ILLINOIS POLLUTION CONTROL BOARD
March 17, 2011

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

GEORGE MUELLER, MUELLER ANDERSON PC, APPEARED ON BEHALF OF PETITIONER;

RENEE CIPRIANO AND AMY ANTONIOLLI, SCHIFF HARDIN LLP, APPEARED ON BEHALF OF THE COUNTY BOARD OF DEKALB COUNTY, ILLINOIS; and

DONALD J. MORAN, PEDERSEN & HOUPT, APPEARED ON BEHALF OF WASTE MANAGEMENT OF ILLINOIS, INC.

OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

On June 11, 2010, a voluntary group of citizens known as Stop the Mega-Dump (STMD or petitioner) timely filed a petition asking the Board to review a May 10, 2010 decision of the County Board of DeKalb County, Illinois (County) *See* 415 ILCS 5/40.1(b) (2008); 35 Ill. Adm. Code 107.204. In a 16-8 vote, the County granted the application of Waste Management of Illinois, Inc. (Waste Management) for expansion of the DeKalb County Landfill (Landfill), subject to conditions contained in the County's Resolution # 2010-31.[1]

[1] In a separate petition for review filed June 14, 2010, Waste Management challenged one of these conditions which would require Waste Management to fund and maintain improvements to the shoulder and slope of Somonauk Road. While the Board initially consolidated the two appeals, the Board later vacated the consolidation order at Waste Management's request. Waste Management of Illinois, Inc. v. DeKalb County Board, PCB 10-104 (Aug. 19, 2010). Waste Management has yet to present its case on the PCB 10-104 petition at hearing. Board decision on that petition is currently due for decision June 16, 2011 pursuant to Waste Management's waiver of the decision deadline. The merits of the PCB 10-104 appeal are not considered in today's opinion and order.

The Landfill is located northeast of the intersection of Somonauk and Girler Roads in unincorporated DeKalb County. The proposed expansion (Expansion) would consist of the exhumation of an old fill area and disposal of the exhumed waste in a composite-lined cell, development of a 61-acre waste disposal area above and adjoining the Landfill's existing 88-acre waste footprint, and the development of a 179-acre waste disposal area east of Union Ditch No. 1. The Expansion's capacity is expected to be 23.2 million tons, with a disposal life of 46 years.

Petitioner STMD appeals on the grounds that the County conducted the siting proceeding in a manner that was fundamentally unfair as a result of alleged *ex parte* contacts between Members of the County Board and Waste Management, and efforts to discourage and limit public participation. STMD also contends that the County's determination to grant siting was contrary to the manifest weight of the evidence with respect to certain siting criteria in Section 39.2(a) of the Environmental Protection Act (Act) (415 ILCS 5/39.2(a) (2008)). STMD also challenged the substance of conditions added by the County regarding monitoring of hydrogen sulfide.[2]

For the reasons discussed below, the Board finds that petitioner failed to prove that the County's siting procedures were fundamentally unfair. STMD also failed to prove that the County's determinations regarding the contested siting criteria were against the manifest weight of the evidence as to the following criteria of Section 39.2 of the Act: criterion (i) facility is necessary to accommodate area waste needs, criterion (ii) the facility is so designed, located and proposed to be operated to protect the public health, safety, and welfare, and criterion (vi) the traffic patterns to or from the facility are so designed as to minimize impacts on existing traffic flows.

Contrary to STMD's assertions, the record demonstrates that the County Board Members properly understood that their role in siting hearings was adjudicatory, not legislative, in nature. This resulted in their inability to relate to their constituents in some of the ways both were accustomed to in dealing with legislative matters. The record demonstrates that the County Board Members properly based their decision on the statutory criteria, after considering the record developed during the siting proceedings.

The Board therefore affirms the County's May 10, 2010 decision, as contained in Resolution # 2010-31, to grant siting approval to Waste Management for expansion of the DeKalb County Landfill, subject to conditions.

In this opinion, the Board first provides a brief introduction to third-party siting appeals. That is followed by a discussion of procedural matters, including the procedural history of this case. The Board then provides the statutory framework for pollution control facility siting under

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[2] STMD's petition challenged the County's findings of five criteria—those in Section 39.2(a) i, ii, iii, v, vi. 415 ILCS 5/39.2(a)(i, ii, iii, v, vi). Additionally, STMD challenged the conditions added by the County concerning hydrogen sulfide (condition 2) as too vague. Later in this opinion, based on prior precedent, the Board holds that STMD has waived consideration of these challenges by the Board, due to its failure to address them in closing briefs. *See, infra*, p. 6

the Act. After that, the Board sets forth the factual background of this case. Next, the Board turns to the parties' arguments and the Board's rulings with respect to fundamental fairness. The Board then discusses the parties' arguments and makes the Board's rulings regarding the siting criteria at issue.

## INTRODUCTION

Before the Illinois Environmental Protection Agency (IEPA) can issue a permit to develop or construct a new or expanding pollution control facility, the permit applicant must obtain siting approval for the facility from the local government (*i.e.*, the county board if in an unincorporated area or the governing body of the municipality if in an incorporated area) under Section 39.2 of the Act. *See* 415 ILCS 5/39.2 (2008). If the local government approves siting, certain third parties may appeal the local government's decision to the Board. *See* 415 ILCS 5/40.1(b) (2008).

Section 40.1(b) of the Act (415 ILCS 5/40.1(b) (2008)) allows third parties to appeal a local government's decision granting approval to site a pollution control facility if the third parties participated in the local government's public hearing and are so located as to be affected by the proposed facility. In the petition for review, petitioner must, among other things, specify the grounds for appeal and file the petition within 35 days after the local government approves siting. *See* 415 ILCS 5/40.1(b) (2008); 35 Ill. Adm. Code 107.208. Unless the Board determines that the third party's petition is "duplicative or frivolous," the Board will hear the petition. 415 ILCS 5/40.1(b) (2008).

Petitioners have the burden of proof on appeal. *See* 415 ILCS 5/40.1(b) (2008). Hearings before the Board are based exclusively on the record before the County, except that evidence may be introduced on the fundamental fairness of the County's siting procedures where the evidence is necessarily outside of the record. *See* Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E.2d 188, 194 (3rd Dist. 2000).

## PROCEDURAL MATTERS

### Procedural History before this Board

#### Petition and Record

On June 11, 2010, STMD, a voluntary association of citizens, filed a petition asking the Board to review the County's decision to grant Waste Management siting approval for the Landfill Expansion. In its petition, STMD alleges that the County conducted the siting proceeding in a manner that was fundamentally unfair. STMD also contends that the County's determination to grant siting was contrary to the manifest weight of the evidence with respect to certain siting criteria in Section 39.2(a) of the Act. 415 ILCS 5/39.2(a) (2008). Finally, STMD challenges some of the conditions placed on the County's approval. More specifically, STMD asserts:

5) The proceedings of the DeKalb County Board, including the public hearing, post-hearing procedures and the decision making process as well as the actions of the DeKalb County Board prior to the public hearing were not fundamentally fair for the following reasons:

A. The DeKalb County Pollution Control Facility Siting Ordinance and the Articles of Rules and Procedures supplementary to the provisions of that Ordinance improperly limited, restricted and discouraged public participation and otherwise violated the requirements of fundamental fairness, including the requirement for at least minimal procedural due process.

B. The DeKalb County Board and its agents and employees otherwise improperly limited and restricted full public participation in the siting process, including but not limited to restriction of public access to the Siting Application, refusal to provide information regarding the duplication of the Application or portions thereof, refusal to provide to members of the public, upon their request copies of the electronic version of the Siting Application on file and generally making it as difficult as possible for the public or members thereof to access, view, study and duplicate the Siting Application.

C. Multiple members of the DeKalb County Board had prejudged the Application and were biased in favor of Waste Management of Illinois, Inc.

D. The entire DeKalb County Board was tainted by improper *ex parte* contacts, including but not limited to a private tour of Waste Management's Prairie View landfill in Will County, Illinois.

E. The DeKalb County Board improperly committed and or ear-marked expected Host fees from the expanded landfill prior to making a decision the Siting Application.

F. The DeKalb County Board failed to properly understand the burden of proof, its role in the siting process and the Legal effect of siting approval.

G. The DeKalb County Board had other improper *ex parte* contacts including conducting a pre-filing review of the Siting Application during which the public was excluded.

H. The action taken by the DeKalb County Board was not based upon the evidence.

I. The public hearing on the Application, the hearing procedures and the decision making process employed in this matter were otherwise fundamentally unfair.

6) The finding of the DeKalb County Board that the nine statutory siting criteria had been proven subject to certain conditions was against the manifest weight of the evidence as to criteria i, ii, iii, v and vi.

7) The siting conditions imposed in Resolution #R2010-31 with respect to criterion ii are so vague and indefinite that they improperly defer determination of whether or not the facility was so designed, located and proposed to be operated that the public health, safety and welfare will be protected for future determination. Specifically, three of the conditions imposed in connection with the finding that criterion ii had been met relate to Hydrogen Sulfide emissions from the existing facility. These conditions imply the County Board's recognition of the current danger posed by Hydrogen Sulfide emissions and contemplate a continuation of these emissions, including emissions which directly impact the children attending nearby Cortland Elementary School. Accordingly, it is obvious, with regard to these Hydrogen Sulfide emissions and the need to impose multiple conditions related thereto, the Application, as submitted, was not protective of the public health, safety and welfare. However, the three special conditions included relating to Hydrogen Sulfide do not impose or lay out a solution to the existing health hazard. Instead, the conditions improperly defer remediation of this existing health hazard to the IEPA and to the DeKalb County Health Department. Pet. at unnumbered pp.2-5 following page entitled "Petition for Review."

On June 17, 2010, the Board issued an order accepting the petition for hearing, on its own motion consolidating this case with Waste Management's separate petition for review in PCB 10-104 of one of the conditions to the County's approval. *See, supra* at 1, n.1.

On July 20, 2010, with the hearing officer's leave for later than originally expected filing, the County filed the record of its proceedings, along with an index of documents in the record.[3]

The parties engaged in discovery, including the taking of depositions, through early November 2010.

**Hearing**

On November 22, 2010, Board hearing officer Brad Halloran conducted a hearing in the DeKalb County Health Facility in DeKalb. The hearing transcript[4]indicates that an estimated 75

[3] The Board cites the County's record as "C000xxxx."

[4] The Board's hearing transcript is cited as "Tr. at _."

members of the public were in attendance at the start of the hearing; at a later point, a hearing participant counted 150 persons in attendance. Tr. at 120.

At the Board's hearing, STMD presented the testimony of four witnesses: Paulette Sherman (Tr. at 16-33), Danica Lovings (Tr. at 35-47), STMD Chairman Dan Kenney (Tr. at 48-58), and founding STMD member Mac McIntyre (Tr. at 62-96). These witnesses presented testimony in support of various allegations in STMD's petition. Neither the County nor Waste Management presented witnesses.

Various members of the public spoke in opposition to the Landfill Expansion. Two members of the public presented statements subject to cross-examination: Misty Haji-Sheikh (Tr. at 139-151; see also HO Exh. 3) and Rose Marie Slavenas (Tr. at 159-178 and 187-194). Oral public comments were presented by eleven persons: Ed Miguel (Tr. at 99-104), Mark Charvat (Tr. at 104-107); William Moore (Tr. at 107-109); Richard Hahin (Tr. 109-111), Barbara Votaw (Tr. at 113-114), Jennifer Tomkins (Tr. at 115-118); Janet Johnson (Tr. at 119-120); Kerry Mellott (Tr. at 120-135); Roger Anderson (Tr. at 136-139); Lea Ann Brei (Tr. at 152-158); Grace Mott (Tr. at 179-182). Dave Kolars was called to present his comment, but waived use of his time as he had previously filed a written comment (Tr. at 109).

At hearing, the hearing officer marked and admitted into the record five hearing officer exhibits. These hearing officer exhibits consist of four written public comments presented to the hearing officer the morning of hearing, as well as his public comment sign-up sheet for November 22, 2010 hearing.[5] In addition to other exhibits, the hearing officer also admitted into the record certain deposition testimony, as agreed to by the parties[6]. Tr. at 13-16, 217-223.

Petitioner STMD sponsored as exhibits 15 depositions of County Board Members, staff, and parties' consultants, as well as a separate group exhibit consisting of all documents referred to in the deposition exhibits (Pet Exh. 16):

a) Nine then-sitting DeKalb County Board Members, each of whom voted in favor of siting: County Board Chairman Ruth Ann Tobias (Pet. Exh. 5); Anita Jo Turner (Pet.

[5] The hearing officer exhibits are: HO Exh. 1 PC from Lolly Voss, dated Nov. 22, 2010; HO Exh. 2 PC (with attachments) from Cecile Meyer, Nov. 22, 2010; HO Exh. 3 PC from Misty Haji-Sherikh, dated Apr. 29, 2010; HO Exh. 4 Public Comment sign-up sheet for the hearing of Nov. 22, 2010; HO Exh. 5 PC from Dr. Aubrey J. Serewicz, dated Nov. 22, 2010.

[6] The Board notes that examination of these deposition exhibits reveals that all deposition testimony was taken by the counsel for the parties in this proceeding during discovery in this case, and counsel for all parties attended and had the opportunity to question and/or cross-question the deponents. In their briefs, all of the parties refer to these depositions by name only; here the Board will refer to them by name as well as exhibit number, *e.g.* "Pet. Exh. 1, XXX Dep., at xx" and "Resp. Exh. 2, XXX Dep., at xx." As stated above, the exhibits to all of STMD's 15 deposition exhibits were entered as a single exhibit (Pet. Exh. 16), and such documents will be referenced as "Pet. Exh. 16, XXX Dep. at xx."

Exh. 1); Marlene Allen (Pet. Exh. 4); Patricia Vary (Pet. Exh. 6); Riley Oncken (Pet. Exh. 7); Patricia Vary (Pet. Exh. 9); Steve Walt (Pet. Exh. 10); Michael Haines (Pet. Exh. 11); and Paul Stoddard (Pet. Exh. 12);

b) County Clerk and Recorder Sharon Holmes (Pet. Exh. 14), and a member of her staff in the elections department, Geralynne Kunder (Pet Exh. 15);

c) County Administrator Ray Bockman (Pet. Exh. 3); and Mary Supple, administrative assistant for Mr. Bockman and Chairman Tobias (Pet. Exh. 2);

d) Chris Burger of Patrick Engineering (the County's Landfill consultant) (Pet. Exh. 13); and

e) Lee Addleman, consultant for Waste Management who worked with the County during the Host Agreement and siting process (Pet. Exh. 8).

Waste Management also entered exhibits, the first being a newspaper article dated November 21, 2009 from the DeKalb Daily Chronicle article concerning the imminent filing of the Expansion Application (Resp. Exh. 1). Waste Management sponsored and entered as exhibits 11 additional depositions of:

a) County Board Members Larry Anderson (Resp. Exh. 2), Jerry Augsberger (Resp. Exh. 3); Eileen Dubin (Resp. Exh. 4), Sally Defauw (Resp. Exh. 5), John Emerson (Resp. Exh. 6), John Hulseberg (Resp. Exh. 7); Jeff Metzger (Resp. Exh. 8),

b) Republican candidate for DeKalb County State's Attorney Calvin Clay Campbell (Resp. Exh. 9);

c) STMD members Grace Mott and Lisa Wilcox, who sought access to the Expansion Application (respectively Resp. Exh. 10, 11; Ms. Mott also attended all of the County siting hearings), and Barbara Potuznik, who stated she became aware of the proposed expansion after the public hearings and whose children attended Cortland Elementary School until she removed them due to recurring illnesses due to odors (Resp. Exh. 12).

