BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STOP THE MEGA-DUMP,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-103
	)	(Third-Party Pollution Control Facility
COUNTY BOARD OF DEKALB COUNTY	)	Siting Appeal)
ILLINOIS and WASTE MANAGEMENT OF	)	
ILLINOIS, INC.,	)	
	)	
Respondents	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on January 31, 2011, we filed with the Illinois Pollution Control Board, the attached **Response Brief of Waste Management of Illinois, Inc. in Support of the Decision of the DeKalb County Board Approving Site Location for the DeKalb County Landfill Expansion** in the above entitled matter.

WASTE MANAGEMENT OF ILLINOIS, INC.

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PROOF OF SERVICE

I, Tasha Madray, a non-attorney, on oath states that she served the foregoing **Response Brief of Waste Management of Illinois, Inc. in Support of the Decision of the DeKalb County Board Approving Site Location for the DeKalb County Landfill Expansion** by electronic mail at the e-mail addresses indicated below and by enclosing same in an envelope addressed to the following parties as stated below, and by depositing same in the U.S. mail at 161 N. Clark St., Chicago, Illinois 60601, on or before 5:00 p.m. on this 31st day of January, 2011:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STOP THE MEGA-DUMP, Petitioner, v. COUNTY BOARD OF DEKALB COUNTY, ILLINOIS and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB No. 10-103 (Third-Party Pollution Control Facility Siting Appeal)

RESPONSE BRIEF OF WASTE MANAGEMENT OF ILLINOIS, INC. IN SUPPORT OF THE DECISION OF THE DEKALB COUNTY BOARD APPROVING SITE LOCATION FOR THE DEKALB COUNTY LANDFILL EXPANSION

Respondent, Waste Management of Illinois, Inc. ("WMII"), by its attorneys, Pedersen & Houpt, P.C., submits this Response Brief in response to the Brief and Argument of Petitioner, Stop the Mega-Dump ("STMD Br.").

INTRODUCTION

The decision of the DeKalb County Board ("County Board") granting local siting approval was reached as a result of fundamentally fair procedures and the uncontradicted evidence which established the nine statutory criteria. STMD disagrees, claiming that the local siting procedures were fundamentally unfair because of pre-filing contacts between WMII and the County Board, and because the County Board engaged in a concerted effort to limit and discourage public participation in those proceedings. (STMD Br. at 1-2.) With respect to the statutory criteria, STMD claims that WMII seeks to expand a leaking landfill with ongoing hydrogen sulfide problems over an unlined unit. (STMD Br. at 1.) STMD's fundamental fairness claim misapplies the law and its manifest weight claim misrepresents the facts. Both lack legal and factual support and should be rejected.

Fundamental fairness is not a catch-all legal principle into which all perceived slights, real or imagined, can be placed in the hope that their cumulative impact, not their individual and actual effect, will result in the invalidating of the well-considered and evidence-based decision of the County Board. Rather, fundamental fairness is the legal principle that allows persons a reasonable opportunity, not a perfect or absolute right, to present their case and be heard. It protects the integrity of the administrative process; it does not guarantee a perfect process free of all burden or inconvenience. If persons are provided reasonable access to the siting application and a reasonable opportunity to submit information, cross-examine witnesses and present their case at the public hearing, the local siting procedures are fundamentally fair. By this standard, the local siting procedures used by the County Board in deciding the Site Location Application ("Application") for the DeKalb County Landfill Expansion ("Expansion") were fundamentally fair.

Arguing otherwise, STMD complains of a series of perceived slights relating to the availability of the Application, the ability of persons to participate in the public hearing and the alleged effect of so-called ex parte contacts between WMII and the County Board.[1] For those slights to make the procedures fundamentally unfair, they must cause actual injury or prejudice. There is no evidence, however, that demonstrates any actual injury or prejudice to any person; the Application was available for review and copying in the County Clerk's office, the County Board office, the City of DeKalb, the Town of Cortland, and the DeKalb, Cortland and Sycamore public libraries. (Notice of Application, Pet. Ex. 1, Vol. 2; C6790, 6797; Bockman Dep. at 36, 43; IPCB Tr. at 36, 40.) No

[1] In making its argument attacking fundamental fairness and challenging criteria (i), (ii) and (vi), STMD in its brief repeatedly makes false or unsupported assertions. Rather than describe each of them in the text of this brief, WMII has prepared a representative list of the misstatements and included them in the Addendum at the end of this brief.

one was denied or refused the opportunity to view the Application at any of the seven locations where it was available. (IPCB Tr. at 89.) Each person who requested a copy of the electronic version of the Application received it. (IPCB Tr. at 71, 89, 105-106.) Each person who requested photocopies of any portion of the Application received it. (Kunde Dep. at 18-19; Supple Dep. at 29-31.) And no one was denied or refused the opportunity to participate in the public hearing in whatever manner desired. (IPCB Tr. at 45-46, 77.) On this record, there is no question that the procedures employed by the County Board were fundamentally fair.

STMD further claims that the County Board's findings on criteria (i), (ii) and (vi) were against the manifest weight of the evidence. Yet the statements STMD presents in support of its manifest weight argument on criterion (ii) are false. The existing landfill is not leaking; no part of the Expansion will occur over an unlined unit; the existing landfill does not have an ongoing hydrogen sulfide problem; and the upper most aquifer is not precariously close to ground surface. (Addendum at A-1 – A-4, Nos. 1-12.) In fact, the record shows that WMII's evidence in support of criteria (i), (ii) and (vi) was persuasive and unrefuted. No credible evidence was presented that would support a contrary finding of any of the challenged criteria, much less provide sufficient evidence to demonstrate that the County Board's findings were obviously and indisputably wrong.

For these reasons, and as more fully set forth below, STMD's claims lack legal and factual support, and the County Board's decision granting Site Location Approval should be affirmed.

ARGUMENT

I. STMD'S FUNDAMENTAL FAIRNESS CLAIMS ARE NOT SUPPORTED BY THE FACTS AND ARE BASED ON MISSTATEMENTS OF THE LAW.

STMD's fundamental fairness claims are based on trivial complaints about the nature of the local siting procedures. STMD objects to any pre-filing contacts between the decision maker and the applicant. STMD finds fault with the manner in which the County made an electronic version of the Application available to the public. STMD criticized the local siting rules and procedures for barring or limiting a hypothetical person's ability to participate in the public hearing. In essence, STMD wants more than fundamental fairness; it wants a perfect process according to its standards. Despite its arguments in this appeal, STMD and the public were entitled to, and received, all the adjudicative due process rights available in administrative proceedings. No member of the public was denied the opportunity to access the Application, the right to be heard, present evidence, cross-examine witnesses, or submit post-hearing written comment. No improper ex parte contacts occurred. No evidence of collusion, prejudgment, or actual harm was presented. As demonstrated below, although STMD may want more, it (and the public) received what it was due, namely adjudicative due process that was clearly fair and open. Therefore, this Board should reject STMD's arguments that the local siting procedures were fundamentally unfair.

A. The Provisions for Public Participation Comported with Fundamental Fairness.

STMD argues that Section 50-54(a)(3) of the DeKalb County Pollution Control Facility Siting Ordinance ("Ordinance"), and Article III, Section 5 of the DeKalb County Pollution Control Facility Committee Articles of Rules and Procedures ("Rules and Procedures") are, on their face, fundamentally unfair because the definition of "participant" is not broad enough and as a result, most

public participation was barred at the public hearing. (STMD Br. at 12-14.) This argument has no merit because those persons allowed to act as "participants" under the Ordinance and Rules and Procedures is broader than those entitled to notice of the Application by Section 39.2(b) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/39.2 (2008). Moreover, the provisions for participation included public comment by all members of the public. Therefore, STMD has not shown that the Ordinance and Rules and Procedures barred public participation or discouraged participation on their face. Also, given STMD's acknowledgment that the Hearing Officer allowed anyone to act as a participant, and STMD's failure to prove that anyone was actually prevented from participating at the public hearing, it has not shown that the Ordinance and Rules and Procedures were fundamentally unfair in effect. (C6823-24, 6830, 6833, 6837, 6840-42; IPCB Tr. at 45-46, 77-78; IPCB PC #54.)

1. The definition of "participant" is not restrictive, and it is not fundamentally unfair to have different levels of participation in a local siting hearing.

STMD argues that the definition of "participant" is too restrictive because it "essentially mirrors" the notice requirements in Section 39.2(b) of the Act, and thereby "effectively limits participation to property owners within four hundred feet of the subject site and municipalities within 1.5 miles of the subject site." (STMD Br. at 12.) STMD argues that "everyone else" was limited to public comment, and that does not comport with adjudicative due process. Id. STMD's argument is flawed for three reasons.

First, STMD assumes that any and all persons are entitled to participate as a party in the local siting hearing. There is, however, no legal support for this assumption. Neither the Act nor the case law establishes that any and all persons, regardless of their residence or interest, have the right to

party status in a local siting hearing. It would be inconsistent with the nature and purpose of the local siting hearing for the Act to confer party status on any person who asked for it, irrespective of where they resided or whether they would be affected by the proposal.

The Act identifies the persons entitled to pre-filing notice of the application. 415 ILCS 5/39.2(b). They include those persons owning property within up to 400 feet of the site, as well as municipalities within one-half mile of the subject site. Id. It is logical to conclude that Section 39.2(b) establishes those persons with standing to participate as a party in a local siting hearing, for the following reasons. The Act does not address the issue of who has adjudicative due process rights in a local siting proceeding other than in Section 39.2(b), and it is unreasonable to conclude that the legislature intended those rights to apply to all persons. If such rights universally apply to all and anyone can obtain party status in a local siting hearing, the local siting authority's ability to conduct a fair and efficient hearing may be limited or impaired. Moreover, the Act provides for any person to make written comment. 415 ILCS 5/39.2(c). It does not provide that any person may have party status in the public hearing. By authorizing any person to submit written comment, but not the right to party status in the public hearing, the Act has struck the appropriate balance called for by adjudicative due process between the individual's interest and society's interest in efficient and effective governmental operation.

Second, STMD acknowledges the well-settled legal principle that local authorities are allowed to establish rules for conducting a local siting hearing, including participation and preregistration requirements, so long as those rules are not inconsistent with Section 39.2 of the Act. (STMD Br. at 12 citing Waste Management of Illinois, Inc. v. Pollution Control Board , 175 Ill.App.3d 1023, 1036, 530 N.E.2d 682, 693 (2d Dist. 1988)); see also Slates v. Illinois Landfills,

Inc., No. PCB 93-106, slip op. at 11, 16 (Sep. 23, 1993). As discussed above, it is logical and rational to interpret Section 39.2(b) as identifying the group of persons, at a minimum, entitled to participate as a party in a local siting hearing. Hence, a local provision for public participation that defines a party-participant to include a larger class of persons than would be entitled to notice under Section 39.2(b) cannot be said to be inconsistent with the Act.

Third, STMD bases its argument on an erroneous reading of the Ordinance and Rules and Procedures. Contrary to STMD's assertion, the Ordinance and Rules and Procedures do not limit participants to "property owners within four hundred feet of the subject site and municipalities within 1.5 miles of the subject site." (STMD Br. at 12.) Rather, Article III, Section 5 of the Rules and Procedures provides, in pertinent part:

> For purposes of the hearing, a "participant" may only be one of the following: an owner of property subject to notification under Section 50-54(a)(3) of the Ordinance; an attorney representing said property owners; or an official or attorney representing a township or a municipality located within one and one half miles of the proposed facility. All other parties will be limited to public comment during the public comment time of the public hearing or to written comment through the written comment period.

