additionally, WMII provided contradictory evidence concerning whether any mechanical or odor counteractant control measures would be implemented. Finally, due to the 145' open doorway, any ventilation system installed by WMII as conceptually designed in the application (*i.e.,* the only portion of it that was apparently designed was the fact that there would be six vents) would "short circuit," resulting in it pulling air from the outside, rather than from the areas of operation within the transfer station building. (C004398-004401 (Tr. 10/10, 50-53)).

- No accommodation was made for noise attenuation from the building, in the building itself (C003586-003587 (Tr. 9/24, 77-78)). Types of accommodation, such as screening and landscaping are also considered under Criterion 3, as the facility's ability to control these items helps minimize impact on the character and value of surrounding properties. Further, although WMII did not believe insulation for noise attenuation would be needed inside the building, it also did not perform any studies to determine whether the screening they propose would diminish noise levels, such as a decibel study. (C003587 (Tr. 9/24 78)).

- Although WMII strenuously, both in writing and through testimony, represented its compliance with the Kane County Stormwater Ordinance, it was not compliant with that Ordinance. For example, under the Kane County Stormwater Ordinance, infiltration in the detention basin does not "afford compliance" with the retention component of the Ordinance (C003615 (Tr. 9/24, 106)) as represented by the Applicant's witness, and, although required by the Ordinance, the Applicant did not address existing wetlands either on site or adjacent to the site/facility. (Kane County Solid Waste Management Ordinance, Art.2, Sec. 203(g)(1); Art. 4, Sec. 414-418).
- Although the site/facility was proposed to operate indefinitely, there was no consideration provided to the life expectance of basic material components of the proposed transfer station structure, which components do not have an "indefinite" life span. (C003584-003585 (Tr. 9/24,75-76)). Further, despite its proposed indefinite lifespan, there was no, at least comprehensive or complete, maintenance plan for the facility presented by the Applicant. (C003593-003594 (Tr. 9/24, 84-85)).
- Although a lighting plan was included in the application, there was no accommodation for natural illumination and WMII did not know whether the lighting plan considered the change in lighting conditions from natural to electrical/artificial, when a truck backs into the facility. (C003591-003593 (Tr. 9/24, 82-84)).
- Contrary opinions were provided as to whether there is sufficient room on-site to facilitate the transfer of 2,000 tpd of solid waste. On the one hand, WMII's witness Mr. Nickodem testified that the facility was designed to transfer 2,000 tpd (C003516-003517 (Tr. 9/24, 7-8)), but admitted that the size of the building for that capacity was the most

challenging feature of the site to overcome (C003582 (Tr. 9/24, 73)), and additionally was non-committal concerning the location of the proposed sand pile and its three-sided structure, due to the potential for holding up traffic flow on site (C003532-003533 (Tr. 9/24, 23-24)). On the other hand, Mr. Deigan testified that the proposed throughput for the facility can cause operational issues due to the limitations on usable land area (C004392-004394 (Tr. 10/10, 44-46)).

- Contrary opinions were given with respect to whether the evidence presented by the Applicant meets this Criterion. While WMII's hired expert stated that the Criterion was met, the County's consultant presented his opinion that the Criterion was not met. (C003477-003478 (Tr. 9/19, 135-136); C003717 (Tr. 9/26, 43); C004391 (Tr. 10/10, 43)).
- WMII **did not consider** off-site areas, such as Brewster Creek and wetland areas, in connection with its design of the stormwater management system. (C0036147 (Tr. 9/24, 108)). Further, to the extent the WMII's 1993 letter from the Illinois Department of Conservation (concerning the Woodland Landfill) is considered "evidence" addressing such proximity, the evidence is outdated. (C000196-000198). In fact, the evidence is so old that the agency from where the letter came is no longer in existence (if a to-date letter was provided in the application it would have be provide by the Department of Natural Resources). Further, although WMII references studies having been done with respect to the hydrogeology of the proposed site, it does not include any detail of those studies, either through attachment or detailed description of them, in the application or through testimony.

- Given the ability of plant and animal life to migrate and populate new areas, the 9-year-old letter from Illinois Department of Conservation contained in WMII's siting application and obviously prepared for a different Woodland Landfill project, is not reliable or accurate from a current perspective. Obtaining an updated letter from the Illinois Department of Natural Resources is rational and reasonable, and there is no valid reason why the Kane County Board could not reject this 9-year-old document on its face and based solely on its stated age. Additionally, it is unclear from WMII's application whether the property of the proposed location, opposed to the footprint of the landfill, was reviewed by the Illinois Department of Conservation in preparation of this 1993 letter.