The hearing officer directed the filing of simultaneous opening briefs and response briefs. STMD, the County, and Waste Management each filed an initial post-hearing brief on January 3, 2011; each filed a response brief on January 31, 2011.[7]

[7] The Board cites the post-hearing briefs as follows: STMD's opening brief as "STMD Br .I at _", and its response brief as STMD Br. II at _"; Waste Management's opening brief as "WM Br. I at _" and its response brief as "WM Br. II at _"; the County's opening brief as "County Br. I at _"; and the County's response brief as "County Br. II at _." The Board reminds the parties that it is their responsibility to consistently cite to the record as prepared by the County and presented to the Board in this appeal (*e.g.* C0000XXX) and to exhibits presented at the Board hearing

The Board received 54 public comments between June 22, 2010 and December 30, 2010 from:

Frankie Benson, Moderator of Special Township Meeting, Cortland Township Elector (PC 1)
Dr. Aubrey J. Serewicz (PC 2)
Rosemary Feurer (PC 3)
Matthew and Brittany Scott (PC 4)
Richard Hahin, Ph.D. (PC 5)
Lolly Voss (PC 6)
Rita Prober Hutchins (PC 7)
Rev. William F. Moore of DeKalb, IL (PC 8)
Barbara Votaw (including minutes of the DeKalb County Ad Hoc Solid Waste Committee) (PC 9)
Rosemarie Slavenas (PC 10)
Dean Maddy (PC 11)
Frank Kasper (PC 12)
Janet Johnson (PC 13)
Eleanor N. Hegland (PC 14)
Richard D. Larson (PC 15)
Craig S. Roman (PC 16)
Barbara Votaw (PC 17)
Danica Lovings (PC 18)
Beverly Black (PC 19)
Edward Miguel (PC 20)
The Nguyen Family (PC 21)
Karen Rosier (PC 22)
Mr. and Mrs. Sipe (PC 23)
Michael and Amber Frykman (PC 24)
Hank Brooks (PC 25)
Susan Jorgenson (PC 26)
Jason Hoshaw (PC 27)
Janet and Jim Barr (PC 28)
Robert J. Brown (PC 29)
Frankie and Bob Benson (PC 30)
Michael Van Wiltenburg (PC 31)
Elaine Larson (PC 32)
John W. Steimel (PC 33)
Erica Wise and Kailey (age 9) and Abbie (age 5) (PC 34)
Richard Hahin, Ph.D. (PC 35)
Lisa G. Wilcox (PC 36)
Robert Hahin, Ph.D. (neurophysiology) (PC 37)
Paul J. Borek of DeKalb County Economic Development Corporation (PC 38)

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(Pet./Resp. Exh.__, Doe Dep. at __). Citation by name, even when accompanied by page number, to documents presented to the County or the Board is not sufficient.

John Bradley (PC 39)
Lolly Voss (PC 40)
Jack Bennett (PC 41)
Charles and Sharron Reichling (PC 42)
David C. Kolars (PC 43)
Ray Bockman, DeKalb County Administrator (PC 44)
Waste Management of Illinois, Inc.: Nov. 20, 2009 DeKalb Daily Chronicle article (PC 45)
Julia Olson (PC 46)
John Goodacre (with signatures of 100% of neighbors contacted who agree with his letter) (PC 47)
Steve Anderson (PC 48)
Waste Management of Illinois, Inc.: Feb.18, 2009 DeKalb Daily Chronicle article (PC 49)
Waste Management of Illinois, Inc.: Feb.25, 2009 DeKalb Daily Chronicle (PC 50)
Waste Management of Illinois, Inc.: Feb.27, 2009 DeKalb Daily Chronicle Letter to the Editor (PC 51)
Waste Management of Illinois, Inc.: Feb.27, 2009 DeKalb Daily Chronicle Letter to the Editor (PC 52)
Waste Management of Illinois, Inc.: Mar. 18, 2009 DeKalb Daily Chronicle article (PC 53)
Waste Management of Illinois, Inc.: Feb. 26, 2010 DeKalb Daily Chronicle article (PC 54)

All of the comments received from individuals not specifically affiliated with County government (*i.e.* PC 38 and 44) spoke in opposition to the Landfill Expansion and/or the siting process. As to the comments of Waste Management, while the Board typically does not accept "public comments" from parties in a siting appeal, Waste Management's entry of the newspaper articles into the record as public comments (PC 45, 49-54) is not inappropriate in this case.

On March 2, 2011, the Board received an additional comment, which the Board includes in the record and considers, even though late-filed:

Eileen Dubin, former DeKalb County Board Member (Dist. 8, 2000-2010) PC 55.

## PRELIMINARY ISSUES CONCERNING AND POSED IN BRIEFS

The Board will deal with two procedural issues concerning the briefs, and another concerning the criteria to be reviewed by the Board, prior to initiating considerations of the other issues in this case. In the interests of clarity for the reader, the Board discusses, and finds unavailing, an issue raised by Waste Management and the County concerning STMD's alleged waiver of any ability to challenge Member Fauci and Oncken's participation in the decision for failure to raise the issue at the County hearings . *See infra* at 47, 51, 52.

### STMD "*De Facto* Sanctions Motion" Concerning County Opening Brief

In the introduction to its January 31, 2011 reply brief, STMD characterizes the respondents' opening briefs as being "one sided and which seriously misrepresent existing law," misstating the law applicable to fundamental fairness. STMD Br. II, p. 2. Later, in a discussion of case law concerning ex parte contacts, STMD suggests that "the Board should consider

sanctioning the County for what can now not be construed as anything other than an intentional misstatement of the law." *Id* at 9, following discussion at 8 of County Br. I, p. 27.

On February 15, 2011, the County filed a six-page document called a "Response to Petitioner's De Facto Sanctions Motion" (Resp. Sanc.). The County notes that the statement in STMD's brief does not comply with the Board's procedural rules regarding the filing and content of motions. Resp. Sanc., p. 1. But, the County states that it has filed a response within 14 days of the STMD brief's submission to avoid any determination under the Board's procedural rule at 35 Ill. Adm. Code 101.500(d) that it has waived objection to the granting of sanctions. Resp. Sanc. 2. The County then proceeds to discuss the case law concerning *ex parte* contacts.

Given the procedural deficiencies of the "*de facto*" motion, the Board considers STMD's statements to be mere statements of advocacy, rather than a motion requesting ruling by this Board. Accordingly, the Board finds that response by the County was not necessary. The Board will discuss the facts of the case and the case law concerning *ex parte* contacts raised by these parties later in this opinion, and then relate the Board's conclusions.

**County Motion For Leave to File 72-Page Response Brief**

The County's 72-page response brief was accompanied by a motion for waiver (Mot. Waiver) of 35 Ill. Adm. Code 101.302(k), the procedural rule limiting briefs to 50-pages in length. The County asserts that

> The County Board cannot adequately address the numerous mischaracterizations of facts and the law, including factual omissions, half-truths, and false misrepresentations, found in Petitioner's opening brief in the 50-page limit provided by the Board's procedural rules. Mot. Waiver at 2.

STMD filed its response in opposition (STMD Resp.) on February 3, 2011. STMD argues that the County's response brief is 40% longer than permitted, is repetitious, reargues previous points, and is not limited to response to points raised in STMD's opening brief. STMD Resp. at 1-2.

The Board grants the County's motion, and accepts the brief for filing. In so doing, the Board notes that, particularly in decision deadline cases, the parties' briefs are particularly important to the Board's thorough review of a voluminous record and timely resolution of the issues posed in the case. As the County notes in its motion and Waste Management notes in its brief (WM Br. II at 2, n. 1 and A1-A9), STMD's opening brief contains many assertions that are not supported by citation to pages in the record before the Board. STMD's motion as posed requires the Board either to accept or reject the County brief in total, and the Board finds the better course to be acceptance of the brief. Again, the Board will discuss the facts and the law in later portions of this brief, and then relate the Board's conclusions.

## STMD's Waiver Of Issues Raised in Petition But Not Argued in Briefs

STMD's original Petition for Review raised issues with respect to criteria (i), (ii), (iii), (v) and (vi). *See supra*, p.4, numbered para.6. STMD's opening brief only discusses the County Board's findings with criteria (i), (ii) and (vi). In its closing brief, the County contends that STMD has waived any arguments regarding criteria (iii) and (v). County Br. II at p. 57.

In siting cases, petitioners have the burden of proof on appeal. *See* 415 ILCS 5/40.1(b) (2008). In various case types, the Board has previously ruled that hose issues that were raised by a petition but have not been argued by a petitioner are waived. *See, e.g.* American Bottom Conservancy v. City of Madison, PCB 07-84, slip op. at 4 and cases cited therein (Feb. 21, 2008).

The Board accordingly finds here that STMD has waived any issues it raised in the petition concerning criteria (iii) and (v) but failed to address in its opening brief.[8] Additionally, as the petition's challenges to the substance of the hydrogen sulfide conditions were not argued in STMD's opening brief, the Board deems those waived as well. The Board will not further address here evidence or arguments concerning these criteria or conditions.

## STATUTORY FRAMEWORK

Pollution control facility siting applications and their processing by local authorities are governed by Section 39.2 of the Act. *See* 415 ILCS 5/39.2 (2008). Section 39.2 addresses, among other things, the proof required of siting applicants, public hearings before the local siting authority, the opportunity for public comment, and the form of the siting decision. Specifically, Section 39.2(a) requires the applicant to submit to the local siting authority sufficient details describing the proposed facility to demonstrate compliance with the nine criteria of Section 39.2(a). *See* 415 ILCS 5/39.2(a) (2008). For purposes of this case, only siting criteria (i), (ii), and (vi) are at issue:

> (a) The county board of the county or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, shall approve or disapprove the request for local siting approval for each pollution control facility which is subject to such review. An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if the proposed facility meets the following criteria:
>
> > (i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;
> >
> > ***

[8] STMD did not address criteria (iii) and (v) in its closing brief either. The Board concurs with STMD's observation that it does not waive any points addressed in its opening brief but not again addressed in its closing brief. *See* STMD Br. II, p. 3.

> (ii) the facility is so designed, located, and proposed to be operated that the public health, safety and welfare will be protected;
>
> (vi) the traffic patterns to or from the facility are designed as to minimize the impact on existing traffic flows. 415 ILCS 5/39.2(a)(i), (ii), and (vi) (2008).

No later than 120 days after receiving an application, the local siting authority must hold at least one public hearing. *See* 415 ILCS 5/39.2(d) (2008). For at least 30 days after the date of the last public hearing, any person may file written public comment with the local siting authority. *See* 415 ILCS 5/39.2(c) (2008). The local siting authority's decision must be:

> in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section. 415 ILCS 5/39.2(e) (2008). Siting decisions may be appealed to the Board. *See* 415 ILCS 5/40.1(a), (b) (2008).

Section 40.1(a) allows the applicant to appeal a denial or conditional grant of siting. *See* 415 ILCS 5/40.1(a) (2008). Section 40.1(b) allows certain third parties to appeal a grant of siting, as in this case. In a third-party appeal:

> the Board shall hear the petition in accordance with the terms of subsection (a) of this Section and its procedural rules governing denial appeals . . . . The burden of proof shall be on the petitioner. 415 ILCS 5/40.1(b) (2008).

In turn, subsection (a) of Section 40.1 provides in relevant part:

> In making its orders and determinations under this Section the Board shall include in its consideration the written decision and reasons for the decision of the county board or the governing body of the municipality, the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision. 415 ILCS 5/40.1(a) (2008).

## FACTUAL BACKGROUND

In this section of the opinion, the Board sets forth the background facts of this case. Facts pertinent to each argument will be provided later in the opinion.

### Proposed Landfill Expansion

The existing DeKalb County Landfill, located northeast of the intersection of Somonauk and Girler Roads in unincorporated DeKalb County, includes an 88-acre waste disposal area on a 245-acre property. The existing Landfill consists of three sections, an active area, an old area, and the north area. The old area consists of twenty-four acres which are believed to have operated between 1958 and 1974. C0000145. The north area is immediately to the north of the Old Area and consists of approximately thirty-eight acres. It was permitted in 1974 and filling

was accomplished by the trench-fill method up to the ground surface. The north area was constructed with an *in-situ* clay liner (no synthetic standard liner). *Id.* The active area was permitted in 1989 and continues to receive waste. *Id.*

The proposed expansion would consist of the a) exhumation of the 24-acre old fill area and disposal of the exhumed waste in a composite-lined cell, b) development of a 61-acre waste disposal area above and adjoining the Landfill's existing 88-acre waste footprint, and c) development of a 179-acre waste disposal area east of Union Ditch No. 1, all on a 595-acre property. C0007767. The Landfill Expansion is anticipated to receive approximately 1800 tons per day of solid waste from the service area, and will receive no more than 500,000 tons per year. C0000209. The Expansion's capacity is expected to be 23.2 million tons, with a disposal life of 46 years. *Id.*

## Activities Prior to Filing of Siting Application

As previously stated, Waste Management filed its siting application with the County on November 30, 2009. Several actions and activities prior to that filing are germane to the Board's decision today, as set forth below.

### County Adoption of Procedural Ordinance and Articles: 2007

County Administrator Ray Bockman, has served the county in that capacity since the summer of 1984; the position's duties are similar to that of a city manager (for that form of government). Pet. Exh. 3, Bockman Dep.at 1-2, Mr. Bockman related that the County, through an *ad hoc* committee, began the process of reviewing its options concerning its Landfill in 2006, due to a concern that capacity of the Landfill could be exhausted in some seven years. *Id* at 9-10, 21-22.

As explained by Chris Burger, Vice President of Engineering for Patrick Engineering, the County hired Patrick Engineering as its landfill consultant to begin conducting a feasibility study concerning the Landfill. Pet. Exh. 13, Burger Dep. at 6-7; *see also* Pet. Exh. 3, Bockman Dep. at 9-10. The feasibility study showed that a landfill in the county was less expensive than a transfer station and transferring waste out of the County. In April 2007 Patrick Engineering gave a presentation to the County's Solid Waste Committee concerning the study. Pet. Exh. 13, Burger Dep. at 6-7.

The County of DeKalb adopted a Regional Pollution Control Facility Siting Ordinance, Ord. 2007-12, on September 19, 2007. C0006790-6800. Among other things the ordinance established a pollution control facility (PCF) committee consisting of six Members of the County Board appointed by the chairman for one-year terms. The PCF committee is authorized to hire one or more hearing officers to conduct the public hearing on any PCF application, under the PCF's committee "Articles of Rules of Procedures". Sec. 50-53, C0006792-93.

The ordinance establishes procedures for the filing of PCF applications, public hearings and the PCF committee's attendance at the hearings, public comments, submission of a

recommendation on the application by the PCF committee to the full county board, and decision on the application by the County. Sec. 50-54(a) "Host agreement" provides in pertinent part that

> (1) Prior to submitting an application for siting approval for a PCF, the applicant shall enter into negotiations with the county board to develop a host agreement. The host agreement must be approved by the county board. The host agreement shall be signed by the applicant and the Chairman of the county board before the applicant submits an application for siting of a PCF. The host agreement shall be completed prior to any pre-filing review of a conceptual PCF.
>
> (2) If the county and applicant agree that a pre-filing review is warranted, then a pre-filing deposit of $75,000.00 shall be submitted prior to the county engaging professional services to review the draft concept application. Any pre-filing review shall occur completely prior to the applicant initiating the siting process described in section 39.2 of the Act. . . . [A memorandum of understanding must be signed prior to the pre-review, and any unused portion of the deposit is to be returned.] Nothing in this article requires that a pre-filing review be performed.
>
> (3) The applicant shall meet all notice requirements as required by 415 ILCS 5/1 *et seq*. as follows:
>
> (a) The applicant shall cause to be published no sooner than 30 days nor later than 15 days prior to a request for siting approval a written notice of such request to be served either in person or by registered mail, return receipt request, on the owners of all properties:
>
> 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.[9] C0006793-6794.