(C6802.) Section 50-54(a)(3), as referenced in Article III, Section 5, identifies persons entitled to notice as property owners:

1. within the subject area not solely owned by the applicant,
2. adjoining the subject property,
3. that would be adjoining but for public right-of-ways and other easements that do not extend more than 400 feet from the subject property line, and
4. adjoining those properties above.

(C6793-94.) By contrast, Section 39.2(b) of the Act provides that notice of a request for site approval:

> be served either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located; provided, that the number of all feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways.

415 ILCS 5/39.2(b). As such, it is clear from the plain language of the foregoing provisions that STMD is wrong. The persons who may act as participants under the Rules and Procedures extend beyond those entitled to notice of the application under Section 39.2(b).

As stated previously, there is no case law or statutory authority for the proposition that all persons may qualify as a "participant." The Board has held that it has no problem with a local siting ordinance that "create[s] different requirements for those who wish to participate as parties, presenting testimony and evidence, than for members of the public who simply wish to comment and ask questions." See Slates, No. PCB 93-106, slip op. at 16. InSlates, the objectors claimed that two local ordinances governing participation in the local siting hearing were restrictive and confusing and, thereby rendered the proceedings fundamentally unfair. One ordinance mandated preregistration and specific pre-filing requirements for persons who wanted to participate in the local siting hearing as a party. The Board held that the ordinance requiring that persons preregister and pre-file in order to participate as parties is not fundamentally unfair. Id., at 15. The objectors then argued that the ordinance for participants conflicted with another ordinance for persons simply wishing to comment but that also had registration requirements, and the result was confusing as to who could participate in the hearing. The Board rejected that argument as well, holding:

> The Board agrees that the provisions of the two ordinances are not as clear as we may wish. However, we do not find that the vagueness of the provisions created any fundamental unfairness in the local proceedings. The ordinances do indeed create different requirements for those who wish to participate as parties, presenting testimony and evidence, than for members of the public who simply wish to comment and ask questions. Petitioners have not presented any authority for their implication that differing requirements for different types of participants creates fundamental unfairness, and we do not find any such problem.

Id., at 16.

Likewise, there is nothing fundamentally unfair about the Ordinance and Rules and Procedures differentiating between members of the public who may act as participants and those who make public comment, particularly when the definition of participants is broader than those persons entitled to notice under Section 39.2(b) of the Act.

STMD's argument that the Ordinance and Rules and Procedures were fundamentally unfair also ignores the other ways the public was able to participate in the process. Participation in the local siting process was not limited to registering as a "participant," but included participation by persons wishing to attend the public hearing and those wishing to give public comment or file post-hearing written comment. Therefore, STMD overstates its argument that members of the public who did not qualify as "participants" were left out of the process. The Ordinance and Rules and Procedures clearly and expressly provided that any person that did not meet the definition of "participant" would still be allowed to attend and participate in the local siting proceedings through public comment during the public hearing and after that hearing through the written comment period. These provisions for public participation were in no way fundamentally unfair.

2. STMD concedes that the Hearing Officer allowed participant status to anyone who requested it, and that no one was barred from participating.

The fatal blow to STMD's argument is that it cannot show that a single person was harmed or prejudiced by the provisions for participation at the public hearing. STMD ignores a key tenet of the doctrine of fundamental fairness: the procedures will not be found to have been fundamentally unfair if there was no resulting harm or prejudice. E&E Hauling v. Pollution Control Board, 116 Ill.App.3d 586, 607, 451 N.E.2d 555, 571-72 (2d Dist. 1983), aff'd, 107 Ill.2d 33, 481 N.E.2d 664 (1985). Here, there has been no showing that anyone misinterpreted Section 50-54(a)(3) of the Ordinance or Article III, Section 5 of the Rules and Procedures in the way STMD suggests, or more significantly, that anyone was actually denied the opportunity to be a participant or to participate at the public hearing.[2]

As detailed in WMII's Opening Brief, and admitted by STMD (STMD Br. at 9), the Hearing Officer was extremely flexible and accommodating to anyone seeking to participate in any way. (C6823-24, 6830, 6833, 6837, 6840-43; IPCB Tr. at 45-46, 77-78; IPCB PC #54.) Any person who requested it was accorded participant status at the public hearing, even if they registered late, did not register at all, or otherwise did not meet the eligibility requirements, including four persons who signed up after the February 22, 2010 deadline and 13 persons who did not own property near the Expansion, including members of STMD. (C6823-24.) The record also shows that, at the start of the public hearing, the Hearing Officer emphasized repeatedly the different ways that members of

[2] No person has come forward and claimed that he or she read the Ordinance and Rules and Procedures as prohibiting their participation at the public hearing, and then, based on this understanding, the person decided not to attend the public hearing. This includes all persons who attended the public hearing and the IPCB hearing, and all those who filed public comment with the County Board and the IPCB.

the public could participate and that he clearly communicated that he would grant anyone participant status. (C6823-24, 6837, 6840-42; IPCB PC # 54.) STMD acknowledges that the Hearing Officer "allowed participation by everyone who had signed up," including representatives of STMD, and "allowed everyone who so desired, regardless of property ownership status, proximity to the landfill, or date of registration to actively participate." (STMD Br. at 9.) By doing so, STMD effectively concedes that it cannot show any resulting harm or prejudice.

Because it cannot show actual harm, STMD argues that the definition of "participant" might have had a "chilling effect" on all forms of participation on the assertion that unknown members of the public may have incorrectly interpreted the Ordinance and Rules and Procedures to mean that only persons entitled to Section 39.2(b) notice could participate as participant. (STMD Br. at 12-13.) This argument is baseless. STMD has not provided any case law that stands for the proposition that fundamental fairness can be established by speculating about a theoretical harm even though the record shows that no one suffered any actual harm. To the contrary, the Board has held that irregularities in the local siting procedures, including those affecting the public's ability to register as participants, did not result in fundamental unfairness when the procedural error was cured such that there was no resulting prejudice. See County of Kankakee v. City of Kankakee, Nos. PCB 03-31, 03-33, 03-35 (cons.), slip op. at 57-59 (Jan. 9, 2003) (even though two public notices published contradictory information about participant registration and the city clerk refused to allow late registration for participants, the procedures were fundamentally fair because the hearing officer's ruling to accept additional participant registration on the first evening of the hearing resolved much of the confusion). As in County of Kankakee, the Hearing Officer here cured any confusion or possible prejudice by granting participant status to any one who requested it. Therefore, the public's

ability to participate was fundamentally fair.

B. Requiring that Post-Hearing Briefs be Submitted 21 Days After the Hearing was not Fundamentally Unfair, Particular As STMD submitted and the County accepted STMD's Written Comment at the end of the 30-day comment period.

Although not raised as part of STMD's fundamental fairness argument, STMD asserts in the "facts" section of its Brief that the Hearing Officer purportedly made "one error" in directing the parties to submit post-hearing briefs by April 2, 2010, i.e., 21 days after the public hearing concluded, rather than allowing 30 days. (STMD Br. at 10-11.) This contention should be rejected for two reasons. First, there is no right to file post-hearing briefs, and hence STMD cannot successfully argue that the time limit imposed on post-hearing briefs in any way affected the right to file written comment. Second, the written comment period remained open for the full 30-day period, to April 12, 2010. The 30-day period was in no way limited by the schedule for submitting post-hearing briefs. In fact, STMD filed its own public comment, the report by GeoHydro, Inc., on April 9, 2010. (C7995-8002.) STMD members Dan Kenney and Mac McIntyre both filed their post-hearing briefs on April 5 and April 7, respectively. (C7796-7817.) Thus, STMD's assertion that the submission deadline for post-hearing briefs rendered the process fundamentally unfair is unfounded.

C. Public Access to the Application Was Not Denied or Diminished in Any Way.

STMD's argument that access to the Application was diminished or made difficult is unsupported by the evidence. No one was denied access to the Application. The Application was widely available for review and copying in the County Clerk's office, the County Board office, the city of DeKalb, the Town of Cortland, and the DeKalb, Cortland and Sycamore public libraries. (Notice of Application, Pet. Ex. 1, Vol. 2; C6970, 6797; Bockman Dep. at 36, 43; IPCB Tr. at 36, 40.) Although one member of STMD testified that she was told to go to the library to copy the

Application, and another STMD member testified he was displeased with the size of the room available to review the Application, none of the witnesses testified that they were in any way prevented from reviewing or copying the Application. (IPCB Tr. at 36, 38, 40, 64-66,72, 74.)

STMD's argument that the proceedings were fundamentally unfair because the Application was not available in an electronic form and required a Freedom of Information Act ("FOIA") request is defective as well. There is no requirement in the Act, Ordinance, or Rules and Procedures that the Application be made available to the public in electronic form. There also is nothing fundamentally unfair about requiring a FOIA request as part of the procedure for requesting a copy of the Application. See County of Kankakee, Nos. PCB 03-31, 03-33, 03-35 (cons.), slip op. at 55-56 (city clerk's demand of FOIA requests before producing routinely available landfill siting information, even though the siting ordinance did not require a FOIA request, did not render the proceedings fundamentally unfair). In fact, STMD admits that it was provided with a copy of an electronic version of the Application by asking the County Clerk, and without having to submit a FOIA request, and that the electronic version was made available to STMD members. (IPCB Tr. at 65-66, 72, 74.)

Fundamental fairness does not require that every preference and convenience requested by the public be accommodated. Rather, fundamental fairness is meant to protect the integrity of the local siting procedures by incorporating the minimal standards of procedural due process. Peoria Disposal Co. v. Illinois Pollution Control Board, 385 Ill.App.3d 781, 797-98, 896 N.E.2d 460, 475-76 (3d Dist. 2008). Even in instances where there are procedural failures, there must be a resulting harm. Tate v. Pollution Control Board, 188 Ill.App.3d 994, 1017, 544 N.E.2d 1176, 1191 (4th Dist. 1989). In Tate, objectors argued that the applicant's failure to file certain documents with the siting application as required by Section 39.2(c) of the Act, and the failure to produce those documents at

an early stage in the proceedings, deprived them of a fundamentally fair process. Id. The appellate court disagreed, even though it was clear the proper procedures had not been not followed. The court considered that impact of the procedural failures and found there was no harm, noting that the documents did not pertain to the siting application and also were public record on file with the IEPA. As such, the court found that the objectors failed to show any prejudice, and held that "any error which may have occurred is harmless at best." Id.

Similarly, STMD has not shown that it, or anyone else, was denied access to the Application. Because STMD cannot show any prejudice, any perceived issues or difficulties with accessing the Application were harmless and do not constitute fundamental unfairness.

D. The Pre-filing Contacts Here Do Not Evidence Collusion, and There Has Been No Showing that Any Contacts Resulted in Prejudgment.