- WMII did not have a written plan that identified day-to-day operations, opposed to emergency contingencies, of the site/facility, such as cleaning access roads and other impervious road and lot areas on site at least daily for water quality purposes; inspection and cleaning of silt and debris from drainage areas; measuring or cleaning sedimentation accumulation in the detention basin; cleaning the floor and walls of the facility; regular rodent and vector inspections and controls; odor response planning; litter picking; equipment breakdown; and other potential operational or regular operational issues. The Kane County Board can take the operational history of the applicant into consideration and testimony by Mr. Deigan raised concerns with WMII's housekeeping practices, based on his observations of two other facilities operated by WMII. (C004375-004389 (Tr. 10/10, 27-41)).

- WMII was inconsistent in its assertions concerning the timing of transferring waste at the proposed facility and this has a direct impact on the ability of the facility to manage the proposed throughput capacity. Specifically, although WMII provided more than two different estimates in which waste could be transferred at the facility (eight and ten minutes), two consultants hired by Kane County observed and timed the Applicant's operations at another facility, finding that the waste was transferred in 10 minutes. (C003652-003653 (Tr. 9/24, 143-144); C004330 (Tr. 10/9, 130); C004435-004436 (Tr. 10/10, 87-88); C003909-003912 (Tr. 10/1, 41-44)). This evidence directly contradicts one of WMII's main assertions crucial to its opinions concerning the operation, capacity, and on-site traffic flow (back up potential) of this proposed facility.

Therefore based on the record, in the light most favorable to the Kane County Board, the County Board's decision is **not** against the manifest weight of the evidence, WMII's appeal should be denied; and the Kane County Board's decision as respects Criterion 2 should be affirmed.

2. The Kane County Board's decision denying WMII's site location request on the basis of Criterion 3 should be upheld, as that decision was not against the manifest weight of the evidence

WMII argues that the Kane County Board's decision is against the manifest weight of the evidence and, in doing so, again focuses solely on the four-page Walter document, ignoring the weight of the entire record, including the four-page Walter document. For at least the following reasons in addition to those touched on in County Board Member Walter's four-page document, the Kane County Board had ample reason to deny on Criterion 3.

As an initial matter, prior to stating those reasons, two blatant misrepresentations by WMII in its Memorandum must be addressed. First, WMII represents that the local hearing officer ruled that the 1988 Woodland Landfill expansion was not relevant. To the contrary, the hearing officer was consistent in his holding that although he was not going to decide relevancy, *per se*, that the Kane County Board could consider the adjacent property and use, and, thus, consider the end-use of Woodland Landfill in terms of Criterion 3 issues. (C004566-004567). Second, WMII incorrectly defers to the local hearing officer's determination that WMII "substantially" complied with the Kane County siting ordinance (Respondent's Hearing Exhibit 1), when Resolution 02-431 clearly states that such findings of the local hearing officer are not adopted by the Kane County Board if they contradict the four-page Walter Memorandum. WMII's failure to review and present evidence concerning a 5-mile radius as required by Kane County's ordinance, instead, determining for itself 1-mile or 1/5th of the required distance was sufficient. Either this was overlooked by WMII in its preparations of the siting application or it intentionally ignored the requirement of the siting ordinance; in either case, however, the Kane County Board would be correct in finding that WMII's evidence was insufficient to meet Criterion 3.

In addition to the above and the reasons provided in the four-page Walter document, the following evidence provides ample support for the Kane County Board's decision to deny on Criterion 3:

- Berming, landscaping and fencing are all, admittedly by WMII, important factors in minimizing the incompatibility or effect of the proposed site/facility, as they

help to buffer the site/facility from view. However, although WMII proposed berming and fencing along the Illinois Prairie Path side and entranceway side of the proposed site/facility, it proposed no buffer on the other sides of the proposed facility, including that portion of the facility that would be adjacent to and "face" the Woodland Landfill recreational end-use. (C004481 (Tr. 10/10, 133).