Section 50-58 goes on to direct the PCF committee to establish "articles of rules and procedures for the application and the hearing process" (Articles) to be followed by the applicant. C0006800.

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[9] Compare with the less inclusive requirements of Section 39.2(b) for notice to property owners in proximity to the proposed expansion.

During the fall of 2007, the PCF committee established Articles in Resolution R2007-65. *See* C0006801-6822.[10] Among other things, the Articles provide guidance and rules considering conduct of hearings, factors to be considered by the PCF committee in making its recommendation to the County, and information to be provided in the application.

Particularly pertinent for the purposes of this decision are some portions of Article III hearings. Section 5 provides that

> For the 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 public comment through the written comment period. C0006802.

Section 6 "Submission of Evidence" requires participants to file copies of exhibits 5 days in advance of hearing (Sec. 6(A)), and members of the public who speak during the public comment time to provide copies of exhibits "prior to the time designated for the public to speak" (Sec, 6(B)). C0006802.

> Section 6(F) provides that:
>
> All parties wishing to testify or cross-examine must submit written notification of said intent to the County Clerk at least seven (7) days before the first date of the hearing. If the hearing should extend beyond one session, no additional parties shall be allowed to testify or cross examine. C0006803.

But, Section 6(G) allows waiver of Section 6 requirements by the committee

> "[i]n order to insure fundamental fairness, compliance with the Act, allow for unforeseeable circumstances, and to protect the public interest." *Id.*

**Host Agreement: Executed April 17, 2009**

At some point after 2007, consistent with the Ordinance and Articles, Waste Management and the County negotiated a Host Community Agreement (Agreement). The Agreement was approved by the County Board and executed by the County Chairman April 17, 2009. C0001345-90. By its terms, the Agreement states that "[b]y entering into this Agreement, the County does not express any opinion or commitment with respect to the siting application".

[10] The last page of the Articles document submitted for the record does not contain the specific effective date, but the County's notice of hearing specifies the effective date as September 19, 2007, and amended August 19, 2009. C0008111.

C0001347. The Agreement states that it will apply to the Expansion in the event of final and non-appealable local siting approval. C0001348.

Among other things in the Agreement, WMII guarantees disposal capacity at the Expansion for nonhazardous solid waste generated in DeKalb County for at least 25 years. C0001351. WMII agrees to a property value guarantee plan and domestic water well monitoring plan for properties located within 1/2 mile of the waste footprint of the Expansion and included those plans in the Agreement. C0001355-56. WMII will indemnify DeKalb County for any liability relating to the operation and closure of the Expansion. In addition to a commercial general liability insurance policy in the amount of $10 million, WMII will maintain pollution liability insurance in the amount of $20 million for the entire period of Expansion, operation, and 30 years after closure. C0001356-57, 1361, 1365-67. WMII agrees to actively promote key responsibilities of environmental stewardship, including the provisions for a methane gas recovery facility, citizen forum procedures and a household hazardous waste collection program. C0001363.

In the course of negotiations, Waste Management made two presentations: first to the Ad Hoc Solid Waste Committee of the County Board on February 9, 2009, and then to the full County Board on February 24, 2009. *See* Pet. Exh. 16, Bockman Dep., Exh. 3-4 which are the County's minutes of the respective meetings at which the presentations were made. The public could attend both meetings and ask questions. Pet. Exh. 5 Tobias Dep. at 8-9; *but see* STMD I Br., p. 4. The County Board sent notice of the meetings to the press, the County Board members, and all relevant department heads and the meetings were publicized on the County's website. Pet. Exh. 5 Tobias Dep. at 9; http://www.dekal bcounty. org/ Agendas/09 /9 _13 feb .html; http://www .dekal bcouty .org/ Agendas/09/23_27feb.html. No member of the public elected to attend either meeting. Pet. Exh. 5 Tobias Dep., pp. 8, 9. After the meetings, minutes were posted on the County's website. Pet. Exh. 16, Bockman Dep., Exh. 3, 4. These public meetings were intended to familiarize the County Board members with the concepts included in the Host Agreement and the impact of that Agreement on DeKalb County should the County Board approve the Application. *Id.*

Patrick Engineering assisted the County in its review of the Host Agreement. Pet. Exh. 13, Burger Dep. at 7-8.

In March 2009, during the host agreement negotiations, Waste Management offered to provide tours of a comparable facility, Waste Management's Prairie View Landfill, to familiarize County Board Members with a comparable facility. Pet. Exh. 8, Addleman Dep. at 17. The Prairie View facility is the closest of comparable size, of comparable daily volume, and which contains the design elements that are part of the proposal for the DeKalb Landfill Expansion. *Id* at 16.

**Facility Tours of Prairie View Landfill for County Board Members: Conducted July 18, 2009 - November 21, 2009**

Six tours were held, beginning in July 2009. Exh. 8, Addleman Dep. at 17. These tours were facilitated by Waste Management employee Dale Hoekstra and consultant Lee Addleman.

(Mr. Addleman became a consultant for Waste Management in 2007, a year following his retirement as a vice president in business development from Waste Management, where he had been employed since August 11, 1981. *Id* at 5-6). The facilitators provided narrative comments during the tours and answered questions. Six tours were held rather than one, to accommodate scheduling needs of the 15 County Board Members who eventually attended a tour. *Id.* at 13-14. A 2-page document prepared by Mr. Addleman listed the dates when tours were held (on July 16, August 18, September 14, September 18, and November 21, 2009) and what individuals attended each tour. Pet. Exh. 16 (unpaginated), Addleman Dep. Exh. 1.

In the normal course, tour participants were taken by bus (or driven by Mr. Addleman) to the Prairie View Landfill, where:

> the tour started with receipt control so that individuals went into the scale house and actually saw how the trucks were logged in, their weights, the videotapes that are taken of the license plate, the driver, and all of the typical considerations. . .
>
> After that we put them back on the bus and we took them out to an active area so that they could see day-to-day operations, and in this particular case we had the good fortune to be able to view a cell under construction and a cell being capped. Pet. Exh. 8, Addleman Dep. at 15-16.

Lunch was provided to tour attendees. *Id.* at 16. One attendee of a bus tour stated that the bus left DeKalb at 8:30 in the morning, and returned at between 2 and 3 in the afternoon, and that lunch consisted of sandwiches and soda pop brought in from Jimmy Johns, served in an on-site conference room. Pet. Exh. 4, Allen Dep. at 22-23.

**Pre-filing Review of Application by County Consultant Patrick Engineering: Performed July – November, 2009**

Patrick Engineering was again retained to assist DeKalb County by conducting a pre-filing review of the siting application prepared by Waste Management. Pet. Exh. 13, Burger Dep. at 9. Patrick Engineering's review process began July 1, 2009 and ended in November 2009; no County representatives were involved. During the process, the consultant exchanged information with Waste Management, providing notes, comments, and observations. *Id* at 11. In August 2009, Patrick Engineering received drafts concerning various aspects related to criterion ii, such as design, hydrogeology, groundwater monitoring, landfill gas, and stormwater (*Id* at 11, 20); the consultant did not review drafts concerning any other criteria. *Id* at 12-13. Mr. Burger understood that the applicant could accept or ignore Patrick Engineering's statements. Mr. Burger did not find any "fatal flaws" in the pre-filing review, noting that the filed final application incorporated changes concerning location of the bottom liner in response to Patrick Engineering's concerns. *Id.*

A November 20, 2009 meeting with Patrick Engineering representatives (Chris Burger and hydrogeologist Steve Krull) was attended by County Administrator Ray Bockman. Another was attended by the attorney retained by the County (with the consent of the State's Attorney) concerning the siting process, Renee Cipriano of Schiff, Hardin LLP, but neither of them were

involved in interactions between the consultant and Waste Management. Pet. Exh. 13, Burger Dep. at 10-15. Mr. Burger testified that he had no further contact with Waste Management representatives after that meeting and before the application was filed November 30, 2010, which filing initiated the siting proceeding under Section 39.2 of the Act.

**Courthouse Expansion Committee: Formed 2009; Jail Expansion Committee: Formed 2010**

County Board Chairman, Ruth Ann Tobias, stated in her deposition that expansion of the existing De Kalb County Jail has been under discussion since at least 1994. Pet. Exh. 5, Tobias Dep. at 27. The County spends $600,000 per year for other counties to take overflow inmates. Pet. Exh. 7, Oncken Dep. at 8.

County Administrator Bockman explained that the County formed a jail and courthouse expansion committee sometime in 2009. Pet. Exh. 3, Bockman Dep. at 31-33. In 2009 the County retained Scott-Balice Strategies to advise them on planning and funding jail and courthouse expansion. Pet. Exh. 16, Tobias Dep. Exh. 2. On October 21, 2009, the County adopted Resolution R2009-61, authorizing a capital improvement program incorporating the financing plan developed by Scott-Balice Strategies. *Id.* The financing plan noted that

> The County is working with WMII to enter into a contract starting in December of 2012 that will produce roughly $120,000,000 for the County over thirty years. Given the current market, and certain credit assumptions, this revenue stream can accommodate a bond issuance in excess of the $30,000,000 estimated project costs for the jail expansion. Pet. Exh. 16, Tobias Dep. Exh.

The Law and Justice Committee, which formerly had oversight over the courthouse and jail expansion, met on February 2, 2010. As part of providing an update on the courthouse and jail expansion, County Administrator Bockman, is noted as advising that the landfill application was filed on November 30, 2009. Pet. Exh. 16, Allen Dep. Exh. 1.

In March of 2010, the County authorized the sale of $45 million in bonds, $16 million (for the court expansion) to be retired from sales tax revenues. But, the remaining $29 million (for the jail expansion) would not be sold until such time as a sufficient revenue stream can be identified. One of the possible revenue sources would be the host fees paid by Waste Management concerning the Landfill Expansion. Pet. Exh. 3, Bockman Dep. at 34-35.

County Board Member Julia Fauci acknowledged that the jail project was on hold, pending a determination of whether the host fees are going to be available. Pet. Exh. 9, Fauci Dep.at 23. County Board Member Riley Oncken testifimony at deposition indicated that there were two possible sources for funding the jail expansion, tipping fees from the landfill expansion, or general obligation bonds. However, Mr. Oncken did not know how general obligation bonds could be issued without raising taxes. Pet. Exh. 7, Oncken Dep. at 7. County Board Member Paul Stoddard stated he did not know how realistic any alternatives other than the tipping fees (host fees) would be for funding the jail expansion. Pet. Exh. 12, Stoddard Dep. at

15. He also stated that he understood this during the time that the landfill siting proceedings were being held. *Id* at 16).

The jail expansion committee held its first meeting in September 2010, although topics related to jail expansion had also previously been under discussion. Pet. Exh. 3, Bockman Dep. at 31-33.

## County Siting Proceedings

### The Application for Landfill Expansion

Waste Management filed its roughly 7,000 page, 9-volume Application for the Landfill Expansion with the County Board on November 30, 2009. C00000001-6783 (introduced at the County hearing as Petitioner's Exhibit 1). In addition to filing hard copy (*i.e.* paper copies), Waste Management supplied the County with at least 30 copies of an electronic version on DVD.[11]

Waste Management's Notice of the Application was published in the *Daily Chronicle*, a newspaper of general circulation in DeKalb County, on November 7, 2009. C0001007. The notice stated the company's intent to file the application with the County Board on November 30, 2010, and that the application would be available for public inspection and copying "upon payment of the actual cost of reproduction" in the Office of the County Clerk. *Id.* In a November 20, 2010 article, the Daily Chronicle reported that the application would "be available to the public at the County Clerk's Office, several municipalities including Cortland and DeKalb, and at area libraries". PC 45, Tr. at 189)

Waste Management also served notice of the Application on property owners within 400 feet of the landfill property boundary and members of the Illinois General Assembly at least 14 days before the Application was filed as required by 415 ILCS 5/39.2(b). C0000994-1005. Adequacy of service of the application by Waste Management is not at issue in the case before the Board.

As previously stated (*supra*, p. 11), the Application requested local siting approval for the expansion of the existing DeKalb County Landfill located northeast of the intersection of Somonauk and Gurler Roads in unincorporated DeKalb County, Illinois. The Expansion would consist of the exhumation of the old fill area and disposal of the exhumed waste in a composite lined cell, development of a 61-acre waste disposal area above and adjoining the existing 88-acre waste footprint, and the development of a 179-acre waste disposal area east of Union Ditch No. 1. C0000006-7. The capacity of the Expansion is 23.2 million tons, and will provide disposal capacity for approximately 46 years. C0000209. The service area consists of 17 counties. *Id.*

[11] County Board Members received 23 of these. Others went to Patrick Engineering, Renee Cipriano, the town of Cortland, the Cortland and Sycamore Libraries, and the County's planning director and its public health department. Pet. Exh. 3, Bockman Dep. at 44.

**County Scheduling and Notice of Hearings**

The County scheduled public hearings for March 2010, and retained attorney John McCarthy to serve as hearing officer. Notice of the public hearing was published in the *Daily Chronicle* on February 10, 2010 (s*ee* C0008111-12), and was also posted on the County's website. C0006825-6827. Among other things, the hearing notice stated that hearing would begin March 1, 2010 and would be conducted pursuant to "applicable provisions of law", including the Environmental Protection Act, the Open Meetings Act, 5 ILCS 120/1 *et seq.*, and the County's Ordinance and Articles. C0008111. The notice went on to provide that

> The hearing may be continued from time to time for the purpose of receiving all relevant evidence. Persons wishing to testify or cross-examine witnesses at hearing must register with the County Clerk at least seven days before the hearing begins, or by the close of business on February 22, 2010. Members of the public wishing to speak during the public comment time of the public hearing are not subject to the pre-registration requirement, but the hearing officer may set rules and designate specific times for oral public comment during the hearing. *Id.*

After giving the legal description of the Expansion, and general information concerning the Expansion, including plans for exhumation of the waste from the old 24 acre landfill for reburial in the Expansion and the Expansion's 46-year proposed life, the notice discussed availability of the application as follows:

> The Application is on file and available for public inspection in the Office of the DeKalb County Clerk [address here omitted] and the Office of the DeKalb County Board [address here omitted]. Copies of the Application may be obtained from [those Offices] upon payment of the actual cost of reproduction and proper request as outlined in the Freedom of Information Act [FOIA], 5 ILCS 140/1 *et seq.* C0008112.

The notice concluded by noting that any person could file a written comment, and that the County would consider any such comments received or postmarked after the date the Application was received and not later than 30 days after the date of the last public hearing, if sent to the County Board at the listed address. C0008112.

**Availability of Application for Public Inspection**

It is undisputed by the parties that the application was available at the Office of the County Clerk, Sharon Holmes, and at several other locations including the Office of the County Board, the City of DeKalb, the Town of Cortland, and the DeKalb, Sycamore and Cortland public libraries. Pet. Exh. 3, Bockman Dep. at 36, 43; Tr. at 36, 40; Ordinance, Sec. 50-54(c)(1), (d), set out *supra* at 13-14.. The County made a deliberate decision not to place the application on its website, both due to the size of the application, and prior experience with problems perceived in doing so based on criticism from persons without Internet access. Pet. Exh. 3, Bockman Dep. at 38-39.