STMD complains about contacts between WMII and the County Board during negotiations of the Host Community Agreement ("Host Agreement"), tours to the Prairie View landfill, and pre-filing review of the draft application. STMD's argument ignores a critical distinction between pre-filing contacts and prejudicial post-filing ex parte contacts. The negotiations of the Host Agreement, tours to the Prairie View landfill and pre-filing review of the draft application cannot be ex parte contacts by definition because they were all pre-filing contacts that occurred before the Application was filed. STMD not only erroneously refers to those pre-filing contacts as ex parte contacts; STMD also fails to show how any contacts actually harmed them.

1. Ex parte contacts can only occur after an application is filed, and pre-filing contacts are only relevant to show collusive prejudgment.

Pre-filing contacts are not reviewed under the same standard as ex parte contacts, and are not pertinent to a claim of fundamental fairness unless they establish collusion. See County of

Kankakee, Nos. PCB 03-31, 03-33, 03-35 (cons.), slip op. at 10-11 citing Land and Lakes Company v. Pollution Control Board, 319 Ill.App.3d 41, 49-50, 743 N.E.2d 188, 194-95 (3d Dist. 2000). In the local siting context, an improper ex parte contact is one that takes place after the siting application has been filed, without notice and outside the record, between the decision maker and an interested party on an adjudicative matter. See e.g. Town of Ottawa v. Pollution Control Board, 129 Ill.App.3d 121, 126, 472 N.E.2d 150, 154 (3d Dist. 1984). By definition, therefore, pre-filing contacts do not constitute ex parte contacts.

Indeed, counsel for STMD argued in the case of County of Kankakee that pre-filing contacts are not indicative of prejudgment bias (citing Residents Against a Polluted Environment v. County of LaSalle, No. PCB 97-139, slip op. at 7 (June 19, 1997)), and that pre-filing meetings between the applicant and the decisionmaker do not render the subsequent hearing fundamentally unfair (citing Southwest Energy v. Pollution Control Board, 275 Ill.App.3d 84, 97, 655 N.E.2d 304, 312 (4th Dist. 1995)). See County of Kankakee, Nos. PCB 03-31, 03-33, 03-35 (cons.), slip op. at 8-9. In that case, the Board clarified that, absent any evidence of pre-filing collusion between the applicant and the decision maker, pre-filing contacts are not relevant to the fundamental fairness calculus. Id., at 10-11 citing Land and Lakes, 319 Ill.App.3d at 49, 743 N.E.2d at 194-95. A review of the pre-filing contacts STMD complains of shows they do not present any evidence of collusion or prejudgment of adjudicative facts.

2. None of the contacts complained of show prejudgment of the Application.

STMD complains about two pre-filing meetings with DeKalb County concerning the Host Agreement (STMD Br. at 19-20), but does not argue that the decision on the Application was in any way affected by these pre-filing meetings. The facts of record show that these meetings, which were

noticed and open to the public, were part of the County Board's legislative actions in considering and negotiating the Host Agreement and in no way constituted a decision to approve a landfill expansion that had not yet been designed. (Addendum at A-7 – A-8, Nos. 17, 19.) As such, these pre-filing contacts are not relevant and cannot support STMD's fundamental unfairness claims.

Despite the well-established principle that pre-filing landfill tours are not fundamentally unfair, STMD claims that the pre-filing tours of the Prairie View landfill by 15 County Board members were prejudicial. (STMD Br. at 20-25.) Nothing in the record suggests that those 15 County Board members colluded with WMII to prejudge the Application. Indeed, there could not have been any prejudgment because not all 15 members voted to approve - four of the County Board members who went on a tour voted to deny the Application. (C8495-8531.) STMD's claim that the tours rendered the proceedings fundamentally unfair is based on misstatements of the law and unfounded speculation about prejudgment. STMD cites to Southwest Energy Corp. and the other cases where the private tours of existing landfills after the application was filed were found to be fundamentally unfair. As stated above, the tours of the Prairie View landfill occurred before the Application was filed, and therefore, the cases STMD relies upon are not instructive.

While certain County Board members testified that they found the tours to be educational and informative, there was no testimony from any County Board member that actual aspects of the Application were presented or considered, much less adjudicated, during the tours. STMD also makes much about the point that some County Board members had the impression from the tours that the Expansion would be operated like the Prairie View landfill, or have similar design characteristics. (STMD Br. at 21-22.) However, to the extent the design and operation of the Prairie View landfill are similar to what is being proposed for the Expansion, the specific design and

operational aspects of the Application were presented at the public hearing where STMD and other members of the public had the opportunity to cross-examine that evidence. In fact, WMII made the Prairie View landfill part of the local siting record by introducing photographs and testimony of Dale Hoekstra about a typical operating day at a landfill. (C7096, 7100-7103, 7107, 7111, 7144; C7610, 7617-7623, 7759-66.) No prejudice could have resulted because these aspects of the tour were made a part of the public record, subject to review and comment. Therefore, no fundamental unfairness could have resulted from the Prairie View landfill tours. See Waste Management of Illinois, Inc. v. County Board of Kankakee County, No. PCB 04-186, slip op. at 35, 38-39 (Jan. 24, 2008) (no fundamental unfairness where contents of numerous ex parte letters to county board members were made a part of the record and therefore could have been addressed at the hearing and in post-hearing comments); see also Fairview Area Citizens Taskforce v. Pollution Control Board, 198 Ill.App.3d 541, 548-49, 555 N.E.2d 1178, 1182-83 (1990) ("FACT").

The 11 County Board members who toured the Prairie View landfill and voted to approve the Application testified that they based their decision solely on the evidence submitted during the local siting process. (C8534-35; Allen Dep. at 29-31; De Fauw Dep. at 15; Emerson Dep. at 13-14; Fauci Dep. at 42-43; Haines Dep. at 42; Hulseberg Dep. at 18; Oncken Dep. at 31; Stoddard Dep. at 33; Tobias Dep. at 33-34; Turner Dep. at 19; Vary Dep. at 35.) STMD argues that "ex parte tours are, per se, prejudicial, regardless of what decision makers may say after the fact." (STMD Br. at 24.) Contrary to STMD's argument, again Illinois law is clear: fundamental unfairness requires a showing of actual harm, not just a speculative possibility. Waste Management, 175 Ill.App.3d at 1043, 530 N.E.2d at 697-98; see also Rochelle Waste Disposal, LLC v. City of Rochelle, No. PCB 03-218, slip op. at 41 (Apr. 15, 2004) (recognizing the long-standing principle that a showing of

actual prejudice is required to support a finding that ex parte contact has resulted in a lack of fundamental fairness).

STMD next argues that the pre-filing review of the application by Patrick Engineering, the County Board's consultant, rendered the proceedings fundamentally unfair. STMD, however, does not dispute that a pre-filing review by the decision makers' technical consultant is not an improper ex parte contact. See Land and Lakes, 319 Ill.App.3d at 49-52, 743 N.E.2d at 194-196. Rather, STMD claims that the pre-filing review was made improper due to alleged participation in the review by County Administrator Ray Bockman, and Attorney Renee Cipriano. (STMD Br. at 25-26.) This argument should be denied because Mr. Bockman and Ms. Cipriano did not vote on the Application, and unlike the case of Residents, there is no evidence that either of them advised or influenced the County Board members on their votes, or participated in the County Board members' deliberations. (Bockman Dep. at 5, 23-24, 67-69; Burger Dep. at 9-10, 15-17.)

3. STMD waived the argument that County Board members prejudged the Application.

STMD argues that the cumulative effect of the pre-filing contacts resulted in certain County Board members having prejudged the Application. (STMD Br. at 28.) STMD, however, has waived this argument. Waiver occurs by failing to object to some known bias or impropriety prior to or during the local hearings. Miller v. Pollution Control Board, 267 Ill.App.3d 160, 170, 642 N.E.2d 475, 484 (4th Dist. 1994); A.R.F. Landfill, Inc. v. Pollution Control Board, 174 Ill.App.3d 82, 88, 528 N.E.2d 390, 394 (2d Dist. 1988). A party's failure to object in the proceedings below generally results in a waiver of the right to raise the issue on appeal. Waste Management, 175 Ill.App.3d at 1039-40, 530 N.E.2d at 695. The principle of waiver is particularly well-settled concerning claims of bias or prejudice on the part of the local siting authority. Those claims are "generally considered

forfeited unless they are raised promptly in the original siting proceeding 'because it would be improper to allow the complainant to knowingly withhold such a claim and to raise the claim after obtaining an unfavorable ruling.'" Fox Moraine LLC v. United City of Yorkville, No. PCB 07-146, slip op at 60 (Oct. 1, 2009) citing E&E Hauling, 107 Ill.2d at 38-39, 481 N.E.2d at 666.

STMD claims that it preserved the issue of "alleged bias of all county board members who had gone on the WMII sponsored private tours, and all the county board members who were known to have made statements evidencing prejudgment," through the Motion to Terminate it presented at the start of the public hearing. (STMD Br. at 9-10.) The Motion to Terminate, however, did not specifically request the disqualification of any individual County Board members. (C7550-7551.) Instead, it sought the termination of the proceedings, the disqualification of the entire County Board and denial of the Application based on a number of claims, all of which were denied by the Hearing Officer after extensive oral argument. (C6832-6840.) Because STMD's Motion to Terminate did not specifically seek the disqualification of individual County Board members, it is insufficient to preserve the issue. This is particularly true as it relates to any claims of bias or disqualification of County Board members Riley Oncken and Julia Fauci. According to FACT, a party is obligated to object "after knowledge of the alleged [impropriety]." Id., 198 Ill.App.3d at 545, 555 N.E.2d at 1180-81. Here, STMD was aware of the alleged bias of County Board members prior to or on the first day of the public hearing. STMD's knowledge of possible bias should have resulted in a timely motion directed at disqualifying purportedly biased County Board members. Because STMD failed to preserve the issue of bias, this Board should rule that STMD has waived the issue.

4. STMD made no showing of bias or prejudice.

In the event this Board finds that STMD has sufficiently preserved the issue, STMD still has no evidence to support its contention that certain County Board members were biased and overcome the presumption that decision makers are not biased. E&E Hauling, 107 Ill.2d at 42, 481 N.E.2d at 667-668; Waste Management, 175 Ill.App.3d at 1040, 530 N.E.2d at 695-96. As stated in WMII's Opening Brief, the presumption can only be overcome upon a showing that members of the local governing body actually prejudged the facts pertaining to the statutory criteria. FACT, 198 Ill.App.3d at 547, 555 N.E.2d at 1182. No such prejudgment occurred.

Simply suggesting that the County Board pre-approved the Application to pay for the jail expansion project is inadequate to demonstrate that the County Board predetermined the Application.[3] E&E Hauling, 107 Ill.2d at 42-43, 451 N.E.2d at 667-668 (provisions for the payment or receipt of fees under a host agreement is not indicative of predisposition because government officials routinely make decisions that affect their revenues and are deemed to make decisions for the general welfare, not for financial gain). Moreover, the comment from County Board member Oncken that WMII has a "track record of compliance and protecting homeowners, the water supply and generally being a good neighbor" will not rebut the presumption against bias. The comments made by County Board members Oncken and Julia Fauci are not evidence of prejudgment because they do not decide adjudicative facts regarding the statutory criteria. They are merely observations or opinions taken out of context by Mr. Kenney and STMD. (IPCB Tr. at 60-61.) As such, the comments were in no way a predetermination or finding of any fact related to the statutory criteria.

[3] See Addendum at A-9, No. 22.