- Additionally, although Mr. Lannert was aware of the End Use Plan for Woodland Landfill, he provided contradictory evidence concerning his consideration of this use in planning the proposed berming and fencing of the site/facility (C003284-003290 (Tr. 9/17, 97-103). While, on the one hand he recommended fencing, berming and landscaping to buffer the Illinois Prairie Path from the site/facility, due to is recreational use, he utilized the Woodland Landfill as a buffer, rather than buffering the site/facility from the Woodland Landfill. Id.
- Landscaping, berming and fencing is an important tool in minimization of effect and incompatibility. Additionally, an undulating berm, which was not proposed by WMII, other than a "little bit," "just looks better" according to Mr. Lannert, and, thus, is a more effective way to screen the site/facility from the surrounding land uses, yet it was not proposed by WMII. (C003308-003309 (Tr. 9/17, 121-122).
- Litter, vector, odor, and dust, as examples of operational issues, are important to compatibility as the site/facility, and Mr. Lannert *assumed* those issues would be properly and efficiently addressed by the operator, in reaching his conclusion on Criterion 3. (C003310-003312 (Tr. 9/17, 123-125).

Therefore based on the record, in the light most favorable to the Kane County Board, the County Board's decision is **not** against the manifest weight of the evidence, WMII's appeal should be denied; and the Kane County Board's decision as respects Criterion 3 should be affirmed.

3. The Kane County Board's decision denying WMII's site location request on the basis of Criterion 6 should be upheld, as that decision was not against the manifest weight of the evidence

Transfer trailers did not (as Woodland Landfill is no longer open) use Woodland Landfill at the time WMII filed its transfer station site location application, at the time of the public hearings on that application, and for some time prior to those events. (C003923-003924 (Tr. 10/1, 55-56). Thus, transfer trailer routing was not something already in existence from Woodland Landfill that WMII could argue was a "carry over" to the proposed transfer station. WMII incorrectly argues, that its witness David Miller and the County's traffic expert, Brent Coulter, agreed on transfer trailer truck routing to the north on Rte. 25 and east on West Bartlett Rd. The only transfer trailer route which WMII's witness, David Miller, testified in support of meeting Criterion 6 was Rte. 25 south to Rte. 64 East. Mr. Miller ruled out Rte. 25 north due to the left turn maneuver out of the proposed site driveway and due to the Level F intersection at Rte. 25 and Dunham, which would need to be passed by transfer trailers moving north. Even when prodded by the local hearing officer concerning the north Rte. 25 option, Mr. Miller would only agree that it would be an option if the intersection of Rte. 25 and Dunham did not exist. (C003986-003987 (Tr. 10/1, 118-119)). Mr. Miller ruled out all other existing routes. (C003963-003967, C003969-003972 (Tr. 10/1, 95-99, 101-104)).

Mr. Coulter, a professional engineer with a background in urban planning, who was at one point in time the highway superintendent for DuPage County, testified as to numerous reasons why Mr. Miller's preferred route does not meet Criterion 6, and expressly did not provide any opinion that any other route, existing or planned, would meet Criterion 6. Brent Coulter[10] testified that WMII's proposed Rte. 25 south, for transfer trailers did not meet Criterion 6, due to the curvy, rolling and hilly alignment of Rte. 25; the residential street function of Rte. 25; the very tight turning radius at Rte. 25 and 64; and the downgrade slope on the southern approach to Rte. 25 and 64; and, vehicle queing at that intersection (particularly since Mr. Miller's firm, Metro, was working with IDOT to increase the delay on Rte. 25 at the signal that controls the intersection of Rtes. 25 and 64). (C004234-004251). Mr. Coulter clarified that Rte. 25, despite being a State of Illinois roadway, is a route that has, essentially, been unchanged since the 1930's to 1950's; that it is an old highway and does not meet modern highway standards relating to alignment. (C004236). Further, Rte. 25 has very little superelevation or banking (which means that at the speed limit or higher, trucks the size of transfer trailer trucks will tend to "off track" and leave the roadway on curves; that 80% of the part of Rte 25 proposed to be used by WMII is no passing (and one lane with, essentially no shoulder); and, that a large portion of this route has residential homes fronting Rte. 25 with their individual driveways entering and exiting directly from Rte 25. (C004238-004239).

[10] Again, WMII's "liberty" with words must be addressed. WMII contends that Mr. Coulter was "not in opposition" to its Application. Although, Mr. Coulter stated he was "neutral," when asked by the local hearing officer (who was authorized by the siting ordinance to ask each witness their "position" with respect to an application) for his position on the application, Mr. Coulter understood that question to mean when he was for, against, or neutral with respect to the transfer station proposal. He clearly stated that he was opposed to WMII's proposed transfer trailer routing south on Rte. 25. (C004224, C004334, C004332).