The record reflects that citizens did examine the application in the County Clerk's Office and received copies of it, although STMD did challenge various aspects of the procedure for review and copying the application, as described in detail later in this opinion. *See infra,* p. 36. Additionally, between the dates of February 16 and 26, 2010, the County Clerk registered 16 citizens as wishing to present testimony and cross-examine witnesses at the County's public hearing. C0006823-6824.

**County Siting Hearing**

The County Board held six days of public hearing on March 1, 2 (and an evening public comment session beginning at 7 p.m.), 3, 4, 5, and 11. C0006828-7549. John McCarthy, an attorney with experience in conducting siting hearings and retained by the County specifically for the task, presided as hearing officer. Despite the 7-day pre-registration requirements in the Ordinance and Articles for "participants", as of Friday, February 26 and at the first hearing Mr. McCarthy gave all persons attending the hearing the opportunity to participate in the hearing and to ask questions of witnesses, as well as to present public comment. C0006832-6833 and PC 54, a February 26, 2009 article in the DeKalb *County Chronicle* headlined "Landfill Hearing Officer Will Be Accommodating". To begin the hearing, Mr. McCarthy provided a short statement concerning the requirements of Section 39.2 siting process, and introduced the members of the County PCF Committee. C0006828-6832. Mr. McCarthy then had counsel for Waste Management and the County introduce themselves to the persons in attendance. *Id.*

The next persons the hearing officer acknowledged were two members of Stop the Mega-Dump--Dan Kenney and Mac McIntyre; STMD was not represented by an attorney at the County hearing. C0006832. Mr. Kenney then immediately presented a motion to dismiss on behalf of named individuals and STMD. The motion sought to "disqualify the County Board, to terminate this proceeding and to deny the siting application" for reasons that the:

1) County Board had "already made up its mind," so that siting was "a done deal",

2) County attended a private tour of a Will County Waste Management landfill which was "improper and tainted the Board in favor of the application,"

3) County Board is "already making arrangements to spend the host fees [to be paid to the County per ton of waste received][12]" "to fund the county jail expansion,"

[12] A February 25, 2009 article in the *DeKalb County Chronicle* titled "Board Discusses Landfill Expansion" filed as a public comment by Waste Management explained that

> Under the agreement, Waste Management would pay the county host fees, or royalties, at $4.60 per ton of waste. Unlike tipping fees, which can be imposed by a local government for waste management purposes, a host fee can be spent on other things. PC 50, p. 2.

4) "County Board does not understand its role in siting or the significance of what it is doing", since the Board does not "merely serve as an advisory capacity (*sic*) to the Illinois Pollution Control Board,"

5) "County Board improperly believes it is under some kind of gag order that prevents them from listening to their constituents" during the siting process,

6) representatives of the County and Waste Management improperly met to conduct a "pre-filing review of the application,"

7) County did not appropriately make "the application available to the public for copying," and

8) County's Articles were unfair, in that they limited the role of "participants" to property owners entitled to notice and to municipalities within one and a half miles of the site, a "damage" that the hearing officer did not cure "because we can never know how many people will fail to appear today because they believed that they would not be allowed to participate". C0006832-33; 7550-7551.

Mr. McCarthy denied the STMD members' motion, after hearing arguments from counsel for the applicant and the County, and Mr. Kenney for STMD. C0006833-6840.

Five individuals asked to participate in the hearing and did, in fact, cross-examine eight witnesses during the six days of proceedings. C0006828-7549, *passim.* One of these individuals presented a witness who testified on the last two days of the hearing. C0007388-7401; 7459-7476. In addition, the hearing officer explicitly invited the public to ask questions and provide oral public comment during the course of the hearing itself and advised the public that any person could file a written comment with the County Board. C0006830-31. Twenty members of the public in fact provided oral public comment, and all written comments were entered into the record.C0006828-6940; 7053-7073; 7884-8056.

Waste Management, as applicant, presented testimony of eight witnesses on the various criteria. No witnesses appeared on behalf of the County Staff, or asked questions of the applicant's witnesses. WM Br. I at 10.

As previously stated (*supra*, p. 16), petitioner in this appeal, Stop the Mega-Dump, was not represented by an attorney at hearing, but various of its members spoke at hearing. C0006832. In addition to those members' statements, STMD presented one witness, Dr. Aubrey Serewicz, and cross-examined all eight witnesses presented by Waste Management.

**Hearing Testimony on Challenged Criteria**

**Criterion i: Necessary to Accommodate Waste Needs of Service Area.** Section 39.2(a)(i) of the Act requires that an applicant for local siting approval demonstrate that the proposed facility "is necessary to accommodate the waste needs of the area it is intended to serve." 415 ILCS 5/39.2(a)(i)(2008). In support of its application, Waste Management

presented as part of its application a report entitled "Need Report for the DeKalb County Landfill Expansion" (Need Report) prepared by Sheryl Smith of the URS Corporation. C0000050-0116. Ms. Smith appeared on Waste Management's behalf to testify at the public hearing concerning her written report on criterion (i) and the need for the Expansion. C0006991-7012.

Ms. Smith is a solid waste consultant and was qualified as an expert on the need criterion. C0006991-6993. Ms. Smith testified about the methodology she used to determine need, the service area, the types of waste accepted, and waste generation rates. C0006991-6994. The service area for the Expansion consists of the following 17 counties in northeast Illinois: DeKalb, Boone, Bureau, Cook, Du Page, Grundy, Kane, Kankakee, Kendall, Lake, LaSalle, Lee, McHenry, Ogle, Putnam, Will, and Winnebago. C0000056, 6991 Ms. Smith stated that the available capacity of the service area (206.6 million tons) compared to the amount of waste generated over the operating life of the Expansion requiring disposal (490.4 million tons) results in a capacity shortfall of 283. 8 million tons, while that the capacity of the Expansion is 23.2 million tons, less than one-tenth of the shortfall identified in the service area. C0006994. Ms. Smith's opinion was that, based on the disposal capacity shortfall, there is insufficient capacity available to meet the waste needs of the service area and the Expansion is necessary to meet the waste needs of the area it intends to serve. C0000083, 6994.

STMD members, as well as other hearing participants, cross-examined Ms. Smith. C0006994-7012. Neither STMD, nor any other person, presented testimony on this criterion.

**Criterion (ii): Facility Protection of Public Health, Safety, Welfare.** Section 39.2(a)(ii) of the Act requires that an applicant for local siting approval demonstrate that the proposed facility "is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii) (2008). Materials relevant to criterion (ii) make up the vast bulk of the Application. *See* C0000117-0492, 0001408-6783. WMII presented four witnesses who testified regarding the design, operation and location of the Expansion: Andy Nickodem, Tom Price, Dale Hoekstra, and Joan Underwood. *See, e.g.,* WM Br. I at 11-16. STMD presented one witness: Dr. Aubrey Serewicz testified concerning hydrogen sulfide generally, and at the existing landfill. *See, e.g., id* at 17.

***Applicant's Witnesses re Proposed Design for the Expansion.*** Waste Management presented two witnesses concerning design: Mr. Nickodem concerning design generally, and Mr. Price concerning enhancements to the surface water management system.

Andy Nickodem is employed by Golder Associates, and is a licensed professional engineer in Illinois, Wisconsin, Indiana, and Kansas. Mr. Nickodem specializes in the design of solid waste landfills. C0006853-54. Mr. Nickodem testified that the primary objective in the design of a landfill is the containment and control of waste. For the Expansion, he proposed the following engineered systems to meet that objective:

1) A composite liner system to contain waste and control the migration of leachate. The composite liner system consists, in ascending order, of a three-foot thick compacted low permeability ($1x\ 10^{-7}$ cm/sec) soil layer, a 60-mil double-sided textured HDPE (high density polyethylene) geomembrane and a geotextile cushion. In addition, a

geocomposite liner (GCL) will be placed under each central leachate collection pipe and each sump. C0000202; 6863-64;6973.) A construction quality assurance program will require testing of soil materials to ensure that the permeability ($1 \times 10^{-7}$ cm/sec) specified for the compacted low permeability soil layer is achieved. C00006978.

2) A leachate management system to collect leachate and keep it off the liner. One foot of highly permeable granular drainage material will be placed on top of the composite liner system so that leachate can flow to the leachate collection pipes. The leachate management system will ensure that there will be no accumulation of leachate over the composite liner. C0006867-68. Without an accumulation of leachate on the composite liner system, there is no leachate that could leak from the landfill. *Id.*

3) A final cover system to minimize the infiltration of rainwater and leachate formation. C0006868. The final cover system will consist of a one-foot soil grading layer overlain with a 40-mil double-sided textured linear low-density polyethylene (LLDPE) geomembrane, a geocomposite drainage layer, and three feet of protective soil. C0006868-69.

4) A surface water management system to control stormwater runoff, and prevent erosion, back-up of surface water off-site, and contact with waste. The system is expected to prevent any flooding of upstream or downstream properties as a result of the construction or operation of the Expansion. The system will include a series of diversion berms to intercept downward flows and prevent erosion. The diversion berms will direct stormwater to a series of downslope channels to the perimeter channels. The perimeter channels will flow into a series of six sedimentation basins. Bioretention rain gardens will be provided to reduce and filter surface water flow. C0006869-70; 6981-82.

5) A landfill gas management system to control landfill gas and odor. The gas management system will consist of a series of vertical extraction wells drilled into the waste mass. The vertical wells are connected by a series of header pipes. The extracted gas flows from the vertical wells, through the header pipes, to an enclosed landfill gas flare for combustion and destruction. C0006870-72. Gas recovery facilities for the west and east units will provide beneficial re-use of landfill gas. Recovery will occur when sufficient quantities of gas are generated. C0006872, 0355.

6) An environmental monitoring system to monitor the performance of the engineered systems. The system will include groundwater monitoring wells, leachate level and leachate quality monitoring at the extraction sumps, landfill gas monitoring probes located around the perimeter of the Expansion, landfill gas quality monitoring within the interior of the waste mass, ambient air monitoring, and surface water monitoring. C0006874.

Mr. Nickodem stated that the Expansion has been designed to meet or exceed all applicable provisions of the Act, Board regulations and IEPA requirements. C0006842-43; 6860. Based on the fact that the engineered systems are designed to prevent any release of leachate, protect the Galena Group bedrock aquifer and private water wells, and meet or exceed all applicable governmental requirements, Mr. Nickodem concluded that the design of the Expansion satisfies criterion (ii). *Id*; 6862-63;6865-68; 6875; 6878-79.

Tom Price, is a licensed professional engineer in Illinois, Iowa, Indiana, Michigan, Wisconsin, Nebraska, and Missouri. Mr. Price is a civil and water resources engineer employed by Conservation Design Forum, who was retained by Waste Management to develop enhancements to the surface water management system for the Expansion. C0006976. Mr. Price testified that he recommended five strategies to integrate surface water management with the landscape and built environment: native landscapes, naturalized sedimentation basins, filter berms, naturalized swales and green site practices. C0006979-82. Mr. Price concluded that these strategies will enhance the surface water management system by ensuring no increase in peak flows relative to existing conditions, improving water quality and increasing habitat diversity. C0006982.

***Applicant's Witness re Proposed Operation of the Expansion.*** Dale Hoekstra presented testimony describing the operation of the Expansion. C0007093-7267; 7193-7200. Mr. Hoekstra is Waste Management's Director of Operations who currently oversees the operations of nine landfills and four transfer stations in Illinois. He has 34 years of experience in the solid waste industry, and is an IEPA-certified landfill operator. C0007093.

Mr. Hoekstra stated that the Expansion will accept only municipal solid waste, construction and demolition debris waste, nonhazardous special waste and landscape waste. C0007094. The Expansion will not accept any regulated hazardous waste, radioactive material, potentially infectious medical waste, liquid waste, or any wastes banned by the Act. C0000380.

Waste Management will put procedures in place to verify that only acceptable wastes are allowed for disposal. These procedures include (a) an employee training program so that all employees are informed and knowledgeable on waste identification procedures, (b) random load inspections three times per week in compliance with Board regulations, and (c) a waste characterization process that requires a profile sheet describing and analyzing the special waste material. The special waste characterization results are reviewed by a technical manager for approval to determine whether the material is suitable for disposal. C0007097; 7101.

Mr. Hoekstra testified that the Expansion will be constructed in a phased manner, and that the west unit will be constructed first. Disposal of waste exhumed from the old area of the existing Landfill will be made into the new composite-lined area of Phase I of the west unit. Following the same approach, Phases 2, 3 and 4 of the west unit will be developed, including the completion of the exhumation of the old area. C0007095. Prior to complete filling of Phase 4 in the west unit, activities would begin for the development of the east unit. *Id.* Development of the east unit would proceed from Phase 1 through completion of Phase 9. C0007095-96.

Mr. Hoekstra explained that waste delivered to the site will be required to be in "tarped" or enclosed vehicles. Waste will be disposed of at the active face. Daily cover is required each day, and is applied throughout the day to the active face as waste material is disposed of and compacted. C0007097-98. Daily cover will consist of six inches of soil or an approved alternate daily cover material. *Id*; 7102, 7124-25. Intermediate cover is placed over areas that have not received waste for a period of 60 days. Once areas have achieved their final elevation, they will receive final cover. C0007097-98.

Waste Management has procedures for the Expansion to control litter, odor, dust, and mud. Those procedures include(a) requiring waste collection vehicles to be tarped or enclosed, (b) minimizing the size of the active area, (c) staging the active area to account for wind, (d) use of wind screens downwind to catch blowing paper, (e) litter collection onsite and on surrounding areas, (f) application of daily cover throughout the day and placement of intermediate cover, (g) placement of final cover over areas that reach final elevation, and (h) installation of a gas management system to remove, monitor and control methane gas. C0007098-99. Dust and mud are controlled by the paved primary access road, all-weather secondary access roads, an on-site water truck and a street sweeper. C0007099.

Mr. Hoekstra then addressed about the detection of hydrogen sulfide at the existing DeKalb County Landfill in 2008. He testified that the presence of hydrogen sulfide odors resulted from the disposal of ground gypsum board found in recycled construction and demolition debris waste. C0007098-99, 7137, 7139-40; 7195. He explained that, prior to the onset of construction and demolition recycling, gypsum board had been routinely disposed of in landfills in its larger, chunk, un-ground form, which had created no hydrogen sulfide issues. Mr. Hoekstra testified that WMII has since adopted a policy against accepting ground gypsum board at its facilities, including the DeKalb County Landfill, and that the Expansion will not accept ground gypsum board for disposal. C0007099.

For the existing landfill, WMII added five additional gas extraction wells to its existing gas extraction system to manage the increase in methane gas generated in September 2008. To address the hydrogen sulfide odors, four more gas extraction wells and associated header piping were added in 2009. In addition, WMII increased the size of its flare from 800 cubic feet per minute (cfm) to 2,000 cfm in order to manage the additional landfill gas and provide additional capacity for future landfill gas generation. In October 2009, approximately 600 feet of horizontal trench collectors were added to provide additional odor control. C0007099. In Mr. Hoekstra's belief, hydrogen sulfide is no longer an issue at the DeKalb County Landfill. C0007099, 7123-24, 7128, 7136.