See FACT, 198 Ill.App.3d at 548, 555 N.E.2d at 1181-82, Waste Management, 175 Ill.App.3d at 1038, 1040-1041, 530 N.E.2d at 694, 696.

Fifteen of the sixteen County Board members who voted to approve made their decision on the evidence in the record and only after all the evidence was submitted. [4] (Allen Dep. at 30; Anderson Dep. at 21; Augsburger Dep. at 21-22; De Fauw Dep. at 15; Emerson Dep. at 13-14; Fauci Dep. at 43; Haines Dep. at 42; Hulseberg Dep. at 18; Metzger Dep. at 16; Oncken Dep. at 31; Stoddard Dep. at 33; Tobias Dep. at 33-34; Turner Dep. at 19; Vary Dep. at 35; Walt Dep. at 23.) They testified that their vote was based on the evidence and written comment presented. Moreover, the fact that there were certain County Board members who voted in favor of the Host Agreement, but voted against the Application is strong evidence that the County Board was not biased as a result of the Host Agreement or the host fees specified therein. There is no evidence in the record to support STMD's assertions that the local siting procedures were fundamentally unfair or that the County Board members were biased. Therefore, WMII requests that the Board reject STMD's fundamental fairness arguments and deny the claims of fundamental unfairness.

II. STMD'S CRITICISMS OF WMII'S EXPERTS ON CRITERIA (i), (ii) AND (vi) CANNOT DISCREDIT THE CLEAR, UNREBUTTED EVIDENCE ESTABLISHING THOSE CRITERIA.

Despite the clear and uncontroverted evidence that criteria (i), (ii) and (vi) were satisfied, STMD argues that the County Board's findings on these criteria are against the manifest weight of the evidence. To succeed on its challenges, STMD must show that the opposite conclusion is clearly evident, plain, or indisputable from a review of the record evidence. Turlek v. Pollution Control Board, 274 Ill.App.3d 244, 249, 653 N.E.2d 1288, 1292 (1st Dist. 1995); CDT Landfill Corp. v. City

[4]County Board member Stuckert did not appear for deposition.

of Joliet, No. PCB 98-60, slip op. at 4 (Mar. 5, 1998). STMD cannot make this showing because, as discussed more fully below, its challenges are based on its lawyer's criticism of the methodology and analysis of certain WMII expert witnesses, and on his misrepresentation of facts in the record. Obviously, such criticisms and misrepresentations do not negate the substantial, and unrebutted, evidence in the record supporting the County Board's findings. The County Board's findings on criteria (i), (ii) and (vi) should be affirmed because they were established by the manifest weight of the evidence.

A. WMII Established Need through Unrebutted Evidence that the Expansion was Reasonably Required, and STMD's Criticism of WMII's Methodology is Insufficient to Overturn the County Board's Finding on Criterion (i).

STMD argues against the finding of need, claiming that an "urgent need" was not shown because remaining disposal capacity exists in the service area. STMD's argument must fail because (1) WMII demonstrated "urgent need" by showing the Expansion is reasonably required by the waste needs of the service area, and (2) the County Board properly found need despite the existence of remaining capacity.

1. WMII demonstrated urgent need by showing the Expansion is reasonably required by the waste needs of the service area.

Although STMD acknowledges that WMII was not required to show an absolute necessity for the Expansion, it erroneously argues that WMII did not consider or demonstrate there was an "urgent need for the new facility." (STMD Br. at 43.) Part of the problem with this argument is that STMD fails to articulate the standard for demonstrating an "urgent need." Illinois courts have consistently held that "urgent need" is satisfied by showing that the landfill is reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capabilities, along with any other relevant factors. Waste

Management, 175 Ill.App.3d at 1031, 530 N.E.2d at 689; Waste Management of Illinois, Inc. v. Pollution Control Board, 123 Ill.App.3d 1057, 1084, 463 N.E.2d 969, 976 (2d Dist. 1984); Waste Management of Illinois, Inc. v. Pollution Control Board, 122 Ill.App.3d 639, 645, 461 N.E.2d 542, 576 (3d Dist. 1984). Under this legal framework and based on the evidence in the record, Sheryl Smith, WMII's expert on need, clearly made that showing.

Ms. Smith prepared a detailed report and provided extensive testimony demonstrating that the Expansion is "reasonably required" by the waste needs of the service area. (Pet. Ex. 1, Criterion 1; C6993-6995.) Ms. Smith testified that her methodology in assessing need consisted of "reviewing the service area or the geographic region from which the proposed landfill expansion intends to take place (sic-waste); reviewing the types of waste to be accepted; calculating the net amount of waste requiring disposal from the service area over the proposed operating life of the facility; identifying the solid waste facilities and their available disposal capacity to receive this waste; and then calculating the capacity shortfall, or the difference between the amount of waste requiring disposal versus the amount of available disposal capacity to receive that waste." (C6993.) In calculating available waste disposal capacity in the service area, Ms. Smith included data from both permitted facilities as well as facilities that do not have final permit approval.[5] (C6994.)

Using this more inclusive and conservative approach, Ms. Smith calculated the available disposal capacity of the service area to be 206.6 million tons. (C6994.) She then measured the available disposal capacity of the service area (206.6 million tons) against the amount of waste expected to be generated over the operating life of the Expansion requiring disposal (490.4 million

[5] Ms. Smith considered the Spoon Ridge landfill, which has been inactive for 10 years, in her evaluation of available disposal capacity. (C6996.)

tons), and determined that based on the resulting capacity shortfall of 283.8 million tons, there is insufficient capacity available to meet the waste needs of the service area and the Expansion is necessary to meet those waste needs. (Pet. Ex. 1, Criterion 1 at 7-1; C6994.) Ms. Smith also testified that, assuming waste generation rates do not change, the remaining available capacity was within the range of 6 to 8 years. (C6996.)

STMD asserts that Ms. Smith's "bias is more than a little obvious." (STMD Br. at 44.) This contention is unsupported by the record. Ms. Smith, who testified that she has spent her entire career from the 1990s to the present in the solid waste business, and has prepared and reviewed 23 need reports for landfills and eight such reports for transfer stations, was clearly qualified as an expert on need. (C6992.) Neither Ms. Smith's expertise in performing a need analysis, nor her impartiality in performing her analysis, was challenged at the public hearing. STMD has presented no evidence of bias in this need analysis. Therefore, the Board should reject STMD's unsupported assumption that Ms. Smith was biased.

STMD's assertion that Ms. Smith's analysis is flawed because she did not address or consider "urgency" is belied by the record. When specifically asked by STMD about how the data demonstrates urgent need, Ms. Smith gave several reasons, namely, that of the 14 landfills that were operating in 2008, only 9 of those facilities are projected to be open in 2013, that it can take 5 to 10 years between planning the development of a new landfill to its construction, and that it would be more costly to transport waste out of the county than to continue to dispose of it in-county. (C6996.) Ms. Smith concluded that, in her expert opinion, there is an "urgent need" to develop the Expansion. Id. No evidence was offered at the hearing that contradicted or impeached Ms. Smith's testimony that the Expansion is necessary.

2. The County Board was not wrong in finding need despite the existence of remaining capacity.

STMD's final criticism of Ms. Smith's opinion is based on its contention that proving a capacity shortfall does not prove need when there is remaining capacity for waste disposal. (STMD Br. at 44.) This argument also is unavailing. Decisions by the appellate court and this Board make clear that the existence of remaining capacity alone does not negate a showing of need. Need has been satisfied where there are 10 or more years of remaining capacity. See E&E Hauling, 116 Ill.App.3d at 608, 451 N.E.2d at 572-73 (finding of need affirmed, even though the remaining capacity in the service area was 10 years, because there was no evidence or witnesses presented to challenge applicant's showing of need); see also American Bottom Conservancy v. City of Madison, No. PCB 07-84, slip op. at 85-91 (Dec. 6, 2007) (unrebutted testimony that the facility was necessary to meet the waste needs of its intended service area was sufficient to establish need despite 17 years of remaining capacity).

The County Board's finding that criterion (i) is satisfied was supported by the only evidence in the record on need. It is well-settled that if there is any evidence which supports the local siting authority's decision and the decision was reasonably reached, the decision must be affirmed. File v. D & L Landfill, No. PCB 90-94, slip op. at 3 (Aug. 30, 1990). That a different decision might also be reasonable is insufficient for reversal; the opposite conclusion must be clear and indisputable. Willowbrook Motel v. Pollution Control Board, 135 Ill.App.3d 343, 481 N.E.2d 1032 (1st Dist. 1985). Here, the opposite conclusion – that the Expansion is not necessary to accommodate the service area's waste needs – has no evidentiary basis, and therefore, is not clearly evident, plain or indisputable. Accordingly, the County Board's determination that WMII met criterion (i) is not against the manifest weight of the evidence, and should be affirmed.

B. The County Board's Decision on Criterion (ii) Must be Affirmed as No Testimony or Other Evidence was Presented to Refute WMII's Proof that the Expansion was Protective of the Public Health, Safety and Welfare.

STMD's arguments on criterion (ii) are based on unsupported speculation about the conditions at the existing landfill, irrational fears about a detection of hydrogen sulfide at the existing landfill in 2008 and misstatements about the evidence in the record which support the County Board's finding that criterion (ii) was met. In fact, the operation of and conditions at the existing facility are not relevant to whether the Expansion satisfies criterion (ii). Hediger v. D & L Landfill, Inc., No. PCB 90-163 slip op. at 25-26 (Dec. 20, 1990). None of STMD's arguments undermines the showing WMII made that the Expansion is designed, located and proposed to be operated to protect the public health, safety and welfare.

As stated in WMII's Opening Brief, criterion (ii) requires a demonstration that the proposed facility does not pose an unacceptable risk to the public health and safety, but does not require a guarantee against any risk or problem. Industrial Fuels & Resources v. Pollution Control Board, 227 Ill.App.3d 533, 547, 592 N.E.2d 148, 157 (1st Dist. 1992); Clutts v. Beasley, 185 Ill.App.3d 543, 541 N.E.2d 844, 846 (5th Dist. 1989). The decision as to whether criterion (ii) has been met is purely a matter of assessing the credibility of expert witnesses. File v. D & L Landfill, Inc. 219 Ill.App.3d 897, 907, 579 N.E.2d 1228, 1236 (5th Dist. 1991). If the County Board found the applicant's witnesses to be credible and persuasive, the County Board's finding that criterion (ii) was met should be affirmed, even where there is conflicting evidence. Id. It is for the County Board, not this Board, to weigh the evidence, assess credibility and resolve conflicts in testimony. Fox Moraine, No. PCB 07-146, slip op. at 6. Merely because some conflicting evidence, if it existed and were accepted, would have supported a contrary conclusion is not enough to find the conclusion reached

by the County Board to be against the manifest weight of the evidence. Tate, 188 Ill.App.3d at 1026, 544 N.E.2d at 1197.

WMII presented credible and persuasive evidence from four expert witnesses to establish that the Expansion is so designed, located and proposed to be operated that the public health, safety and welfare will be protected. Although STMD did not present any evidence indicating that the design or location of the Expansion is flawed from a public safety standpoint, or that its proposed operation poses an unacceptable risk to public health or safety, on appeal STMD attempts to undermine the County Board's finding that criterion (ii) was met by presenting matter about the existing landfill, misrepresenting the evidence in the record and offering unsupported speculation. As discussed below, none of STMD's arguments has merit.