Mr. Coulter also testified concerning Rte. 25 north to West Bartlett Road east as a transfer trailer route he analyzed. Mr. Coulter **did not render an opinion** concerning this routing option and whether it met Criterion 6. (C004258). Mr. Coulter's simply testified concerning the general suitability of Route 25 north and West Bartlett Rd. east of the proposed facility, based on the characteristics of those roadways and acknowledging the suitability is limited by the level of service of intersection Rte. 25 and Dunham. (C004258-004262). Although WMII testified that it would be sending the majority of the transfer trailers out of the proposed facility during off-street peak hours, it failed to provide traffic counts for off-street peak at Rte. 25 and Dunham. (C004263). WMII only provided traffic counts for Rte. 25 and Dunham for the morning and evening rush hours. Id. Rte. 25 and Dunaham is a "F" rated intersection during those times, which means, like a report card, the intersection fails and it is not an acceptable design level of service in the State of Illinois. (*See*, C004262). However, based on traffic counts WMII gathered from Dunham and Stearns (a different, but nearby intersection), Mr. Coulter extrapolated that data to obtain "a preliminary estimate or assessment" of middle of the day operation at the Rte. 25 and Dunham intersection. (C004263). Mr. Coulter testified concerning his evaluation of all the other existing and available routes from the proposed transfer station, and found none of them to meet Criterion 6. (C004252-004257).

Mr. Miller maintained throughout his testimony that the Rte. 25 and Dunham intersection was a sever limitation to the Rte. 25 north to West Bartlett Road routing option and never took the stand in rebuttal to Mr. Coulter to clarify what, if any opinion, Mr. Miller had concerning off-peak usage of that intersection.

Furthermore, it is important to reference that the local hearing officer did **not** find either Miller's Rte. 25 south or Coulter's Rte. 25 north to be options that met Criterion 6. (C004856). The **very first** condition referenced in the local hearing officer's findings states that the facility "shall not open" until July 1, 2006, or the realignment of Stearns-Dunham corridor (with additional limitations). Id. The Stearns-Dunham corridor realignment, another routing option discussed at the public meetings but **not existing** at the time of those hearings, was believed to be scheduled for completion in 2006. (C004334-C004335).

Therefore, unlike WMII's contention, the evidence does not support any single route for transfer trailers, as Coulter's testimony is sufficient for the Kane County Board to find that Rte. 25 south does not meet Criterion 6, and Miller's and Coulter's testimony regarding the intersection of Rte. 25 and Dunham (an intersection necessary to the Rte. 25 north route), is inconclusive concerning the ability of that intersection to handle the addition of transfer trailer traffic, even at off-street peak hours. In addition to the failure of WMII to meet Criterion 6 with respect to its designation of a transfer trailer truck route, there were other concerns raised at the hearings by Mr. Coulter. (*See*, C04270-004272). Finally, there are other problems inherent with Mr. Miller's testimony, including but not limited to those listed below:

- Mr. Miller testified numerous times for WMII and once for a municipality, however, he has never found that traffic impact was not minimized by a proposed pollution control facility. (C003916-003917, C003956 (Tr. 10/1, 48-49, 88).
- Rte. 25 is neither a strategic regional arterial (SRA) nor a designated truck route. (C003824-003825 (Tr. 9/30, 12-13), C003967 (Tr. 10/1, 99)).
- Mr. Miller has limited familiarity with the intersection of Rte. 25 and 64, ". . .I'm not

familiar with 25 and 64," (C003828 (Tr. 9/30, 16), despite having completed a computer model using the geometry of that intersection and riding in a transfer trailer truck (approximately 60 feet long) through that intersection. (C003857-003861, C003865-003866 (Tr. 9/30, 45-49, 53-53)).

- No level of service data was provided by WMII for Rte. 25 and 64 (C003881 (Tr. 10/1, 13)). Likewise, Mr. Miller did not analyze what amount of traffic would reduce the level of service at Rt. 25 and 64 (C003906 (Tr. 10/1, 38)), and he had no knowledge as to whether there were secondary peaks in traffic which would conflict with the peaks in site/facility generated traffic, at the Rte. 25 and 64 intersection (C 003961-003962 (Tr. 10/1, 93-94)).
- In making the turn from 64 to Rte. 25, North, during his ride in a transfer trailer, Mr. Miller even experienced some difficulty, when a automobile traveling South on 25, stopped for the light over the stop line for the intersection with 64. (C003931-003932 (Tr. 10/1, 63-64)).
- Mr. Miller had difficulty recalling characteristics of Rte. 25 which are important to determining whether utilizing the roadway for transfer trailer trucks would minimize impact on existing traffic flows. For example, Mr. Miller did not know how much of Rte. 25 was striped for no passing, even though striping is indicative of horizontal and vertical sight limitations on a roadway, (C003967 (Tr. 10/1, 99)), he could not recall whether Rte. 25 had no shoulder existing in areas and whether there were steep embankment slopes from the roadway on the proposed route, (C003968 (Tr. 10/1, 100)), and he did not obtain any IDOT truck count data for Rte. 25 and 64, although