In conclusion, Mr. Hoekstra testified that the Expansion will be operated so as to protect the public health, safety and welfare based on (a) waste acceptance and load checking procedures; (b) waste placement procedures; (c) controlled site access and security; and (d) litter, odor, dust and mud control procedures. C0007103.

***STMD Witness on Hydrogen Sulfide at the Existing Landfill.*** Slightly out of the order in which testimony was presented, but in the interests of keeping testimony concerning similar

subject matter in proximity, the Board will here present the substance of the testimony of STMD's witness regarding hydrogen sulfide at the existing landfill.

Regarding landfill operation issues, STMD presented the testimony of Dr. Aubrey Serewicz. C0007388-7406; 7459-76. Dr. Serewicz, a former chemistry professor at Northern Illinois University, stated that in 1998 he retired from American Home Products, Wyeth Laboratories, as a process control engineer. Dr. Serewicz then became interested in sulfur compounds and did research work on sulfur compounds with the College of Health and Human Sciences at Northern Illinois University. C0007388-89.

Dr. Serewicz testified about hydrogen sulfide generally and at the existing landfill. Based on his attendance at the County public hearing and his listening to the testimony presented, Dr. Serewicz gave his opinion that all landfills are unsafe, and that hydrogen sulfide from the existing landfill is moving northward downhill across Interstate 88, up the north embankment and over to Cortland Elementary School, one-half mile away. C0007463; 7465; 7474. Dr. Serewicz acknowledged that he had not reviewed the Expansion application, that he did not know about criterion (ii) or how it could be evaluated with respect to the Expansion. C0007459. But, it was his opinion that insufficient information had been presented for the County to reach a decision that criterion (ii) as read to him at hearing had been satisfied had been satisfied. C0007461

***Applicant's Witness re Hydrogeology of the Proposed Location for the Expansion.***

Joan Underwood testified regarding the geology, hydrogeology, and proposed groundwater monitoring system at the Expansion site. C0007200-7255. She is an environmental manager and hydrogeologist employed by Quantum Management Group, with 32 years of experience in evaluating ground-water issues, performing hydrogeologic site characterizations, and developing groundwater monitoring and remediation programs. C0007200-01.

Ms. Underwood described in detail about the geologic and hydrogeologic conditions at the site. C0007205-7210. She described the soil materials at the site and testified that beneath the soil layers are either the Lacustrine unit or glacial till, which lie on bedrock units including the Silurian, Maquoketa and Galena Formations. C0007208-09. She testified that (a) the Silurian dolomite is a low-yielding aquifer and is not a significant source of drinking water in the area; (b) beneath the Silurian is the Maquoketa shale, which is a confining unit (*i.e.* a barrier to groundwater movement); and (c) beneath the Maquoketa shale is the Galena-Platteville unit, which is an aquifer used for private water supply ("Galena Group aquifer"). C0007210. She explained that the principal municipal drinking water source in the area is the deeper Ancell aquifer. *Id.*

Ms. Underwood then addressed the groundwater flow in the Silurian dolomite (found only on the eastern portion of the site) and the Lacustrine unit (found beneath the west side of the area east of Union Ditch No.1 and beneath the west unit). C0007211. She explained that the Silurian and Lacustrine units are the first units that transmit enough groundwater to monitor, and therefore, the groundwater monitoring program has been developed in those units. *Id.* She stated that these are the units that Illinois regulations would designate as monitorable zones and require to be monitored. C0007211. The groundwater monitoring system includes 37

monitoring wells for the west unit (25 screened in the Henry Formation, 1 in the Tiskilwa Formation, 11 in the Lacustrine unit) and 37 monitoring wells for the east unit (23 screened in the Lacustrine unit and 14 screened in the Silurian dolomite).

Ms. Underwood testified that the groundwater monitoring system will effectively monitor groundwater at the site and the performance of the landfill. C0007213. Ms. Underwood concluded that the Expansion is suitably located for groundwater safety, and will protect the public health, safety and welfare. C0007213, 7228.

**Criterion (vi): Proposed Traffic Patterns to Minimize Impact On Existing Traffic Flows.** Section 39.2(a)(vi) of the Act, requires that the applicant establish that "the traffic patterns to or from the facility are so designed as to minimize the impact on traffic flows." 415 ILCS 5/39.2(a)(vi)(2008). Waste Management presented one witness concerning this criterion, David Miller. C0007256-7271. STMD presented no witnesses on this point.

David Miller, a licensed traffic engineer and Chief Executive Officer of Metro Transportation Group, has 42 years of experience as a traffic engineer. He has directed over 1,600 traffic impact studies, and evaluated traffic impact for 34 pollution control facilities, including 19 landfills and 15 transfer stations. C0007256. Mr. Miller prepared and testified concerning the Traffic Impact Analysis included in the Application. C0000749-0963.

Mr. Miller testified that his Traffic Impact Analysis consisted of reviewing collected information on surrounding roadways including roadway characteristics (number of lanes, traffic controls, speed limits and jurisdiction) and traffic controls, and observed traffic operations during peak and off-peak times. C0007257. Mr. Miller's analysis also included conducting daily and peak hour traffic counts (manual and mechanical) on surrounding roadways and intersections, and evaluating capacity and level of service for surrounding roadways and intersections. *Id.* Mr. Miller estimated the amount of traffic that would be generated by the Expansion, including the number of trucks and other vehicles using the Expansion, and assigned future 2013 traffic and Expansion traffic to the surrounding roadways and intersections. Capacity and level of service (LOS) for the surrounding roadway intersections were then evaluated. *Id.* In addition, recommended improvements were evaluated for the new facility entrance. C0007263.

Mr. Miller testified that traffic patterns for transfer trailers going to and from the Expansion, as described in the Host Agreement, will require transfer trailers to arrive via Interstate 88, exit to the north at Peace Road, travel north to Illinois Route 38, travel east to Somonauk Road, and travel south on Somonauk Road to the site entrance. The return trip would be the same, only in reverse. C0007257-7264. This route will be enforced by WMII--transfer trailer operators deviating from the designated route can lose disposal privileges. C0007264-65.

Mr. Miller testified that the Expansion will have an estimated total of 474 trips per day, or 237 trips in and 237 trips out. Of this total, 354 trips involve waste vehicles of different types, and 120 trips involve employees, vendors, and visitors. This total includes both existing trips and new trips. The existing landfill has 178 trips per day total. Therefore, the new traffic is 296 trips per day, or 148 vehicles per day, including waste vehicles and employee, vendors and visitors. C0007259, 7269.

Mr. Miller testified that Expansion peak hours, estimated to be 9:00 a.m. to 10:00 a.m., and 1:00 p.m. to 2:00 p.m., do not coincide with street peak hours on the surrounding roadways. C0007259. Expansion-generated traffic was assigned to the existing surrounding roadways, as well as to projected 2013 surrounding roadways; this did not cause a decrease in LOS to the evaluated roadway segments or intersections. C0007259-61.

Mr. Miller also testified that a gap study was performed for three movements at the site entrance, including vehicles leaving the site turning north onto Somonauk Road, vehicles leaving the site turning south onto Somonauk Road, and vehicles traveling south on Somonauk Road and turning left, or east, into the site entrance. He found that for all movements adequate gaps are available to accommodate all vehicle movements for the Expansion. C0007261-62.

Mr. Miller provided his expert opinion that the traffic patterns to and from the Expansion have been so designed as to minimize the impact on existing traffic flows. C0007263. No other witness testified with respect to criteria (vi) and no evidence was presented to refute Mr. Miller's testimony.

**Hearing Officer McCarthy's Deadlines for Post-hearing Briefs and Comments**

At the close of hearing, the hearing officer directed the participants to file any briefs by April 2, 2010; briefs were filed by Waste Management on April 2, 2010 and STMD members Mac McIntyre on April 5, 2010 and Dan Kenney on April 7, 2010. See, respectively, C0007767-7795; 7796-7805; and 7806-7817. Additionally, hearing officer McCarthy set a 30-day public comment period, expiring April 12, 2010. C0007514

Within the period beginning February 5, 2010 and ending April 12, 2010, the County received 78 separate communications which it included in the record as public comments (s*ee* Comments A- ZZZ, C0007884-8054); the County also marked as Public Comment AAAA an April 27, 2010 letter from a County Board Member. C0008055-8056. The overwhelming majority of the communications received by the County as public comments were opposed to the landfill and/or the quasi-adjudicatory siting process as contained in Section 39.2 of the Act, as interpreted by the courts.

On April 12, 2010, the County received a letter from Clay Campbell (C0007818-7820) and the DeKalb County Staff Report (authored by Patrick Engineering and Renee Cipriano). C0007821-7883.

**Meetings of the PCF Committee and Recommendation to Approve Siting**

The PCF Committee had the siting issue on its agenda for April 12-16, 2010 (C0008267-8272), and discussed it on April 13, 2010. *See* meeting minutes at C0008242-8247. The matter appeared again on the committee's agenda for April 19-23, and 26-30. C000-8273-8275. The PCF Committee again met on April 27, 2010. *See* C0008350-8389 for 4/27/10 meeting transcripts and minutes. The PCF Committee recommended siting subject to conditions, consistent with the staff report. On April 27, 2010, the County received the DeKalb County Board Revised Staff Report concerning the siting record. C0008276-8349.

**Meetings of the County Board and Adoption of Resolution #2010-31, Approving Siting With Conditions**

The siting issue appeared on the County Board Meeting Agenda for May 10-14, 2010 (C0008390), and was discussed at the May 10, 2010 meeting. *See* C0008495-8536 for meeting transcripts and minutes. On May 10, 2010, the County Board voted to approve Waste Management's siting application, subject to conditions. *See* Resolution #2010-31, C0008537-8548. Sixteen members voted in favor of the approval Resolution, while eight voted against it. [13]

Resolution #2010-31 found that each and all of the siting criteria had been met. But, it also added 31 specific conditions to various criteria, as well as a "generally applicable" requirement that Waste Management ask IEPA to include the County conditions in any IEPA-issued permits. Resolution #2010-31, Cond. 31, C0008547. No conditions were added concerning criteria (iv)(located outside of 100-year floodplain), criteria (v) (operation plan re fire, spills, etc.), criteria (vii) (no hazardous waste), criteria (viii) (consistency with solid waste management plan), or criteria (ix)(located outside of regulated recharge area). *Id*, C0008537-8548.

As to the need criterion (i), the County added a single condition requiring Waste Management to guarantee disposal of waste generated in DeKalb County "for a period that equals the life of the landfill. *See* Resolution #2010-31, Cond. 1, C0008538. As to criterion (ii) concerning facility design, location, and operation, the County Board added 20 conditions. Particularly notable conditions include those for hydrogen sulfide monitoring and notification protocols in the event of exceedances (Conditions 5 and 13), gas monitoring, increased random load inspections, off-site litter collection and disposal, complaint handling and hotline, soil as cover, construction of a gas to energy facility within 4 years of receipt of an IEPA operating permit for the Expansion, and various details concerning exhumation and handling of waste from the 24-acre old area of the existing Landfill. Resolution #2010-31, Cond.2-21, C008546-8544.

The County added seven conditions as to criterion (iii) to minimize incompatibility of the Expansion with surrounding areas and property values; these concern mainly requirements for screening berms and vegetation, but also with extension of a property value guarantee plan contained in the Host Agreement to current owners of property within 1 mile of the Expansion footprint. Resolution #2010-31, Cond. 22-28, C0008544-8546.

As to criteria (vi) regarding traffic patterns, the County added a condition requiring Waste Management to notify haulers of the designated truck routes and another requiring it to

[13] As stated in the minutes of the May 10, 2010 County Board proceedings, those Members voting "yea" were Mrs. Allen, Mr. Larry Anderson, Mr. Augsburger, Mrs. De Fauw, Mr. Emerson, Ms. Fauci, Mr. Haines, Mr. Hulseberg, Mr. Metzger, Mr. Oncken, Mr. Stoddard, Mr. Stuckert, Mrs. Turner, Ms. Vary, Mr. Walt and Chairman Tobias. C0008495-8536. All of these members except Mr. Stuckert were deposed in this appeal (County Br. I at 21). The Members' depositions were introduced into the record as exhibits at the Board's hearing, as discussed *supra* at 7.

monitor adequacy of tarps covering waste. Resolution #2010-31, Cond. 22-28, C0008546. Later in the Resolution, the County added a "criterion 6: additional condition" numbered as condition 32. This condition would require Waste Management to fund and maintain improvements, both as to width and embankment slope, of road shoulders on either side of Somonauk Road from the I-88 overpass to Route 38. *Id*, Cond. 32, C0008547. As previously stated (*supra*, p. 1 at. n.1), Waste Management has petitioned the Board to review this condition in PCB 10-104, but has not yet chosen to present its case at hearing.

## FUNDAMENTAL FAIRNESS

### Overview

### Board Analysis—Legal Standards for Fundamental Fairness Review

The Board must first consider the fundamental fairness of the procedures used by the County in reaching its decision to approve siting for the Expansion of the DeKalb County Landfill:

> Section 40.1 of the Act requires this Board to review the proceedings before the local decisionmaker to determine if the proceedings were fundamentally fair. 415 ILCS5/40.1(a). In making its orders and determinations under this Section the Board shall include in its consideration . . . the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision. 415 ILCS 5/40.1(a) (2008); *see also* 415 ILCS 5/40.1(b) (2008).

A non-applicant who participates in a local pollution control siting hearing has no property interest at stake entitling him to the protection afforded by the constitutional guarantees of due process. Land & Lakes, 319 Ill. App. 3d 41, 47, 743 N.E.2d 188, 193. Instead, procedures at the local level must comport with adjudicative due process standards of fundamental fairness. E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d 586, 596, 451 N.E.2d 555, 564 (2d Dist. 1983) (hereinafter E & E Hauling (2d Dist. 1983)); *aff'd* 107 Ill. 2d 33, 481 N.E.2d 664 (1985) (hereinafter E & E Hauling (1985)).

The "fundamental fairness" standards are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 1037, 530 N.E.2d 682, 693 (2d Dist. 1988). These standards consist of "minimal standards of procedural due process, including the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence." Land & Lakes, 319 Ill. App. 3d at 48, 743 N.E.2d at 193.

Petitioner STMD's claim that the City's siting proceedings were "conducted in a fundamentally unfair manner" is based on two general categories of arguments. First, STMD contends, the County conducted the proceedings unfairly due to flaws in its Ordinance and Articles limiting public participation, failure to make the application reasonably available prior

to hearing, and restriction on the filing of public comments after hearing. STMD believes that the various cited actions "demonstrate a continuing pattern on the part of the County of discouraging public participation", and as such, their cumulative effect should be considered." STMD Br. I at 16.

Next, STMD asserts that extensive *ex parte* contacts (generally used by STMD as to indicate contacts between the County decisionmakers and staff and the applicant's staff outside of the presence of others), beginning prior to the filing of the application, caused bias or prejudgment in Waste Management's favor, including but not limited to contacts during negotiation of the Host Agreement, tours of the Prairie View Landfill prior to the application's filing, and pre-filing review of a draft application by the county's consultants and staff. Finally, STMD contends that the County Board "actually prejudged the application,"(i*d* at 27), determining that the County needed to approve the Expansion to finance a $29 million jail expansion, rather than applying Section 39.2 criteria.

Waste Management and the County assert that these arguments are unavailing because the contacts described do not fit the legal definition of *ex parte* contacts as enlightened by precedential siting review cases, and that STMD has failed to demonstrate any prejudice arising from alleged deficiencies in the County's hearing procedures and actions to make the application publicly available. They also contend that the County Board Members based their decision solely on the criteria of Section 39.2 of the Act, as evidenced in part by the deposition testimony entered into the record at this Board's hearing.