1. The evidence in the record does not support STMD's speculation that the existing landfill is leaking.

As part of its ploy to create fear and uncertainty about the Expansion, STMD falsely asserts that the existing landfill is "leaking and impacting ground water." (STMD Br. at 36.) The evidence in the record, however, establishes that the existing landfill is not leaking or impacting groundwater. (Addendum at A-1, A-2, Nos. 1, 4.)

The old area is not leaking. (Pet. Ex. 1, Criterion 2 at 2-3.) The evidence establishes that: (1) the old area was neither constructed nor permitted as a sanitary landfill, (2) it was covered and closed in 1974, (3) impacts from the old area to Henry Formation groundwater, an upper sand unit that is not a source of drinking water, occurred prior to WMII's acquisition of the site in 1991, and were detected by WMII in 1997, and (4) corrective action for these impacts was approved by the

IEPA in October, 2001, and implemented by WMII.[6] (Pet. Ex. 1, Criterion 2 at 1-1, 2-2, 2-3; Criterion 2 Drawings No. 4.) With regard to the north area, the evidence demonstrates that: (1) the north area has a Subtitle D-equivalent liner, (2) there was no leaking or release of leachate from the north area, (3) the impacts from the north area were the result of past petroleum spill(s) and gas migration, not leachate, and (4) the impacts were to Henry Formation groundwater, an upper sand unit, not to sources of drinking water. (Pet. Ex. 1, Criterion 2 at 1-1, 2-2, 2-3; Criterion 2, Fig. 1-3 and Fig. 5-12.)

In addition, Andy Nickodem, WMII's expert witness on the design of the Expansion, testified that the existing landfill is not leaking. (C6880, 6972, 6975.) Joan Underwood, WMII's expert witness who testified regarding the geology, hydrogeology and proposed groundwater monitoring system, also testified that there is no evidence to support any speculation that the north area is leaking. (C7216.) Again, no witnesses testified that the existing landfill is leaking, and the testimony of Mr. Nickodem and Ms. Underwood on this issue stood unimpeached.

2. WMII's investigation and characterization of the geology and hydrogeology of the site was reliable and uncontroverted.

STMD's criticisms of the methods and analysis Ms. Underwood used to investigate and characterize the conditions at the site are unwarranted. As demonstrated in her report contained in the Application, as well as her testimony at the public hearing, Ms. Underwood engaged in extensive investigation, sampling, testing and evaluation to understand and characterize geologic and hydrogeologic conditions at the site. (C7205-7211.)

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[6] WMII proposes to exhume the waste in the old area and place it in a composite-lined area in the west unit of the Expansion. (Pet. Ex. 1, Criterion 2 at 6-2, Fig. 1-3.)

To characterize the geology at the site, Mr. Underwood considered regional, local and site-specific information. (C7205.) As part of her site-specific investigation, Ms. Underwood implemented a boring program to collect soil and rock samples from the site. (C7207.) The boring samples were laboratory tested for grain size (to evaluate the distribution of the different material sizes), Atterberg limits (to look at how the sample material acts at different moisture contents), permeability (to evaluate the difficulty or ease with which water can or cannot move through the different subsurface materials), and moisture content. (C7202; Addendum at A-3, No. 8.) She also installed a series of piezometers as part of her site investigation to measure the pressure head at different depths within the subsurface to obtain information about the groundwater in those materials. (C7202.) She conducted field permeability testing of both rock and soil conditions at the site. (C7202; Addendum at A-3, No. 8.) She also evaluated groundwater chemistry to analyze how groundwater moves and to identify different groundwater flow systems. (C7202.) Finally, for the deeper bedrock, Ms. Underwood performed borehole geophysics to evaluate the different rock layers. Id.

Ms. Underwood testified she was able to design a groundwater and geologic investigation program to investigate the subsurface and ultimately develop a site conceptual model of the subsurface and groundwater flow. (C7205.) Ms. Underwood characterized the hydrogeology at the site by investigating the topography and geography of the area, soil and rock characteristics, water levels, groundwater chemistry and groundwater flow systems. (C7209-7211.) The foregoing completely discredits STMD's assertion that the level of understanding required to characterize the site was "simply not present." (STMD Br. at 37.) STMD's complaints are insufficient to call into question Ms. Underwood's investigation, characterization, and understanding of the site.

STMD next complains that Ms. Underwood should have included a groundwater impact assessment ("GIA"), more extensive groundwater flow modeling and more soil borings. (STMD Br. at 37-38.) STMD is wrong in stating that a GIA is absent here. Ms. Underwood explained that she did review the IEPA- approved and permitted GIA for the existing landfill, and did not conduct another GIA because it was not needed for her analysis. (C7215.) She also pointed out that a GIA has to be completed as part of the permitting process with the IEPA. (C7215, 7235.) As the Board held in Gallatin National Company v. Fulton County Board, No. PCB 91-256, slip op. at 55-59 (June 15, 1992), as long as the applicant presents a prima facie case that the application meets criterion (ii), the local decision maker is free to place some reliance on the IEPA's permit review process. Thus, even though a local decision maker is empowered to consider any and all highly technical details of landfill design and construction in ruling upon criterion (ii), "that does not mean that local decision makers must examine each request for siting approval so as to ensure compliance with every applicable regulation." Id. In recognizing that the process for developing a new pollution control facility in Illinois has two parts, namely (1) siting approval from the local decision maker, and (2) an approved permit from the IEPA, the Board in Gallatin stated that "the local decision maker is not required to perform both functions." Id.

3. The uppermost aquifer is identified and is not precariously close to the ground surface.

Despite STMD's claim to the contrary (STMD Br. at 38), WMII did identify the uppermost aquifer. (Addendum at A-3, Nos. 6, 7.) As set forth in the Application, it includes the undifferentiated Lacustrine Unit on the west side of the facility, and the undifferentiated Lacustrine Unit and the undifferentiated Silurian-age dolomite on the east side of the facility. (Pet. Ex. 1, Criterion 2 at 12-1, 12-2; Addendum at A-3, No. 6.) Additionally, STMD's assertion that the

uppermost aquifer is precariously close to the ground surface is unsupported. (Addendum at A-3, No. 7.) The evidence shows that the minimum distance between ground surface and the undifferentiated Lacustrine Unit on the west side of the facility is 71 feet, with the distance in some areas ranging up to 113 feet. The minimum distance between ground surface and the undifferentiated Lacustrine Unit on the east side of the facility is 43 feet, and ranges in some areas up to 83 feet. The minimum distance between ground surface and the undifferentiated Silurian-age dolomite on the east side of the facility is 46 feet, and ranges in some areas to 80 feet. (Pet. Ex. 1, Criterion 2 at Appendix C-3, Drawings Nos. 8-23.) STMD's assertion that the uppermost aquifer appears to be "precariously close" to the ground surface is a misrepresentation that should be rejected.

4. There is no hydrogen sulfide problem at the existing landfill.

STMD's argument that a past detection of hydrogen sulfide at the existing landfill in 2008 should be a basis to overturn the County Board's finding on criterion (ii) is nothing more than a ploy to inspire fear. STMD members were present at the public hearing to hear the clear and unrefuted evidence that there is no hydrogen sulfide problem at the existing landfill. (C7098, 7107, 7123, 7124, 7128, 7136.) STMD cross-examined Mr. Dale Hoekstra, WMII's expert witness on criteria (ii) and (v), who testified that there is no hydrogen sulfide problem at the existing landfill. Id. Hydrogen sulfide at the existing landfill was detected in 2008, the presence of which resulted from the disposal of recycled ground gypsum board that had previously been disposed of in an unground form without causing hydrogen sulfide issues. (C7098-99, 7137, 7139-40, 7295.) Mr. Hoekstra explained WMII's policy against accepting ground gypsum board at its facilities, including the existing landfill, and that the Expansion will not accept ground gypsum board for disposal. (C7099.)

STMD's claim that "the ongoing hydrogen sulfide problem at the existing landfill" raises an "issue of major concern" (STMD Br. at 39) is not only false, but disingenuous. (C7931-61.)

The testimony of Dr. Aubrey Serewicz did not support STMD's hydrogen sulfide claims, much less any public health, safety or welfare issue concerning the Expansion. While Dr. Serewicz testified about his knowledge of hydrogen sulfide, he was not qualified to testify as an expert on criterion (ii) or the generation and management of hydrogen sulfide at landfills. (C7389-91, 7459-60.) In fact, he gave no opinion on criterion (ii), or whether the Expansion is so located to protect the public health, safety and welfare. (C7459-60, 7474.) Instead he offered testimony about the dangers of hydrogen sulfide at levels of 200 parts per billion (ppb) and below, claiming that at 200 ppb, the level at which a person can smell it, the person is "in trouble." (C7402.) There is no basis in science for either of these claims. Following up on these unsupported assertions, Dr. Serewicz offered another: hydrogen sulfide from the existing landfill is moving downhill from the existing landfill, across Interstate 88, up the north embankment and over to Cortland Elementary School, one-half mile away. (C7465; C7931-61.)

The falsehoods and inconsistencies in Dr. Serewicz's testimony were plain, and the County Board was entitled to discredit his testimony accordingly. See Environmentally Concerned Citizens Organization v. Landfill LLC, No. PCB 98-98, slip op. at 3, 8 (May 7, 1998) (local siting authority is sole trier of fact responsible for weighing evidence, resolving conflicts in testimony and assessing credibility of witnesses.) Moreover, none of Dr. Serewicz's testimony was relevant. His testimony provided no evidence or opinion on whether the Expansion satisfied criterion (ii), specifically whether any aspect of the Expansion design was flawed or whether the proposed operation for the Expansion would pose an unacceptable risk to public health or safety. (C7459-61, 7474-75.) At

best, his testimony related to the existing landfill, but as the Board has ruled in other cases, the operation of the existing facility is not relevant to whether the Expansion satisfies criterion (ii). See Hediger, No. PCB 90-163, slip op. at 25-26 (problems relating to the existing facility may be relevant to an enforcement action, but has diminished weight in the context of evaluating the design and operational aspects of the proposed facility, and local siting authority should not be required to decide against the applicant on the basis of prior problems at the site when the new facility is designed to protect the public health, safety, and welfare).

Because conditions at the existing landfill are not relevant to whether the Expansion meets criterion (ii), Dr. Serewicz's testimony on the risks of hydrogen sulfide as it relates to the existing landfill was not relevant to the issue of whether the operation of the Expansion will protect the public health, safety and welfare and comply with criterion (ii). Even were his testimony relevant, it was not found credible by the County Board, and thus could not support a determination that the County Board finding on criterion (ii) was against the manifest weight of the evidence.

5. The Application demonstrated that all required regulatory factors of safety for static and seismic conditions were exceeded.