he admitted that IDOT may have such data (C003978 (Tr. 10/1, 110)). Additionally, Mr. Miller testified that the slowest speed limits of any of the potential routes for transfer trailer trucks leaving or arriving at the proposed site/facility were on Rte. 25. (C003998-003999 (Tr. 10/1, 130-131)).

- Mr. Miller did little to analyze and did not utilize a computer model to analyze queuing of transfer trailers from the proposed site/facility to the intersection of Rte. 25 and 64. (C003978 (Tr. 10/1, 110)). The significance of this is even more important with the evidence that Mr. Miller's firm, Metro, was working on the re-timing of signals at Rte. 25 and 64, to make the stop signal longer on Rte. 25. (C003995-003996 (Tr. 10/1, 127-128)).

Finally, contrary to WMII's assertion in its Memorandum, evidence was presented from more than Mr. Miller and Mr. Coulter concerning Criterion 6. Daniel Lynch on behalf of the Village of Wayne, testified and the following people provided written comment: City of St. Charles; Village of South Elgin; Jim W. Hanson, II, Mayor of South Elgin; Joan Korinek; Robert Morrow; Village of Bartlett (providing a traffic engineering report concerning Rte. 25 north to West Bartlett Rd. not meeting Criterion 6)(C002770-002780); Barbara & James Bachman; Jill Schneeberg & Robert Hayes; Sandy Lance; Roger Tilbrook; Mary Byrne; Barbara Ross; Dan Karais; and Carol Hecht on behalf of FRESH. (C002533-2534, C002660-002710, C002743-002754, C002763-002781, C002882, C002890-002903).

Therefore based on the record, in the light most favorable to the Kane County Board, the County Board's decision is **not** against the manifest weight of the evidence, WMII's appeal should be denied; and the Kane County Board's decision as respects Criterion 6 should be

affirmed.

4. The Kane County Board's decision denying WMII's site location request on the basis of Criterion 8 should be upheld, as that decision was not against the manifest weight of the evidence

WMII argues that the Kane County Board's decision as respects Criterion 8 is against the manifest weight of the evidence as "[f]ailure to provide information that is either not required by the statutory language, or arbitrary, does not cause a siting application to be inconsistent with a plan." (Memorandum p. 40). However, WMII cites no legal support for its argument and WMII's failure with respect to Criterion 8 was more than not providing traffic characteristics for future growth.

WMII apparently seeks to establish a rule of law through this case that limits the consistency of the Solid Waste Management Plan, but it does not propose what limits of authority or consistency to impose other than Kane County's requirement that an applicant provide future traffic growth characteristics. Requesting the information from an applicant is completely within a local government's authority under Section 39.2 of the Act. There is no limitation and the case law to date supports a local government's establishment of procedure, which includes what information the applicant should provide in a siting application, at the local siting process level. Further, a County's authority for the Solid Waste Management Plan comes from State Law, independent of Section 39.2,[11] which also requires that the Plan be submitted to the Illinois Environmental Protection Agency review and comment, and WMII has no standing in this proceeding to challenge the authority of the County pursuant to that law.

Additionally, even though a requirement for traffic characteristics for future growth cannot be relied upon by the Kane County Board as the plain language of Criterion 6 provides for "existing" traffic flows, it does not mean that this information is not relevant to other Criteria (such as Criterion 3).

Finally, WMII's failure to meet its burden on proof and show that the proposed facility is consistent with Kane County's Solid Waste Management Plan is more extensive than its failure to provide traffic characteristics for future growth. For example, WMII failed to provide accident histories, as required by Chapter 6, Figure 6.2, Item VI.E of the Solid Waste Management Plan Five Year Update, of the intersections of Rte. 25 and 64 (a key intersection for Mr. Miller's and WMII's proposed routing of transfer trailers on Rte. 25 south of the proposed facility) and of Rte. 25 and West Bartlett Road (a key intersection for the routing of transfer trailers on Rte. 25 north of the proposed facility).