In this portion of the opinion, the Board will first discuss the parties' fundamental fairness arguments regarding alleged flaws in the County's siting procedures and handling of access to the application. Next, the Board addresses the issue of alleged *ex parte* contacts and prejudgment of the application.

## Fundamental Fairness: Ordinance, Articles, Access to Siting Application

### STMD's Position: Articles and Ordinance

STMD's states that its arguments are premised on repeated Board and appellate court holdings that "the public hearing before the local governing body is the most critical stage of the site approval process." Peoria Disposal Co. v. Peoria County Board, PCB 06-184, slip op. at 36 (June 21, 2007)(PDC, 06-184). STMD has several problems with the content of the Article and Ordinances (set out in pertinent part *supra* at 13-15), many of which STMD contends the County must have enacted "to discourage the public." STMD Br. I at 14. First, STMD contends that "[i]f ever there was an issue that called for summary reversal, the local siting ordinance's prohibition of most public participation in this case is such an issue." *Id* at 11. In Section 5 of the Articles, a hearing "participant" is defined as property owners, or their attorneys, who receive notice under the Ordinance (*i.e.* owners of properties located within 400 feet of the site), or officials, or their attorneys, of municipalities located within 1.5 miles of the site. *Id* at 11-12. Persons seeking participant status are required to register with the County Clerk one week in advance of hearing.

STMD argues that these limitations and sign up requirements are inconsistent with Section 39.2 of the Act, and on their face deprive all excluded individuals of adjudicatory due process. STMD Br. I at 11-12, citing Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 1037, 530 N.E.2d 682, 693 (2d Dist. 1988). While acknowledging that the County's hearing officer did not follow the procedures at hearing and let anyone who wanted to "participate" to do so, STMD asserts that "the damage was already done, and the bell cannot be unrung." *Id* at 13. STMD asserts that this is so because the announcement immediately before hearing that anyone could participate would not cure the prior chilling effect on public participation, and could not restore to persons advised late of their ability to participate the full 90 days to prepare for hearing envisioned by Section 39.2. *Id*, citing American Bottom Conservancy v. Village of Fairmont City, PCB 00-200, slip op. at 12 (Oct. 19, 2000) (ABC, PCB 00-200)(fundamentally unfair to limit public's access to application to two weeks before local hearing).

STMD expands on this theme in its closing brief. STMD Br. II at 3-7. STMD asserts that the fundamental unfairness of the Ordinance' and Articles' restriction of public "participation" to specified landowners or municipal officials cannot be undone by the hearing officer's failure to follow those restrictive procedures because

> a fairly conducted hearing is no cure for those who failed to prepare or failed altogether to attend because they did not think they would be allowed to participate. *Id* at 4.

STMD argues that the County's written procedures dampen or chill public participation or preparation, and so they "cannot be tolerated and must be found fundamentally unfair as a matter of principle." STMD Br. II at 4.

Finally, although not explicitly addressed in STMD's fundamental fairness argument, STMD asserts in the "facts" section of its opening brief that the Hearing Officer purportedly made "one error which further rendered the proceedings fundamentally unfair: 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. STMD contends that this deprived the parties, including STMD, of the full thirty days of statutory post hearing public comment time under 415 ILCS 5/39.2(c). *Id.*

**Waste Management's Position: Articles and Ordinance.**

Waste Management contends that STMD's fundamental fairness arguments based on the Articles and Ordinance must fail because no one was denied the opportunity to participate at the public hearing. Waste Management observed that the County's Notice of Public Hearing contained the pre-registration requirement found in Section 6(a) of the Articles, but also that it explained that public commenters were not subject to the preregistration requirement. WM Br. I at 7. The *Daily Chronicle* published a news article on February 26 advising that the hearing officer would not require persons to pre-register to make statements or to ask questions at the hearings beginning March 1, 2010. PC 54. The record indicates that 16 people registered with the Clerk's office to participate at the hearing, four after the February 22 deadline date.

C0006823-6824. Additionally, the hearing officer allowed persons to become participants on the first day of hearing. C0006833, 6837, 6840-42; Tr. 45-46. He also allowed any person, timely-registered "participant" or not, to question any witness. C0006841.

Waste Management observed that two STMD members, Mr. McIntyre and Ms. Lovings, testified at the Board's hearing that they were not aware of anyone who was prevented from participating in the public hearing based on where they lived, or anyone who was prevented from presenting information or evidence. Tr. at 77. Ms. Lovings acknowledged that she was allowed to register as a participant at the public hearing even though she missed the registration deadline by calling the County Clerk's Office to register on Friday, February 26. Ms. Lovings affirmed that she had been given the opportunity to question witnesses and provide whatever public comment she wished. She further stated that the Hearing Officer was very accommodating of people who wanted to speak at the public hearing. Tr. at 45-46.

Waste Management agrees with STMD that "the public hearing before the local governing body is the most critical stage of the site approval process," citing PDC, PCB 06-184, slip op. at 36. But, Waste Management reiterates that there was no lack of access demonstrated here, contrasting it with the situation in County of Kankakee v. City of Kankakee, PCB 03-31,03-33,03-35 (cons.), slip op. at 60-62 (Jan. 9, 2003)(County of Kankakee, PCB 03-31,03-33,03-35 (cons.))(no fundamental unfairness even when 50-150 persons, including those pre-registered, could not attend and participate during first night of hearings due to inadequate room accommodations). WM Br. I at 30-32.

In its response brief, Waste Management first challenges STMD's unsupported assumption that all persons are entitled to participate as a "party" in the local siting hearing. WM Br. II at 5-6, 8-9. Waste Management points out that neither the Act nor case law prevents local government from creating "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," and that the Board has found that such requirements have not created fundamental unfairness. Slates v. Illinois Landfills, Inc., PCB 93-106, slip op. at 11, 16 (Sep. 23, 1993).

Waste Management then observes that a key tenet of the doctrine of fundamental unfairness is that procedures must have resulted in harm or prejudice. Waste Management contends that STMD has been unable to present evidence of harm, and that STMD's mere assertion that fundamental fairness can be established by speculation about theoretical harm is unsupported. WM Br. II at 10-11, citing *inter alia* E & E Hauling (2d Dist. 1983), affd, 107 I11.2d 33, 481 N.E.2d 664 (1985) and County of Kankakee, PCB 03-31,03-33,03-35 (cons.). Waste Management asserts that any confusion or harm caused by the Ordinance or Articles was cured by the hearing officer's handling of the public at hearing. *Id.*

Waste Management lastly argued that there is no fundamental unfairness in the hearing officer's setting of a 21-day deadline for the filing of briefs (by April 2, 2010) and a 30-day deadline for public comments (by April 12, 2010). WM Br. II at 12. Waste Management noted that the briefing schedule in no way limited the time for filing public comments: STMD filed its last comment, a report by GeoHydro, Inc. on April 9 (C0007995-8002), while STMD members

Kenney and McIntyre filed their post hearing briefs on April 5 and 7, respectively. C0007796-7817.

**The County's Position: Articles and Ordinance.**

The County, too, argues that the existence of the Articles and Ordinance resulted in no fundamental unfairness, and that the Board must examine whether the proceedings *were* fundamentally unfair, "not whether a local ordinance *could have* rendered the proceedings fundamentally unfair." County Br. I at 19 (emphasis in original). As did Waste Management, the County argued that STMD presented no evidence that members of the public were denied the ability to participate at the County hearings. *Id* at 20-22.

In its response brief, the County argued that the notice and registration provisions of the Ordinance and Articles had no practical effect on participation, given the actions of the hearing officer and lack of evidence from STMD that any person was discouraged from participating after reading the Ordinance and Articles. County Br. II at 4. Moreover, the County argued, the Ordinance and Articles gave more individuals rights to become hearing "participants" than does Section 39.2 (b) of the Act, given the broader notice provisions of the Ordinance. *Id* at. 5-7. The County argues that STMD's argument is unpersuasive, given its failure to submit proof of prejudice, as opposed to "mere speculation and supposition." *Id.* at 8-10.

Finally, the County argues that STMD has waived any argument concerning the Ordinance' and the Article's discouragement of adequate hearing preparation, due to failure to raise it with the County hearing officer. County Br. II. at 10.

**Board Analysis: Articles and Ordinance**

The Board finds that STMD has failed to demonstrate that the procedures set forth in the County's Ordinance and Articles caused the County's proceedings to be fundamentally unfair, or that these procedures reflect any intent to discourage public participation. As the respondents argued, the Board held long ago that neither the Act nor case law prevents local government from creating "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." Slates v. Illinois Landfills, Inc., PCB 93-106, slip op. at 11, 16. STMD has failed to prove any prejudice from mere existence of the Ordinance and Articles, and the Board cannot find that the County's procedures as written and on their face were fundamentally unfair.

The County was proactive in addressing the issue of its future landfill needs, enacting the Ordinance and the Articles in 2007, two years before Waste Management filed its Expansion Application. The particulars of the County procedures were spelled out well in advance, and could have posed no surprise to County residents. There is no evidence of any objection to them in advance of the March 2010 hearings.

The Ordinance' and Articles' participation classes include more persons than the landowners entitled to notice under Section 39.2 of the Act, as the County correctly argues. The requirements for pre-registration a week in advance of hearing of those wishing to participate are

not particularly onerous, and are conducive to the efficient management of large numbers of people. More importantly, as respondents have argued, STMD has presented no evidence that any person failed to participate at hearing because of the creation by the Ordinance and Articles of classes of participants. The Board cannot give credence, in the absence of any evidence, to STMD's bald speculation that the County's adopted procedures may have chilled or dampened participation by the public.

In any case, the Ordinance and Articles were not applied in this case at hearing, since the hearing officer waived application of the County's adopted procedures. In practice, the hearing officer did not apply the Ordinance and Articles to restrict public access at the hearing itself and allowed all persons to ask questions and present witnesses, testimony, exhibits and oral public comments.

The hearing officer afforded the public a full 30 days in which to file post-hearing public comments, while giving the "participants" 21 days in which to file briefs. Arguably, in staggering the filing order, the hearing officer enhanced the public's comment rights, since they could respond to the closing statements made by the applicant and others. Again, in this instance, STMD has failed to establish any prejudice to its members, since the County accepted all filings of STMD members and others which it received within 30 days, regardless of the earlier 21-day limit.

**STMD's Position: Access to Application**

STMD argues that the County made access to and copying of the roughly 7000 page, 9-volume application "difficult and frustrating". STMD acknowledges that everyone who asked to view the application at the Clerk's office did so, with the exception of Danica Loving. STMD Br. I at 14, citing Tr. at 36. STMD stated that the viewing room at the County Clerk's office was cramped, with room for only one person to sit at a time. *Id*, citing Tr. at 64.

As to copying all or part of the application, STMD explains that the hearing notice required persons to make FOIA requests, eliminating the anonymity rights STMD believes are granted such persons under Section 39.2 of the Act. STMD Br. I at 15. STMD also contends that the County's procedures for making copies were never properly established, noting various testimony that the County Clerk would have charged $0.25 per page, Mr. Bockman's assistant would have charged $0.10-$0.15 per page, while FOIA limits copy costs to actual reproduction costs which the County Clerk could not quantify. *Id.*

STMD asserts that this lack of uniform procedures is made even more troubling due to the fact that the County did not initially make available to the public electronic copies of the siting application on DVD. STMD is critical of Mr. Bockman's failure to arrange to make copies of the DVD available to the public, or to put it on the County's website. In conclusion, STMD argues that the public's difficulties in viewing and copying the application:

> might, by themselves, be viewed as harmless error, if the remainder of the record was pristine on fundamental fairness issues. However, in this case, these difficulties demonstrate a continuing pattern on the part of the County of

discouraging public participation, and as such, their cumulative effect should be considered. STMD Br. I at 16, citing ABC, PCB 00-200.

**Waste Management's Position: Access to Application**

Waste Management's opening brief sets out various facts concerning the application's availability. WM Br. I at 2-3, 5-6. Waste Management's response brief argues that STMD's claim that access to the application was diminished or made difficult is unsupported by the evidence, since no one was denied access to the Application, and copies of an electronic version of the Application were given to STMD and any person who asked for it. WM Br. II at 12-14. Waste Management contends that there is nowhere a requirement that applications be made available in electronic form. As to local government's requiring that the public make FOIA requests for copies, Waste Management notes that in County of Kankakee, PCB 03-31,03-33,03-35 (cons.), slip op. at 55-56 (Jan. 9, 2003), the Board found that such a request was not fundamentally unfair. Waste Management notes that STMD again failed to demonstrate harm, since STMD members received electronic copies without submitting FOIA requests. *Id* at 13.

**The County's Position: Access to Application**

The County argues that it complied in all respects with the requirements of Section 39.2 of the Act relating to public access to the application for review and copying. The Application was filed by Waste Management with the County Board November 30, 2009 and was made available for public inspection at the office of the County Clerk, office of the County Board, three local libraries, the Town of Cortland, and the City of Sycamore. Pet. Exh. 14, Holmes Dep., at 6-7, 12, 24, 27- 29, Pet. Exh. 3, Bockman Dep. at 36, 43. Members of the public were able to make copies at their own expense if they so desired. *Id* at 8, 11, 20-21, 26-27. No witnesses testified that they were denied the opportunity to review or make copies of the application. County Br. I at 22.

In its response brief (County Br. II at 10-12), the County specifically addressed Mr. McIntyre's complaint about the cramped quarters in which he reviewed the Application in County Clerk Holmes office. *See* Pet. Br. at 14. County Clerk Holmes stated in her deposition that she observed that Mr. McIntyre and his friend were both sitting in chairs while they reviewed the application in the designated room (Pet. Exh. 14, Holmes Dep. at 14); Mr. McIntyre stated that the review had lasted a "couple of hours". Tr. at 73. The County notes that another STMD member, Ms. Loving, was not *"unable"* to review the application as STMD characterizes it, but instead testified that she was instead *unwilling* to do so either at the library or the County Clerk's office due to the time involved. Tr. at 38, 40.

The County argues that there is nothing improper in the County's written position that FOIA requests would be necessary in order to copy the Application, and questions STMD's unsupported assertion that there is a "right of anonymous access" to siting applications. County Br. II at 12, addressing STMD Br. I at 14-15. The County further argues that, in any event, neither the offices of the County Clerk nor the County Administrator ever required anyone to submit FOIA requests to review applications. *Id*, citing Pet. Exh. 14, Holmes Dep. at 19-20, and Pet. Exh. 2, Supple Dep. at 35.

As to the issue of making copies and their cost, the County asserts that there was no testimony that the County refused to make copies or charged anyone more than the actual cost of reproduction. While acknowledging that there was differing testimony from various employees in different offices as to the customary per page charge, the County asserted that STMD failed to establish that the County Clerk's stated charge of $0.25 exceeded the actual costs of reproduction, considering labor and overhead costs. County Br. II at 12-13. Additionally, the County notes that, while STMD asserts that County Administrator Bockman "never made arrangements for copying the siting application on public request" (STMD Br. I at 15), what Mr. Bockman stated was that he "did not prearrange with any local merchant or vendor to provide [copying] service at a prearranged cost." County Br. II at 13, citing Pet. Exh. 3, Bockman Dep. at 42.