STMD's argument on criterion (ii) concerning the factor of safety for seismic events is without basis. STMD claims that between the design of the Expansion and the siting hearing, an earthquake in the vicinity of the site caused the United States Geological Survey ("USGS") to raise the peak acceleration standard at the site location to .1g. (STMD Br. at 41-42.) This claim is false. USGS did not raise the peak acceleration standard at the site location to .1g. The standard is .081g, as indicated in the Application and the USGS National Seismic Hazard Mapping Project, 2008 Update, and as testified to by Mr. Nickodem. (Pet. Ex. 1, Criterion 2 at 3-4, Fig. 3-2; C6944.) STMD bases its assertion that the USGS changed the standard in the 2008 Seismic Mapping Project

on a preliminary earthquake report that showed peak acceleration associated with the specific February 2010 event. STMD submitted that report to the County Board as a public comment, but deliberately left out the information indicating that the report was preliminary and event-specific. The USGS did not amend the 2008 Seismic Mapping Project based on the 2010 event and the standard remains at .081g for the site. (Addendum at A-5, No. 14.) Thus, the Board should reject STMD's false statement that the USGS raised the peak acceleration standard at the site location to .1g, or that Mr. Nickodem's factors of safety were based on outdated standards.

Based on its false statement that USGS raised the peak acceleration standard to .1g, STMD speculates that the factor of safety in the design for seismic events "may or may not be under the required 1.3 regulatory factor of safety." (STMD Br. at 42.) There were 78 factors of safety presented in the Application for geotechnical evaluation for both static and seismic conditions, all of which exceeded the required regulatory factor of safety. (Pet. Ex. 1, Criterion 2 at Tables 7-5 and 7-6.) STMD mentions only one, the 1.38 factor of safety for a seismic condition for the short-term evaluation of excavation stability for the east unit. (Pet. Ex. 1, Criterion 2 at Table 7-6.) The misleading implication STMD intended is that this one factor of safety applies to the stability of the entire, constructed landfill. This is false. The 1.38 factor of safety represents one short-term condition related to excavation at one specific location along the north side of the east unit, prior to construction of any landfill components. (Pet. Ex. 1, Criterion 2 at Table 7-6.) It represents nothing about the stability of any landfill component, much less the long-term stability of the constructed landfill, and it is disingenuous for STMD to try to make it appear otherwise.

Mr. Nickodem testified in response to cross-examination by the County's attorney and a County Board member regarding the information presented by the USGS on their website following

the February 10, 2010 event. He testified that he looked at the USGS website after the event. (C6944.) Mr. Nickodem testified that the February 2010 3.8 magnitude event is a milder earthquake, or lower ground acceleration and lower rated earthquake, than the peak acceleration of the .081g used in the Application. (C6944, 6957-58.) He testified that it did not affect what is in the Application. Id.

6. The County Board found that WMII satisfied criterion (ii), and STMD has not shown that finding to be against the manifest weight of the evidence.

The County Board heard all of the evidence presented on the issue of whether the Expansion was protective of the public health, safety and welfare. There was no testimony or other evidence presented that clearly refuted WMII's proof that criterion (ii) has been satisfied. The County Board made their own credibility determinations and found criterion (ii) satisfied. Based on this record, it was more than reasonable for the County Board to find that the Expansion was designed, located and proposed to be operated so that the public health, safety and welfare will be protected. Thus, the Board must affirm the County Board's finding. Industrial Fuels, 227 Ill.App.3d at 547, 592 N.E.2d at 157; Fox Moraine, No. PCB 07-46, slip op. at 82.

C. The Evidence Demonstrated that Patterns of Landfill Traffic Have Been Designed to and from the Expansion to Minimize Effect on Existing Traffic Flows.

Criterion (vi) was satisfied because WMII showed that traffic patterns to or from the Expansion will minimize impact on existing traffic flows. WMII was not required to demonstrate no impact or eliminate any problems; an applicant need only show that any impact has been minimized. FACT, 198 Ill.App.3d at 554-555, 555 N.E.2d at 1187. The key is to minimize impact on traffic because it is impossible to eliminate all problems. Id.

Mr. David Miller, a traffic engineer with 42 years of experience directing over 1,600 traffic impact studies and WMII's expert on criterion (vi), gave uncontroverted testimony that the traffic patterns to and from the facility were designed to minimize the impact on existing traffic flows. (C7256-7271, 7342-60.) STMD claims, erroneously, that Mr. Miller did not consider farm vehicles or the not-yet-opened Cortland Elementary school. On the issue of farm vehicles, Mr. Miller testified that he was aware of the potential for those types of vehicles and that farm vehicles may have been counted in his spring traffic counts even though they are more likely to be present in the fall. (C7270.)

Mr. Miller testified that he considered agricultural vehicles in his study because the traffic counts were done in April and May. He testified that "we do understand, especially in sites that are out in more rural areas, that especially in the fall you can have some of those types of vehicles." (C7270.) He testified that "we are aware of the potential for those kinds of vehicles." Id. To determine if the traffic volume data collected needed to be adjusted to account for seasonal variations, data from IDOT were obtained. Based on the IDOT data, Mr. Miller testified that traffic volumes during the months of April and May represent above average monthly conditions. Therefore, the observed traffic volumes were used with no adjustments to provide a conservative scenario. (Pet. Ex. 1, Criterion 6 at 6.)

Whether Mr. Miller specifically incorporated a precise number of farm vehicles into his traffic analysis should not be determinative. The issue is not whether there will be negative impact on traffic flows due to increased traffic volumes, traffic noise, dust, driver negligence or otherwise, because criterion (vi) assumes there will be some impact. FACT, 198 Ill.App.3d at 554, 555 N.E.2d at 1187. Instead, the operative word in criterion (vi) is "minimize," as it is impossible to eliminate all traffic-related problems. Id.; Tate, 188 Ill.App.3d at 1024, 544 N.E.2d at 1196. This issue is

whether the traffic routes identified by WMII minimize the impact on existing traffic flows. 415 ILCS 5/39.2(a)(vi). The existing traffic flows were determined by Mr. Miller, taking into account traffic count data for both agricultural and non-agricultural (including school bus) vehicles. (Pet Ex. 1, Criterion 6 at 6; C7343-44.)

Specifically, Mr. Miller included in his base-line traffic evaluation, the school buses and routes that service DeKalb School District 428 that use the study area roadways, including those servicing the former Cortland elementary school when the counts were done in April and May 2009. He accounted for all 12 of the school bus routes in the study area, including the additional two school bus routes that serve after-school activities in the study area. He also considered the private schools in the area, including two school buses that serve St. Mary School, and Cornerstone Christian Academy which also serves the area, but no school bus service is provided. (Pet. Ex. 1, Criterion 6 at 9.) The school bus data is provided in the Application as part of the baseline counts. (Pet. Ex. 1, Criterion 6 at Appendix B.) The school buses were redirected to the new Cortland elementary school when it opened in September 2009 from their previous service routes for the old Cortland elementary school. All school bus traffic and buses in the study area serving the school district in April and May 2009 were accounted for in Mr. Miller's base-line evaluation.

In any event, criterion (vi) does not require consideration of traffic from future developments, but limits the evaluation to existing traffic flows. 415 ILCS 5/39.2(a)(vi); See also Tate, 188 Ill.App.3d at 1024, 544 N.E.2d at 1196 (analysis of existing traffic flow into an existing facility is the appropriate consideration for this criterion (vi)); Waste Hauling, Inc. v. Macon County Board, No. PCB 91-223, slip op. at 40 (May 7, 1992) ("It is important to recognize that the statutory criterion only requires consideration of 'existing traffic flows.'").

None of STMD's criticisms or concerns about traffic are sufficient to require a reversal of the County Board's approval of criterion (vi). WMII presented expert testimony and evidence satisfying criterion (vi). No evidence was presented establishing that impact on existing traffic flows was not minimized. The record supports the County Board's finding that criterion (vi) was satisfied, and that finding should be affirmed. File, No. PCB 09-94, slip op. at 3.

CONCLUSION

The County Board afforded STMD and any interested person all of the rights and protections required by adjudicative due process. Access to the Application and ability to participate in the public hearing were complete and unrestricted. Pre-filing contacts were entirely appropriate and in no way even suggested collusion or bad faith. There was no evidence of prejudgment, as each County Board member who voted to approve did so only by consideration of the evidence after all of the evidence was submitted. Thus, the local siting procedures used by the County Board were fundamentally fair in all respects.

WMII established criteria (i), (ii) and (vi) by clear and convincing evidence. No relevant or probative evidence was presented that controverted WMII's prima facie case on the challenged criteria. STMD's challenges to the criteria consisted not of evidence but of criticisms of WMII's experts' methodologies, analyses and conclusions. These criticisms are in themselves invalid, but in any event are insufficient to show that the County Board's findings on criteria (i), (ii) and (iv) were clearly and indisputably wrong.

For all of the reasons set forth above, the County Board decision granting Site Location Approval for the Expansion should be affirmed.

Respectfully submitted,

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ADDENDUM

Correction of Statements in STMD Brief

STMD makes numerous assertions in its 49-page Brief and Argument that are unsupported or simply false. In the interest of time and efficiency, WMII will not identify each misrepresentation or error here, but will only describe and clarify the most significant of them. Citations to the record before the County Board will be made to the Site Location Application itself ("Pet. Ex. 1") and to the transcripts of the public hearings ("3/__/10 Tr. at ____.") The omission of the remaining misrepresentations and errors should not be viewed as WMII's acquiescence in or agreement with them.

STMD: **1. WMII seeks to expand an existing leaking landfill. (STMD Br. at 1.)**

FACT: The existing DeKalb County Landfill is not leaking. (Pet. Ex. 1, Criterion 2 at 2-3; 3/1/10 Tr. at 207; 3/2/10 Tr. at 124, 134; 3/4/10 Tr. at 97.) The old area within the existing landfill is a 24-acre parcel where waste was dumped and burned with petroleum products in the late 1950's and 1960's, before the Illinois Environmental Protection Act ("Act") was enacted and the Illinois Environmental Protection Agency established. (Pet. Ex. 1, Criterion 2 at 1-6; 3/1/10 Tr. at 113, 121.) The old area was neither constructed nor permitted as a sanitary landfill. It was covered and closed in 1974. (Pet. Ex. 1, Criterion 2 at 1-1.) Impacts from the old area to Henry Formation groundwater, an upper sand unit, not drinking water, occurred prior to WMII's acquisition of the site in 1991, and were detected by WMII in 1997. (3/1/10 Tr. at 120-121.) Corrective action for these impacts was approved by the IEPA in October, 2001, and implemented by WMII. (Pet. Ex. 1, Criterion 2 Drawings No. 4, Criterion 2 at 2-2; 3/1/10 Tr. at 117.)

The north area of the existing landfill is a 38-acre area permitted by the IEPA and constructed with an in-situ clay liner and a leachate collection system. (Pet. Ex. 1, Criterion 2 at Fig. 1-2, p. 2-2; 3/1/10 Tr. at 117.) There is no evidence that the north area is leaking. (3/1/10 Tr. at 207; 3/2/10 Tr. at 124, 134.) While a groundwater management zone directly east of the north area was approved by the IEPA in 2000, the corrective action which was implemented, soil vapor extraction, was intended to remediate past petroleum spill(s) in this area and past landfill gas migration, not leachate releases or leaking from the north area. (Pet. Ex. 1, Criterion 2 at 2-3.) Although WMII did not create these sources, the expansion will include removal of the source of the south GMZ.

STMD: **2. The expansion includes a vertical expansion over an unlined, pre-Subtitle D unit. (STMD Br. at 1.)**

FACT: No part of the vertical expansion will be developed over an unlined unit. The vertical expansion will be developed over portions of the north area and the active area. (Pet. Ex. 1, Criterion 2 at Fig. 1-3.) Both the north area and the active area were constructed with liners permitted by IEPA that were demonstrated by WMII to meet the performance-based liner requirements of 40 CFR 258 and 35 IAC 811, and are therefore Subtitle D-equivalent. (Pet. Ex. 1, Criterion 2 at 1-1.)