Therefore based on the record, in the light most favorable to the Kane County Board, the County Board's decision is **not** against the manifest weight of the evidence, WMII's appeal should be denied; and the Kane County Board's decision as respects Criterion 8 should be affirmed.

5. The Kane County Board's decision denying WMII's site location request should be upheld, regardless of WMII's compliance or non-compliance of the local siting ordinance

WMII's last challenge to the Kane County Board's decision to deny WMII's site location request, is the reference in the four-page Walter document to provisions of Kane County's siting

[11] The Local Solid Waste Disposal Act and the Solid Waste Planning and Recycling Act, 415 ILCS 15/1, *et seq.*

ordinance, which were ignored or not complied with by WMII. **First,** this challenge by WMII should be denied, as it was neither identified in WMII's Petition or its discovery in this proceeding as a basis for its challenge; WMII has no standing to raise a legal challenge to the Kane County siting ordinance (or Solid Waste Managements Plan) in this proceeding; and the IPCB has no jurisdiction to hear a challenge to Kane County's siting ordinance (or Solid Waste Management Plan) in this proceeding.

Second, WMII makes and can make no showing that the references to WMII's non-compliance of these ordinance requirements somehow invalidates the evidence supporting the Kane County Board's decision.

Third, without any legal authority, WMII attempts to limit a local government's ability to require information be presented in a siting application through ordinance and argues that a requirement in the Kane County siting ordinance that an applicant identify zoning and land use 5 miles surrounding the proposed facility and a requirement that some truck directional distribution information (entrance and exit points of the County) are arbitrary.

This is not the appropriate petition for WMII's challenge to Kane County's siting ordinance. The IPCB's review in this proceeding is governed by Section 40.1 and limited to the review of the Kane County Board's decision. WMII not only has no standing to raise a challenge to Kane County's ordinance (or Solid Waste Management Plan) in this proceeding; the IPCB does not have jurisdiction to entertain such a challenge in this proceeding; and whatever objections to the siting ordinance (or Solid Waste Management Plan) WMII had, it waived when it filed its siting application purporting to have reviewed and been in applicable compliance with those provisions, and not raising any objection to them at that time. Residents Against a Polluted

Environment, *et al.* v. County of LaSalle, PCB 96-243, p. 8-9 (July 18, 1996).

Therefore based on the record, in the light most favorable to the Kane County Board, the County Board's decision is **not** against the manifest weight of the evidence, WMII's appeal should be denied; the Kane County Board's decision should be affirmed; and the IPCB should decline to rule on either Kane County's siting ordinance or its Solid Waste Management Plan at this time, as this is neither the appropriate proceeding for such a challenge and WMII has no standing to bring that challenge at this time.

6. WMII failed to contest two Section 39.2 Criteria found by the Kane County Board to have not been met and, thus, WMII's Petition must fail on its face

WMII challenges Criteria 2, 3, 6 and 8. However, the Kane County Board's decision, Resolution No. 02-431, denies on Criteria 1 and 5 in addition to those contested by WMII. Specifically, the local hearing officer's findings, which is one of two attachments to Resolution 02-431, finds that WMII only met Criteria 1 and 5 subject to conditions. Since the conditions are only relevant from the perspective of identifying WMII's failures in proof in the situation, such as this, where the County Board has denied the site location request, and since conditions are not placed on a denial, the "subject to" finding by the local hearing officer means that the Criteria are not met, should the conditions be rejected. In this case, the conditions were "rejected" as the proposed site was denied. Thus, Criteria 1 and 5 were not met by WMII and WMII fails to contest that in its appeal. Therefore, on its face, WMII's appeal must fail, as WMII failed to challenge two Criteria on which they were denied.

IV. CONCLUSION

For the reasons stated above in Section III of this Brief, WMII's fundamental fairness arguments should be rejected and denied, and the Kane County Board's proceedings and decision in this matter found to be fundamentally fair. Further, for the reasons stated above in Section III of this Brief, WMII's appeal on the manifest weight of the evidence should be denied, and the Kane County Board's decision affirmed. Finally, the IPCB should decline to take up any argument raised by WMII on the validity of or challenge to the Kane County siting ordinance or the Solid Waste Management Plan, on the basis of lack of standing and lack of jurisdiction in this proceeding.

WHEREFORE, the Kane County Board respectfully requests the Illinois Pollution Control Board to affirm its decision and deny the challenges raised by Waste Management of Illinois, Inc.

Dated: May 12, 2003

Respectfully Submitted,

RESPONDENT, COUNTY BOARD OF KANE COUNTY, ILLINOIS

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