As to provision of electronic copies of the Application, the County Board contends that it had no legal obligation to make the Application available in digital form. Yet, the County notes that by petitioner's own admission, the only two people (Mr. McIntyre and Mr. Chavat) who requested DVD copies from County personnel received them. County Br. II at 14, citing Pet. Br. I, pp. 15-16. The County argues that petitioner's own testimony reveals that DVDs were provided without much resistance by County employees. Mr. McIntyre testified that

> I wanted to get a copy of the DVD [Sharon Holmes] said they had, and there was resistance to that, and then I asked if I needed to file a FOIA, a Freedom of Information Act, request to get the DVD. There were some phone calls made, and then the - she gave me what she said was her only copy of the DVD". Tr. at 65-66.

Mr. McIntyre stated that he copied the DVD for Petitioner's representative, Dan Kenney. Tr. at 71-72. Additionally, the County reports that Mr. Bockman hand-delivered a copy of the DVD to the home of Mark Charvat, the only other person to request one, on the same day he made his request. Tr. at 105-106; Pet Exh. 3; Bockman Dep., pp. 53- 55).

Finally, as to the issue of posting siting applications online on the County's website, the County observes that petitioner claims that "Bockman's only explanation [for not doing so] was that placing the siting application on the website was not required." County Br. II at 14-15, citing Pet. Br. I at 16). The County points out that "this is false." County Br. II at 14. Mr. Bockman testified at deposition--following a colloquy in which Petitioner's counsel stated that "I'm not even implying that it was required to be placed on the website" - that "the size of the file" made posting the Application difficult and that

> 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, et cetera. Bockman Dep., pp. 37- 38, 39.

**Board Analysis—Access to Application**

The Board finds that the County made the Application reasonably available to members of the public. There is ample evidence that the Application was publicly available for a full 90-days in advance of the hearings at various municipal and County offices and public libraries. STMD has again failed to prove that its members suffered prejudice, as opposed to inconvenience. Indeed, any inconvenience to the public demonstrated by STMD was minor, causing only brief delay in their ability to review the application.

The Board notes that the date on which Ms. Lovings and Mr. Charvat contacted the Clerk's Office to review the Application, and in Mr. Charvat's case to receive an electronic copy was February 26, 2010, as logged in the County Clerk's office and as testified to at the Board's hearing. The Board takes administrative notice that February 26, 2010 was a Friday, the last business day before the scheduled March 1, 2010 start of the County's public hearings. The record is clear that the Clerk's Office made every effort to advise Ms. Lovings of the closest access point. Any failure by Ms. Lovings to review the application was, as the County noted, her own choice based on her own time demands. As to Mr. Charvat, while he was unable to get an electronic copy of the Application the afternoon of February 26, he acknowledges that a copy was hand-delivered to him by County Administrator Bockman that very evening. Tr. at 105. While Mr. Charvat commented that he had lost the afternoon for review purposes, the County made it possible for him to spend time with the application the weekend before the hearings started.

The written requirement to make FOIA requests in order to make copies of the application was not unreasonable, as respondents correctly cite that the Board held when a similar fundamental unfairness challenge was posed in County of Kankakee, PCB 03-31,03-33,03-35 (cons.), slip op. at 55-56 (Jan. 9, 2003). But, in any event, the deposition testimony in the record reflects that this was another requirement that County Staff in practice did not adhere to.

There is no evidence that the County charged excess costs for paper hard copies. Any lack of uniformity in fee amounts potentially charged by various offices having custody of the Application is irrelevant, as no demonstrated practical effect on public participation is evidenced in this record. As to electronic text, the County did make DVD copies available upon request at minimal charge. County Clerk Holmes gave Mr. McIntyre her only DVD copy of the application, which he in turn copied for Mr. Kenney (Tr. 65-66, 71-72), and Mr. Charvat received one from Mr. Bockman. Mr. Bockman adequately explained why he did not take the unrequired step of placing electronic text on the County website because of difficulties caused by the sheer size of the file, as well as his experience that doing so could result in criticism from those lacking access to computers. Pet. Exh. 3, 37-39.

**Fundamental Fairness: Alleged *Ex Parte* Contacts Prior to and After the Application's Filing**

In one of the earliest siting cases under Section 39.2 of the Act, the Illinois appellate court found that the local decision makers must act as adjudicators, rather than legislators, because siting proceedings are

> proceedings designed to adjudicate disputed fact in particular cases [in which] a decision on the grant or denial. . .turns on [the decision makers'] resolution of disputed fact issues, whether the particular landfill, or expansion . . . meets the specific factual criteria set out in Section 39.2 of the Act." E & E Hauling, 116 Ill. App. 3d 586, 598-99, 451 N.E.2d 555, 566 (2d Dist. 1983).

One of the standards of an adjudicatory process is the prohibition of *ex parte* contacts.

*Ex parte* communications in the context of a siting proceeding are contacts between the siting authority and a party with an interest in the proceeding without notice to other parties in the proceeding. Residents Against a Polluted Environment v. County of LaSalle, PCB 96-243 (September 19, 1996) (Residents, PCB 96-243). As the Board has explained:

> the impropriety of *ex parte* contacts in administrative adjudication is well established. *Ex parte* contacts are condemned because they: (1) violate statutory requirements of public hearings and the concomitant life of the public to participate in the hearings, (2) may frustrate judicial review of agency decisions, and (3) may violate due process and fundamental fairness rights to a hearing." *Id*, slip op at 9.

But, the mere occurrence of *ex parte* contacts does not, by itself, mandate automatic reversal. It must be shown that the *ex parte* contacts caused some harm to the complaining party. In Fairview Area Citizens Taskforce v. Pollution Control Board, 198 Ill.App.3d 541 at 549, 555 N.E.2d 1178 (3d Dist. 1990) (FACT (Third Dist. 1990), aff'g. Fairview Area Citizens Taskforce v. Village of Fairview, PCB 89-33 (Jun. 22, 1989) (FACT, PCB 89-33) the appellate court stated:

> [*E*]*x parte* communications from the public to their elected representatives are perhaps inevitable given a county board member's perceived legislative position, albeit in these circumstances, they act in an adjudicative role as well. Thus although personal *ex parte* communications to county board members in their adjudicative role are improper, there must be a showing that the complaining party suffered prejudice from these contacts.

As stated in E & E Hauling (2d Dist. 1983), when determining whether *ex parte* contacts warrant reversal:

> A court must consider whether, as a result of improper *ex parte* communications, the agency's decision making process was irrevocably tainted so as to make the

> ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect. In making this determination, a number of considerations may be relevant: the gravity of the *ex parte* communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose. 116 Ill.App.3d at 606-607, *citing* PATCO v. Federal Labor Authority, 685 F.2d 547, 564-65 (D.C. Cir. 1982).

**STMD's Position: *Ex Parte* Contacts**

STMD contends that

> The *ex parte* contacts in this case occurred in four distinct ways. The first is that WMII conducted a series of preliminary mini-hearings with the County in connection with the County's approval of the Host Agreement. Secondly, WMII conducted private tours with county board members of another landfill with features similar to those in the proposed expansion. The third area of *ex parte* contacts is the pre-filing review conducted by WMII with the County, which review included participation by the county board administrator and County Attorney, both of whom the County relied upon for direction and advice on the siting decision. In addition, there were other *ex parte* contacts while this siting application was pending, and these contacts further establish the close (and improper) relationship between WMII and the County. STMD Br. I at 17.

STMD acknowledges that the first three sets of alleged *ex parte* contacts occurred prior to the filing of the application (STMD Br. I at 17), and before the siting process under Section 39.2 of the Act had begun. Petitioner argues that, notwithstanding any reliance the respondents may place on Residents, PCB 96-243[14], (STMD Br. I at 17), the Board has never established a "bright line test whereby ex parte communications prior to the filing of a siting application can never be considered. *Id.* at 18, citing Land and Lakes (3rd Dist. 2000) and County of Kankakee, PCB 03-31,03-33,03-35 (cons.).

STMD argues that, regarding the mini hearings:

[14] In Residents, PCB 96-243, slip op at 9-10 the Board held that

> We further affirm that order's reliance on Beardstown Area Citizens for a Better Environment v. City of Beardstown (January 11, 1995) PCB 94-98, in ruling that contacts between the applicant and the siting authority prior to the filing of the siting application do not constitute impermissible *ex parte* contacts. *Id.*, slip op. at 9-10.

> The pattern of pre-filing *ex parte* contacts between WMII and the County establishes a close relationship between the two entities, the sole purpose of that relationship being WMII's desire to educate County board members concerning the details of the proposed landfill expansion, and to persuade them of the merits thereof, in advance of any public hearings or participation. STMD Br. I at 17.

STMD argues that the impact of Prairie View facility tours was "profound" (STMD Br. I at 20), as evidenced by the deposition comments made by various County Board Members that the tours were "educational", "informative", "impressive" and "helpful", since the DeKalb Landfill Expansion would have characteristics similar to Prairie View. STMD Br. I at 21-22, citing Pet. Exh. 1, Turner Dep. at 11 and Exh. 1; Pet. Exh. 4, Allen Dep. at 23, 25, 32; Pet. Exh. 9, Turner Dep. at 21; Pet. Exh. 11, Hanes Dep. at 12; Pet. Exh.7, Oncken Dep. at 12; Pet. Exh.12, Dep. at 8, 11; and Pet. Exh.6, Vary Dep. at 11. The problem with these tours, according to STMD, was that

> Information was presented which was obviously not available to any other participant in the process. Not only did these tours leave county board members with a positive impression, but the tours were admittedly used by county board members as a substantive point of reference when interpreting evidence at the siting hearing. This point of reference was not available to anyone who did not go on the tour. We can never know exactly what was said, what was presented or what questions were answered. We do know, however, that WMII had the fifteen county board members who attended as a captive audience from door to door (except Haines) and in small groups for the better part of a day. All this made it possible for WMII to privately present another allegedly comparable facility to the decision makers, and make its case to them, in the best possible light, without any input or involvement of the public. STMD Br. I at 22-23.

In its response brief, STMD further addressed the private tour issue. STMD disagrees with any statements made by respondents in their opening briefs that the tours are not *ex parte* contacts because they took place prior to the filing of the application and that they are permitted under past precedent. STMD believes that County of Kankakee "conclusively" establishes the relevance and admissibility of pre-filing contacts, discussing the applicability of the rationale of various cases of post-application-filing tours, including Residents, PCB 96-243, Beardstown Area Citizens for a Better Environment v. City of Beardstown, PCB 94-98 (January 11, 1995), Concerned Citizens for a Better Environment v. City of Havana, PCB 94-44 (May 19, 1994), Southwest Energy Corp. v. PCB, 275 Ill.App.3d, 84, 655 N.E.2d 304 (4th Dist. 1995). STMD Br. II at 9-12.

The last pre-application-filing contact STMD alleges is the pre-review of Waste Management's application. While acknowledging that the Board has sanctioned such reviews in some cases, STMD argues that here there was no separation between the reviewers and the decision makers as there were in Sierra Club v. Will County Board, PCB 99-136 (Aug 5, 1999). Here, STMD states, both Ray Bockman and Renee Cipriano "actively participated in the pre-filing review", that both of them had contact with the County Board, and that both had the same

"degree of connection" to the County as did the consultant to the LaSalle County Board in Residents, PCB 96-243, supra. STMD Br. I at 26-27.

STMD did not allege instances of post-application-filing *ex parte* contacts between County Board Members and the siting applicant. But, as part of its argument that *ex parte* contacts had "cumulative prejudicial effects," STMD went on to note that Mr. Bockman had "procedural" communications with Lee Addleman "several times a week" even after the application was filed, and that Waste Management's attorney, "appeared with" Mr. Bockman in the County Clerk's Office to pick up sign-up sheets for would-be siting hearing participants. *Id.* at 27.

**Waste Management's Position: *ExParte* Contacts**

In its opening brief (WM Br. I at 33-34), Waste Management argues that a pre-filing tour or visit to the existing or other landfill is not impermissible conduct. Landfill 33 v. Effingham County Board and Sutter Sanitation Services, PCB 03-43, 03-52 (cons.), slip op. at 58-60 (Feb. 20, 2003); County of Kankakee, PCB 03-31, 03-33, 03-35 (cons.), slip op. at 52-55. Pre-filing review of a site location application by the county through its technical consultant is not improper *ex parte* contact and has long been permitted under Illinois law. Land and Lakes, 319 Ill.App.3d at 49-52, 743 N.E.2d at 194-196. Moreover, Waste Management observes, the County's Ordinance at Section 50-54( a)(2) expressly authorizes and addresses pre-filing contacts relating to the Agreement and review of a draft application. Waste Management asserts that STMD has not presented any evidence of pre-filing collusion between WMII and the County Board, or of post-filing *ex parte* contacts with the County Board or its consultant, Patrick Engineering. Waste Management concludes that, not only has STMD failed to present evidence that any improper ex parte contacts occurred, it has not presented any facts that show how the local siting process was irrevocably tainted as a result of the *ex parte* contacts.

In its response brief (WM Br. II at 14-15), Waste Management observes that counsel for STMD has previously argued (in the case of County of Kankakee PCB 03-31, 03-33, 03-35 (cons.)) that there is in fact a distinction between pre-application-filing contacts, and that pre-filing meetings between the applicant and the decisionmaker do not render the subsequent hearing fundamentally unfair (citing Southwest Energy, 275 Ill.App.3d 84, 97, 655 N.E.2d 304, 312; s*ee* County of Kankakee, Nos. PCB 03-31, 03-33, 03-35 (cons.), slip op. at 8-9). Waste Management remarks that in County of Kankakee, 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. This respondent contends that a review of the pre-filing contacts STMD complains of shows they do not present any evidence of collusion.

Waste Management observes that its two meetings with the County Board prior to execution of the Host Agreement were at meetings noticed and open to the public. Waste Management comments that these meetings were part of the County Board's legislative action, and in no way constituted a decision to approve siting. WWM Br. II at 15-16.

As to the tours of the Prairie View Landfill, Waste Management's response brief (WM Br. II at 15-16) underscores that these occurred prior to the Application's filing, and that there was no testimony from any of the 15 County Board Members who attended tours that actual aspects of the Application were presented or considered. Waste Management also points out that 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. C0007096, 7100-7103, 7107, 7111, 7144; C7610, 7617 -7 623, 7759-66.

Waste Management suggests that, 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. Consequently, Waste Management believes that 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, Waste Management concludes that 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 FACT, 198 Ill.App.3d 541,548-49,555 N.E.2d 1178, 1182-83.

**The County's Position: *Ex Parte* Contacts**

The County's opening brief asserts that there were no improper *ex parte* contacts between the County Board Members and the applicant, stating that the only contacts identified occurred prior to the filing of the Application, as permitted by Illinois law. County Br. I at 26-30, and cases cited therein. Even if such contacts were *ex parte*, the County argues, STMD has failed to prove any harm. As to the pre-filing review of the Application by Patrick Engineering, the County states that none of its Board Members participated in the review, and that Patrick Engineering communicated various comments and criticisms of the draft Application to applicant Waste Management. *Id.* at 34, citing Pet. Exh. 13, Burger Dep. at 4-7, 9-12.

In its response brief (County Br.II at 24-25), the County argues that the Host Agreement negotiations between the County and Waste Management were proper, and states that Waste Management's two presentations were made at duly noticed public hearings (which no members of the public chose to attend), and minutes of which were published on the County's website. The County states that the public meetings familiarized the County Board with the Host Agreement's concepts, and the impact on the County if the Agreement were to be approved.