STMD: **3. The North Area was constructed with an in-situ clay liner (meaning no Subtitle-D standard liner at all). (STMD Br. at 35.)**

FACT: The liner in the north area, although permitted and constructed prior to the enactment of Subtitle D, was demonstrated by WMII to have been equivalent to a Subtitle D liner by IEPA Permit No. 1996-247-LFM. (Pet. Ex. 1, Criterion 2 at 1-1.) See Fact in response to STMD assertion No. 2.

STMD: **4. The empirical evidence shows that the unlined North Area must be leaking and impacting ground water. (STMD Br. at 37.)**

FACT: The evidence in the record shows that (1) the north area has a Subtitle D-equivalent liner (Pet. Ex. 1, Criterion 2 at 1-1), (2) there was no leaking or release of leachate from the north area (3/1/10 Tr. at 207; 3/2/10 Tr. at 124, 134; 3/4/10 Tr. at 97; Pet. Ex. 1, Criterion 2 at 2-3), (3) the impacts from the north area were the result of past petroleum spills, and gas migration, not leachate. (3/4/10 Tr. at 97; Pet. Ex. 1, Criterion 2 at 2-3), and (4) impacts were to Henry Formation ground water, an upper sand unit, not to sources of drinking water. (Pet. Ex. 1, Criterion 2 at 2-3, Fig. 1-3 and Fig. 5-12.)

STMD: **5. WMII plans to exhume the waste in the Old Area and rebury the same in the new East Unit, which is east of Union Ditch. (STMD Br. at 36.)**

FACT: The exhumed waste will not be reburied in the new East Unit. All exhumed waste from the old area will be redisposed of in the composite-lined areas of the West Unit. The West Unit development includes four phases. Once Phase 1 is constructed and operational, the exhumation of the old area will begin. Exhumation of the old area will be performed in three phases, Phases 2, 3, and 4. Exhumed material removed from Phase 2 will be placed in the new composite-lined Phase 1 and exhumed material removed from Phase 3 will be placed in the new composite-lined Phases 1 and/or 2. Exhumed material removed from Phase 4 will be placed in Phase 1, Phase 2 and/or Phase 3, all of which is located in the West Unit, west of Union Ditch. (Pet. Ex. 1, Criterion 2 at 6-2; Criterion 2 Drawings No. 6.)

STMD: **6. At this site, the uppermost aquifer is not even identified. (STMD Br. at 38.)**

FACT: By regulation (35 IAC 810.103), the monitorable zones are the uppermost aquifers at the site. The monitorable zones at the site are identified. (3/4/10 Tr. at 77-78.) They include the undifferentiated Lacustrine Unit on the west side of the facility, and the undifferentiated Lacustrine Unit and the undifferentiated Silurian-age dolomite on the east side of the facility. (Pet. Ex. 1, Criterion 2 at 12-1 to 12-2.) This monitoring program is consistent with the permit for the existing facility. (Pet. Ex. 1, Criterion 2 at 12-1 to 12-2; Criterion 2 Drawings Nos. 35, 36.)

STMD: **7. The uppermost aquifer is precariously close to the ground surface. (STMD Br. at 38.)**

FACT: The record shows that the minimum distance between ground surface and the undifferentiated Lacustrine Unit on the west side of the facility is 71 feet, with the distance in some areas ranging up to 113 feet. The minimum distance between ground surface and the undifferentiated Lacustrine Unit on the east side of the facility is 43 feet, and ranges in some areas up to 83 feet. The minimum distance between ground surface and the undifferentiated Silurian-age dolomite on the east side of the facility is 46 feet, and ranges in some areas to 80 feet. Pet. Ex. 1, Criterion 2 at App. C-3, Drawings Nos. 8-23.)

STMD: **8. Slug test permeability data in the Application suggest that the subsurface materials have generally high permeability, enabling the rapid movement of groundwater and contaminants that get into that groundwater. (STMD Br. at 38.)**

FACT: The permeability data in the Application, which includes not only the slug test data but also laboratory conductivity data and other geotechnical test data, does not suggest, much less establish, that the subsurface materials at the Expansion are generally highly permeable. (Pet. Ex. 1, Criterion 2 at 5-4 to 5-8, Table 5-3, Table 5-4, Appendix D.) STMD can make its claim only by cherry-picking slug test data from a limited number of samples, and ignoring the substantial amount of permeability data in the Application which establishes the presence of significant amounts of low permeability subsurface materials. (Pet. Ex. 1, Criterion 2 at 5-4 to 5-8, Table 5-3, Table 5-4, Appendix D; 3/4/10 Tr. at 67, 176-77.)

STMD: **9. The Application indicates that regional groundwater flow under the site is from the northwest to the southeast, meaning directly from the north area to the east GMZ. (STMD Br. at 37.)**

FACT: Groundwater flow between the north area and the east GMZ is not part of a regional flow system. (Pet. Ex. 1, Criterion 2 at Fig. 5-11.) It is part of a local flow system. Groundwater flow in the area of the east GMZ is in the Henry Formation, an upper sand unit, not drinking water. Groundwater flow in the Henry Formation west of Union Ditch No. 1 is from west to east. (Pet. Ex. 1, Criterion 2 at Fig. 5-12.)

STMD: **10. No one offered an explanation as to why the ground water immediately east of the north area has been impacted so as to warrant a GMZ if the north area is not leaking. (STMD Br. at 37.)**

FACT: The soil vapor extraction of the east GMZ treats aromatic compounds and halogenated hydrocarbons. The aromatic compounds are typical components of petroleum-related products and likely result from a past petroleum spill(s) in this area. The halogenated hydrocarbons are compounds related to past landfill gas migration. (Pet. Ex. 1, Criterion 2 at 2-3.) Activities associated with the old area, including burning of waste with petroleum products, historically occurred west of the east GMZ. (WMII Public Hearing Presentation Slides, p. 3 (History-1965), C0007759-C0007766.) Groundwater flow in the

Henry Formation in this area is a local flow system, and moves from west to east in the vicinity of the east GMZ. (Pet. Ex. 1, Criterion 2 at Fig. 5-12.)

STMD: **11. WMII Engineer Andrew Nickodem stated that expanding over a leaking landfill is a good idea. (STMD Br. at 38)**

FACT: Mr. Nickodem did not say, as a general proposition, that expanding over a leaking landfill is a good idea. (3/1/10 Tr. at 209.) He did not agree that the north unit is leaking. (3/2/10 Tr. at 207.) He stated that with an overlay liner, the proposed expansion could be done over the existing landfill, and that he had much experience designing such expansions. (3/1/10 Tr. at 209.)

STMD: **12. A second public health, safety, and welfare issue of major concern is the ongoing hydrogen sulfide problem at the existing landfill. (STMD Br. at 39.)**

FACT: The alleged hydrogen sulfide problem is not ongoing. There is no hydrogen sulfide problem at the existing landfill. (3/3/10 Tr. at 95.) Dale Hoekstra testified that a hydrogen sulfide odor was detected at the existing landfill in late 2008, and determined that it was a direct result of ground gypsum board being brought in with ground-up wood material. (3/3/10 Tr. at 96.) WMII terminated the generator's ability to bring that material to the existing landfill and no longer accepts this material for disposal. (3/3/10 Tr. at 96-97.) Additional gas extraction wells were installed in October, 2009, and no hydrogen sulfide has been detected since. (3/3/10 Tr. at 97; C7931-7961.) The expansion will not accept ground gypsum board. (3/3/10 Tr. at 97-99.)

STMD: **13. Dr. Aubrey Serewicz stated that if a person can smell hydrogen sulfide, the person is in trouble because the concentration level is already harmful. (STMD Br. at 41.)**

FACT: Dr. Serewicz's statement is wrong. He first claimed that hydrogen sulfide can be smelled at 200 parts per billion (ppb), when in fact, it can be smelled at one-half part per billion (0.5 ppb). (3/3/10 Tr. at 246, 263; 3/4/10 Tr. at 44, 204; 3/5/10 Tr. at 349-350.) Though the OSHA standard for toxicity of hydrogen sulfide starts at 10 parts per million (10,000 ppb), Dr. Serewicz claims, without any scientific basis, that the toxic level is 200 ppb, so as soon as you can smell it, "you're in trouble." (3/5/10 Tr. at 349.)

According to Dr. Serewicz, once a person smells hydrogen sulfide, the person will never smell it again. (3/5/10 Tr. at 348.) Changing his earlier testimony, he states that hydrogen sulfide is toxic at 20 ppb, or ten times less than his previously claimed level of 200 ppb. (3/11/10 Tr. at 30.) His testimony on odor thresholds and toxic levels of hydrogen sulfide is baseless.

The error in this testimony is demonstrated by his own actions. In response to the question, "Have you ever smelled this landfill site?", he said, "Yes. When I drive by, I roll down the windows." (3/5/10 Tr. at 336.) Hence, Dr. Serewicz, who claims that a person who smells hydrogen sulfide at 200 ppbs is "in trouble", voluntarily rolls down his car windows when he drives by the existing landfill so he can smell an odor which he believes, based on his experience, to be hydrogen sulfide. (3/5/10 Tr. at 336.) Yet he

reports no harm from his detection of hydrogen sulfide, and no inability to smell the substance on subsequent occasions.

STMD: **14. Between the design of the expansion and the siting hearing, an earthquake in the vicinity of the site caused the United States Geological Survey to raise the peak acceleration standard at the site location to .1g. (STMD Br. at 41-42.)**

FACT: The United States Geological Survey ("USGS") did not raise the peak acceleration standard at the site location to .1g. The standard is .081g, as indicated in the Application and the USGS National Seismic Hazard Mapping Project, 2008 Update. (Pet. Ex. 1, Criterion 2 at 3-4, Fig. 3-2.) STMD wrongly asserts that the USGS changed the standard in the 2008 Seismic Mapping Project, when no such change has been made. STMD relied upon a preliminary earthquake report, showing peak acceleration associated with the specific February 2010 event, in claiming the standard was changed. STMD submitted that report to the County Board as a public comment, but deliberately left out the information indicating that the report was preliminary and event-specific. (http://neic.usgs.gov/neis/eq_depot/2010/eq_100210_snay/neic_snay_z.html.) The USGS, however, did not amend the 2008 Seismic Mapping Project based on the 2010 event and the standard remains at .081g for the site. (http://earthquake.usgs.gov/earthquakes/states/illinois/hazards.phpl).

STMD: **15. Mr. Nickodem's factors of safety were based on outdated standards. (STMD Br. at 42.)**

FACT: The USGS National Seismic Hazard Mapping Project, 2008 Update, has not been amended with respect to peak acceleration rates as a result of the 2010 event. The peak acceleration identified for the location of the site is .081g.

STMD: **16. The factor of safety in the design for seismic events may be under the required 1.3 regulatory factor of safety, and thus there is a lack of a safety factor in the design for seismic events. (STMD Br. at 41-42.)**

FACT: There were 78 factors of safety presented in the Application for geotechnical evaluation for both static and seismic conditions, all of which exceeded the applicable regulatory factor of safety. (Pet. Ex. 1, Criterion 2 at Tables 7-5 and 7-6.) STMD mentions only one, that being the 1.38 factor of safety for a seismic condition for the short-term evaluation of excavation stability for the east unit. (Pet. Ex. 1, Criterion 2 at Table 7-6.) The implication is that this one factor of safety applies to the stability of the entire constructed landfill. This is false. The 1.38 factor of safety represents one short-term condition related to excavation at one specific location along the north side of the east unit, prior to construction of any landfill components. It represents nothing about the stability of any landfill component, much less the long-term stability of the constructed landfill. (Pet. Ex. 1, Criterion 2 at Table 7-6.)

In addition, STMD provided no evaluation establishing that the factor of safety would fall below 1.3. The allegation merely speculated that the factor of safety "may or may not be under the 1.3 regulatory factor of safety." (STMD Br. p. 42.) Mr. Nickodem testified in response to cross-examination by the County's attorney and a County Board member to the information presented by the USGS on their website following the February 10, 2010 event. He testified that he reviewed the USGS website after the event. (3/2/10 Tr. at 12.)

Mr. Nickodem testified that the February 2010 3.8 magnitude event is a milder earthquake, or lower ground acceleration and lower rated earthquake, than the peak acceleration of the .081g used in the Application. (3/2/10 Tr. at 12, 65-67.) He testified that it did not affect what is in the Application. (3/2/10 Tr. at 12, 65-66.)

STMD: **17. WMII's sole purpose in establishing a relationship with the County prior to and during Host Agreement negotiations was to educate County Board members concerning the details of the proposed landfill expansion. (STMD Br. at 19.)**

FACT: The details of the proposed landfill expansion did not exist before the Host Agreement was approved in March, 2009. In fact, the field investigation program to obtain the geologic data necessary to design the expansion did not begin until late April, 2009, and continued until October, 2009. (Pet. Ex. 1, Criterion 2 at Appendix C-3, Appendix D.) The design could not begin without information from the field program. (3/4/10 Tr. at 49-50.) As a result, the preparation of the design and proposed operation of the expansion was not completed until November, 2009. (Pet. Ex. 1; 3/2/10 Tr. at 55-57.)

STMD: **18. WMII made several presentations to the County in February, 2009 concerning the details of the proposed landfill expansion. (STMD Br. at 19.)**

FACT: The details of the proposed landfill expansion had not been developed as of February, 2009. (Pet. Ex. 1, Criterion 2 at Appendix C-3, Appendix D; 3/2/10 Tr. at 55-57; 3/4/10 Tr. at 49-50.)

STMD: **19. WMII and the County communicated regarding a host agreement in settings where the public could not comment or participate. (STMD Br. at 3.)**

FACT: Notices of all county board and committee meetings are set out a week before the beginning of the new month, and sent to all county board members, department heads and the press. (Tobias Dep. at 9; Bockman Dep. at 67-68; www.dekalbcounty.org/Packet/archives.html.) All county board and committee meetings are open to the public to attend and observe. If the public attends a committee meeting and has a question that is relevant, it is often the case that a question may be entered and answered. (Tobias Dep. at 8-9.) The Ad Hoc Solid Waste Committee reviewed and approved the negotiations with WMII. (Tobias Dep.at 7.)

A Host Agreement Workshop was held on February 24, 2009 for the entire county board. (Bockman Dep. at 12-13.) The January 2009 county board meeting packet identified the February 2009 Executive Committee meeting. (www.dekalbcounty.org/Packet/09/Jan.pdf.) The February 2009 county board meeting packet included the minutes of the February 2009 Executive Committee meeting. During the February Executive Committee, it was announced that a Host Agreement workshop was scheduled for the entire county board for February 24, 2009 at 7:00 pm, to be held at the Gathertorium. (www.dekalbcounty.org/Packet/09/Feb.pdf.)

In addition, the Daily Chronicle published an article about the Host Agreement Workshop on February 18, 2009, describing the Host Agreement and workshop, providing general information about the Host Agreement and the workshop meeting date,

time and location. It was identified that the Host Agreement would be voted upon by the entire county board at the March 18, 2009 county board meeting. (IPCB Public Comment No. 49.) Again, the March 2009 county board meeting packet indicated that the Host Agreement would be brought before the full county board, and included a time for public to speak, "Persons to be Heard From the Floor," on the agenda. (www.dekalbcounty.org/Packet/09/Mar.pdf.) Five members of the public are recorded in the March 18, 2009 meeting minutes as having spoken at the March 18, 2009 county board meeting specifically on the Host Agreement resolution. (www.dekalbcounty.org/Packet/09/Apr.pdf.)

STMD: **20. As of March 2009, the County Board was convinced that it had no choice but to approve an Expansion of the landfill. (STMD Br. at 29-31.)**

FACT: It is not true that the County Board was convinced as of March 2009 that it had to approve the Expansion. On March 10, 2009, County Board member Riley Oncken sent an e:mail to a constituent in which he stated: "This vote on the Host Agreement is merely the first in many steps. Waste Management still has to receive approval from the IEPA and EPA and receive ultimate approval from the County for their plan." (Oncken Dep. Ex. 1.)

On March 18, 2009, the County Board voted 16-5 to approve Resolution #R2009-11, Host Community Agreement. (http://www.dekalbcounty.org/Packet/09/Apr.pdf) No County Board member, in voting to approve the Host Agreement, stated that he or she did so because there was no choice but to approve an expansion. In fact, five members obviously did not believe they had no choice, because they voted not to approve the Host Agreement.

On August 25 and 26, 2009, Dan Kenney, of STMD, had communications with County Board members Pat Vary and Julia Fauci. On August 25, Ms. Pat Vary told Dan Kenney that "We are left with three options: expand the landfill, direct driving to very far landfills with great increase in cost for everyone and much more gas etc. used, find another place in the county to start a landfill. We opted for the first option." Contrary to STMD's assertion, she also responded "No" to Dan Kenney's questions as to whether the "expansion of the County waste site is a completed deal" and "what influenced her vote." (Vary Dep. Ex. 1.) While Ms. Vary voted for the Host Agreement, she testified "that did not mean that I would approve the final proposal." She knew that by voting for the Host Agreement that she was not voting to approve the expansion of the landfill. (Vary Dep. at 33-34.) Confirming Ms. Vary's understanding, Ms. Fauci stated that the "vote to approve the host community agreement was not a vote to expand or improve [sic-approve] an expansion of the landfill..." (Fauci Dep. at 26.)

STMD: **21. Article 3, Section 5 of the Rules and Procedures limits participation to property owners within four hundred feet of the subject site. (STMD Br. at 8, 12.)**

FACT: STMD accurately cites the relevant language of Article 3, Section 5 of the Rules and Procedures (STMD Br., pp 11-12), but then misstates the property owners entitled to notification under Section 50-54(a)(3) of the Ordinance. Property owners entitled to notification are not only those who own property within 400 feet of the expansion, as STMD claims, but those owners whose property adjoins property that adjoins the

expansion. (Ordinance, Section 50-54(a)(3).) In this Application, that includes owners whose property is approximately one-half mile from the expansion. (Pet. Ex. 1, Additional Information, Tab A.)

STMD: **22. The County passed a resolution in the fall of 2009 identifying host revenues from an expanded landfill as the only feasible means of funding the jail expansion. (STMD Br. at 28.)**

FACT: Neither Resolution R2009-61, titled Authorizing a Capital Improvement Program, nor the Financing Plan developed by Scott-Balice Strategies attached to the Resolution, identified host fees from an expanded DeKalb County Landfill as the only feasible means of funding the jail expansion. (Resolution R2009-61, October 21, 2009; Tobias Dep. Ex. Nos. 2 and 3; Bockman Dep. at 33-35.)

STMD: **23. Ray Bockman's only explanation for not placing the siting application on the County's website was that it was not required. (STMD Br. at 16.)**

FACT: Ray Bockman provided three explanations for not placing the siting application on the County's website. In response to the STMD question "What was the reason for deciding not to place the application on the County's website," Mr. Bockman first replied, "The size of the file." (Bockman Dep. at 37.) He later responded that he didn't "think the application is required to be placed on the file- - on the website." (Bockman Dep. at 37.) Mr. Bockman did not agree that placing the Application on the County's website basically eliminated all potential issues regarding public access to that Application, because, "Our experience is that that creates more issues than it resolves" because "those who oppose initiatives of the government always cite people who don't have access to the world wide web as being disadvantaged by their placement on the web and that placement of these items on the web discriminates against those who can't afford computers…" (Bockman Dep. at 38-39.) While he testified that the web can be a wonderful tool, we [the County] "recognize that it's simply not available to everyone." (Bockman Dep. at 39.)

STMD: **24. The County Board hearing officer deprived STMD of the benefit of the full thirty days of statutory post hearing public comment time. (STMD Br. at 10.)**

FACT: The hearing officer afforded the parties the right to file a post-hearing brief, which the Act does not specifically authorize. He did not prevent any party from filing public comment within the 30-day period provided by the Act. In fact, STMD, through two of its members and its consultant, filed two briefs and public comment on April 5, 7, and 9, 2010, respectively.

STMD: **25. The County staff report did not consider any public comment, other than WMII's, submitted after March 11, 2010. (STMD Br. at 11.)**

FACT: As STMD acknowledges in the very next line of its brief, the County staff considered the public comment filed April 12, 2010, by STMD's consultant and prepared a supplement that addressed it. All public comments filed with the County Board were considered. (County Staff report, pp. 2-4, Exhibit B, pp. 62-63.)

STMD: **26. The only possible motive for the County's limitation on participation is that the County wanted to discourage the public. (STMD Br. at 14.)**

FACT: No one has claimed that they did not attend the public hearing because of the Ordinance or Rules and Procedures. (IPCB Tr. at 77.) No one was denied or refused the opportunity to participate in the public hearing. (IPCB Tr. at 46-47, 78, 90, 92.) No one was denied or refused the opportunity to view the Application at the County Clerk's office. (IPCB Tr. at 89.) Each person who requested an electronic version of the Application from the County received one. (IPCB Tr. at 71, 89, 105-106.) These actions by the County indicate a motive to assure, not discourage, public participation.

STMD: **27. WMII conditioned or convinced the County that it had no choice but to expand the existing landfill by the time the public hearing began. (STMD Br. at 30-31.)**

FACT: None of the 24 County Board members who voted May 10, 2010 on the Application believed they had no choice but to approve at the time the public hearing began on March 1, 2010. Eight County Board members voted no. The 16 members who voted to approve made their decision only after all the evidence was submitted as of April 20, 2010, and for five of those members the decision was made as late as shortly before or the day of the vote. (Allen Dep. at 30; L. Anderson Dep. at 21; Augsburger Dep. at 22; DeFauw Dep. at 15; Emerson Dep. at 14; Fauci Dep. at 43-44; Haines Dep. at 40-41; Hulseberg Dep. at 18; Metzger Dep. at 34; Oncken Dep. at 31-32; Stoddard Dep. at 33; Tobias Dep. at 34; Turner Dep. at 19; Vary Dep. at 35-36; Walt Dep. at 23.)

STMD: **28. Mac McIntyre testified that he overheard the statements made by Riley Oncken to Paulette Sherman. (STMD Br. at 32.)**

FACT: Mac McIntyre did not hear Mr. Oncken's statements to Ms. Sherman. He learned of the statements "secondhand." (IPCB Tr. at 69.)