As to the pre-application-filing facility tours of the Prairie View Landfill, the County's response brief (County Br. II at 30-31) recites prior precedent to demonstrate that they were permissible, and did not constitute *ex parte* contacts. The County additionally notes that STMD deposed the Waste Management representative Lee Addleman who conducted the tours, as well as all 11 of the County Board Members who both attended a tour and voted in favor of the Expansion. Consequently, STMD had every opportunity to learn "exactly what was said, what was presented [and] what questions were answered. The County states that the evidence reveals

that the tours were general in nature and merely illustrated the concept of a working solid waste landfill. *Id.* at 31. The County argues that these generalities do not amount to evidence of the adjudicative facts to be determined during the siting process about the Application for the Landfill Expansion.

The County response brief (County Br. II at 36) concerning the pre-filing review characterizes the petitioner as misrepresenting both the facts and the law. The County challenges STMD's assertion (Pet Br. at 8, 26) that Mr. Bockman and Ms. Cipriano "actively participated" in the pre-filing review. Instead, the County contends, their only participation was at one or two meetings with the County's consultant (and not the applicant) at which they received status reports (*id.* at 41; *see generally* 38-41 citing to deposition testimony of Mr. Bockman (Pet. Exh. 3) and Patrick Engineering's Chris Burger (Pet. Exh. 13)), and noting that all communications between the consultant and the applicant ended after the application was filed. The County also relates that the deposition testimony demonstrates that neither Mr. Bockman nor Ms. Cipriano later advised the County Board on the Application's merits, or otherwise participated in the County's deliberation on the merits, and that, of course, neither voted on the Application's merits. Accordingly, the County views any prior Board precedent as inapplicable to this situation.

Finally, the County response brief (County Br. II at 43-44) demonstrates that any contacts between any Waste Management employees and County Administrator Bockman or County Clerk Holmes after the filing of the Application concerned administrative matters only.

**Board Analysis: No *Ex Parte* Contacts Occurred**

The Board first observes that the courts have long held that County Board Members act in an adjudicatory manner in proceedings under Section 39.2. Were they acting as legislators, there would be no possibility of *ex parte* contacts, which by definition cannot occur in the legislative context. The prohibition against *ex parte* contacts is not intended to be a "gag order" on the decisionmaker. It exists primarily for the protection of the public, to ensure that each person has equal access to the "ears" of the decisionmakers, and each person is aware of all the information that is being placed before the decisionmakers for their consideration.

Next, the Board agrees with the assessment of the County and Waste Management that all of the contacts of which STMD complains between County Board Members that occurred prior to the filing of the application-filings were permissible under prior Board precedent. They were not, by definition, *ex parte* contacts. The Ordinance authorized the County to negotiate a Host Agreement, and the two presentations that Waste Management made in the time leading up to execution of the Host Agreement took place at open meetings. The facility tours of the Prairie View Landfill were offered to the County Board Members during the course of the Host Agreement negotiations, and were completed on November 20, 2010 *before* the application was filed on November 30, 2010.[15]

[15] The Board additionally observes, by way of *dicta*, that the deposition testimony of the County Board Member's and Mr. Addleman substantiates that the tours were general in nature, of short duration and included only a modest lunch onsite. This distinguishes them from the post-

The pre-filing review of the draft Application was authorized by the Ordinance, and is of the type that the Board has previously found unobjectionable and which does not constitute an *ex-parte* contact. *See* Sierra Club v. Will County, PCB 99-136, slip op. at 12 (Aug. 5, 1999)[16]; McLean County Disposal v. PCB, 207 Ill.App.3d 477, 566 N.E.2d 26 (4th Dist. 1991);FACT, PCB 89-33(Jun. 22, 1989), *aff'd* FACT (3rd. Dist. 1990)*;* Material Recovery Corp. v Lake in the Hills, PCB 93-11 (Jul. 1, 1993). The Board agrees with the County that the record demonstrates that the contacts during the review were between the consultant and the applicant only, and that Mr. Bockman and Ms. Cipriano had no part in them. The case is therefore factually distinguished from that in Residents, PCB 89-33, in which the Board found that *ex parte* contacts had occurred between the applicant and a County employee who participated in the review.

Finally, the Board finds that the post-application contacts between the applicant's employees and the County Administrator and County Clerk cannot be characterized as *ex parte* contacts, as they were administrative or procedural in nature.

**Fundamental Fairness: Alleged Bias and Prejudgment of Adjudicative Facts**

**STMD's Position: Bias and Prejudgment**

STMD contends that the

> cumulative effect of the mini hearings in 2009, the private tours of [the] Prairie View facility, and the pre-filing review had clearly won the County over before the official siting hearing ever began on March 1, 2010. . . due to the County's desperate need to obtain expanded landfill host revenues to fund the county jail expansion. STMD Br. at 28.

STMD believes that "the landfill siting proceeding and the expansion of the jail were connected projects." STMD Br. at 28. STMD charges that Waste Management "had conditioned the County to believe" that there was no choice but to approve expansion. *Id.* at 30. STMD reports that various County Board Members made statements of support of landfill

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application "junket-type" tour described, for example, in Southwest Energy, even had these tours of a Will County facility taken place after the application's filing for the DeKalb Landfill Expansion.

[16] In Sierra Club, this Board considered a pre-filing review conducted by the Will County Board's technical staff and consultants. PCB 99-136, slip op. at 11. As in the instant case, the technical staff and consultants communicated with the applicant prior to the filing of the application in the form of written and oral comments on the draft application. *Id.* This Board held that the pre-filing review did not render the local siting proceedings fundamentally unfair for three reasons. First, the staff and consultants did not provide their report to the County Board until after the application was filed. *Id.* at 12. Second, "the County Staff and consultants neither voted on the siting approval, nor participated during the Will County Board's deliberations. *Id.* Third, "a consultant report or staff recommendation is not binding on the decision-maker".

expansion prior to the filing of the Application, as exemplified by statements of Members Oncken, Fauci, and Vary. STMD Br. 29-30.

At the hearing on its petition for review here, STMD presented the testimony of two of its members, Paulette Danielle Sherman and Dan Kenney, regarding these statements. Dan Kenney, STMD's Chairperson, testified that sometime in August 2009, he saw Julia Fauci at a networking event and when he asked her something about the landfill being expanded, she told him "it was pretty much a done deal" and that "we've negotiated some things for ourselves." Tr. at 48-50. This encounter between Mr. Kenney and Ms. Fauci occurred after the Agreement was signed on April 17, 2009.

Ms. Sherman also testified at this Board's hearing on behalf of STMD. Ms. Sherman testified that she is a friend of Clay Campbell, a member of STMD who participated at the public hearing on STMD's behalf, and that she worked on Mr. Campbell's campaign for DeKalb County State's attorney. Tr. at 22. Ms. Sherman said that on the first day of the public hearing, she was approached by Mr. Oncken whom she claims said "I don't know why all these people are here. We've already made up our minds." Tr. at 16-17, 18-22.

STMD states that other statements of prejudgment were made during the course of the siting hearings and prior to the vote, as exemplified by e-mail and oral statements by Members Fauci, Hanes, Hulseberg, Oncken, and Walt.

STMD's brief relates that:

> On the first day of the public hearing, [Riley Oncken] told his friend Paulette Sherman that all of the people at the public hearing were just crazies with nothing better to do with their time or had too much time on their hands, because, "we've already made up our minds." (R 18)(emphasis added). While Oncken, at the [Pollution Control] Board hearing, denied making the statement about minds being made up, he had previously admitted telling Paulette Sherman that the opposition people at the public hearing simply had too much time on their hands. ([Pet. Exh. 7, Oncken Dep. Pg. 13, 14).
>
> The County was apparently so intent on getting its increased host fees and expanding the jail, that statements of prejudgment actually turned into expressions of hostility toward citizens who expressed opposition to the expansion. Mac McIntyre testified at the [Pollution Control] Board hearing that he heard county board member, Anita Turner, during a break in the hearings, state that she was a high school chemistry teacher and Dr. Serewicz (an opposition expert witness) did not know anything and that his testimony should be disregarded. (R 68). . . McIntyre also testified that he had overheard the statements from Riley Oncken to Paulette Sherman. (R 69). STMD Br. I at 31-33.

In its response brief, STMD further addresses its claim of the County's prejudgment of the siting Application. STMD Br. II at 12-15. STMD notes that respondents' opening briefs relied on deposition testimony from the County Board Members that they based their vote on the

Application on the record of the siting proceedings (described in more detail *infra* at 49-50). STMD characterizes the testimony as "conclusive testimony [] of dubious credibility", since

> The self-serving responses by County board members to the question of whether they made their decision bases on the evidence is undermined by the fact that the question was put to them by counsel for WMII . . . [without] objection from counsel for the County . . . [after] eight out of nine County board members who were asked the question testified they met with counsel for WMII to prepare for their deposition. [Deposition citations omitted] Obviously then this County Board testimony is suspect because it was rehearsed and orchestrated. STMD Br. II at 12-13.

STMD notes that the Board has recognized a deliberative thought process privilege that prevents challengers from probing the decision makers thought processes. STMD asserts that "[s]elf-serving disclosure of those thought processes when it suits the decision makers should not be allowed." STMD Br. II at 13.

**Waste Management's Position: Bias and Prejudgment**

In its opening brief (WM Br. I at 8-9), Waste Management addresses the alleged statements of prejudgment by further citation to the testimony received on the issue. Regarding the "done deal" statement STMD attributes to Member Fauci, Waste Management notes that the record indicates that Ms. Fauci saw Mr. Kenney in March 2010 at the public hearing, and told him that he had misquoted her and taken her statements out of context. Tr. at 53-61. Regarding the "made up our minds" statement by Member Oncken, Waste Management observes that on cross-examination, STMD member Sherman also said that Mr. Oncken did not say who he meant by "we" or what he meant by "made up our minds." Tr. at 28, 30.

In its response brief (WM Br. II at 18-19), Waste Management argues that STMD has waived any argument concerning alleged bias or prejudice as to the statements of Members Fauci and Oncken due to failure to raise such arguments during the local hearing. WM Br. II at 18-19, and cases cited therein. Waste Management dismisses STMD's claim (STMD Br. 1 at 9-10) that it preserved this issue for review by way of its motion to terminate the proceedings, made on the first day of the local hearings. Waste Management reminds that STMD's motion 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 County's Hearing Officer after extensive oral argument. C0006832-6840. Because STMD's Motion to Terminate did not specifically seek the disqualification of individual County Board Members (C0007550-7551), Waste Management urges that, under FACT, STMD's motion was legally insufficient to preserve the issue, particularly as it relates to any claims of bias or disqualification of County Board Members Fauci and Oncken.

Alternatively, in the event the waiver argument fails, Waste Management argues that STMD has failed to submit proof to overcome the presumption that decision makers are not biased. WM Br. II at 20, citing E &E Hauling (1985), 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. Waste Management reminds

that 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. Waste Management states that the statements of Mr. Oncken and Ms. 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." *Id.* at 20.

Waste Management reminds that

> 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. (Allen Dep. at 30; Anderson Dep. at21; 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. WM Br. II at 21

**The County's Position: Bias and Prejudgment**

In its opening brief (County Br. at 23-26), the County strongly insists that the County Board is presumed to have acted objectively and without prejudgment. The County reminds that

> Of the sixteen County Board members who voted in favor of the Application, fifteen subsequently testified under oath that they did not consider any information or evidence not presented in the siting proceeding or contained in the siting record in making their decision to approve the Application. (Allen Dep., p. 30:5-16; L. Anderson Dep., p. 21:3-7; Augsburger Dep, p. 21:18-24; De Fauw Dep., p.15:5-11; Emerson Dep., pp. 13:21-14:3; Fauci Dep, p. 43:8-14; Haines Dep., p. 42:3-8; Hulseberg Dep., p. 18:3-8; Metzger Dep., p. 16:13-19; Oncken Dep.,p. 31:8-15; Stoddard Dep., p. 33:1-12; Tobias Dep., pp. 33:5-34:5; Turner Dep., p. 19:5-9; Vary Dep., p. 35:4-10; Walt Dep., p. 23:3-9). Thirteen further testified that no information or facts not presented to the County Board affected or influenced their decision to approve the Application.(Allen Dep., p. 30:11-16; L. Anderson Dep., p. 21:8-12; Augsburger Dep, p. 22:8-14; De Fauw Dep., p.15:12-18; Emerson Dep., p. 14:4-10; Haines Dep., pp. 42:17-43:20; Hulseberg Dep., p.18:9-15; Metzger Dep., pp. 16:20-17:2; Oncken Dep., p. 31:16-23; Stoddard Dep., p. 33:13-17;Tobias Dep., p. 34:6-11; Turner Dep., p. 19:10-14; Vary Dep., p. 35:11-17; Walt Dep., p. 23:10-15). Finally, all fifteen testified that they did not make their decision to approve the Application prior to the receipt of all the evidence. (Allen Dep., p. 30:17-20; L. Anderson Dep., p. 21:13-16;Augsburger Dep, p. 22:22-24; De Fauw Dep., p.15:19-21; Emerson Dep., p.14:11-16; Fauci Dep, p. 43:15-24; Haines Dep., pp. 40:11-23;

> Hulseberg Dep., p. 18:16-18; Metzger Dep., p. 17:3-11;Oncken Dep., pp. 31:24-32:2; Stoddard Dep., p. 33:18-20; Tobias Dep., p. 34:12-14; Turner Dep., p. 19:15-19; Vary Dep., pp. 35:18-36:11; Walt Dep., p. 23:16-19). County Br. I at 223-24.

Concerning the "done deal/made up minds" statement attributed to Member Onken, the County notes (County Br. I at 25) that STMD members orally moved to terminate and dismiss the proceeding on March 3, 2010, based in part on Mrs. Sherman's allegations. Member Oncken immediately addressed the issue on the record, stating:

> To be absolutely clear, I have not made a decision on Waste Management's application to expand the landfill in DeKalb County [and will not] until all of the evidence is presented and I have an opportunity to review the testimony and evidence which has been given. I am in no position to judge the merits of the application and whether Waste Management has met its burden of proof on the nine criteria. I have and will continue to judge the evidence impartially, fairly and without bias or prejudice of any kind. C0007114-15.

Similarly, on May 10, 2010, the day of the County's vote on the Application, Mr. Oncken explained:

> The law in this situation is very clear. We must set aside our personal feelings, prejudices, opinions, and render an opinion based solely on the evidence presented. Just as a jury swears they will fairly and impartially render a verdict based on the information presented without any inside information or outside information, so must we. . . . Certainly as the proposed facility is in my district – and I have heard from many citizens about their concerns and objection – it would be politically smart for me to vote against this. . . . To do so in this situation would disregard the law and would compromise my integrity. C0008504-05.

Member Oncken's deposition testimony states that he did not make up his mind on the Application until all evidence was in. Pet. Exh. 7, Oncken Dep. at 7.

In its response brief (County Br. II at 16-18, the County echoes Waste Management's assertion that STMD has waived any arguments on the issues of bias and prejudgment due to failure to properly raise the issue to the County, notwithstanding STMD's motion to terminate the proceedings.

Later in its response brief (County Br. II at 44-55) the County expands on its assertion that there was no prejudgment of the application. The County asserts that the adjudicative facts in a siting proceeding are those that relate to the criteria of Section 39.2. *Id* at 44-45. The County believes, then, that the County's need for a jail expansion and funding mechanisms for it are not adjudicative facts and are irrelevant. The siting authorities may consider such economic benefit in their siting decisions so long as they find that the statutory criteria have been met. FACT, 198 Ill. App. 3d 541,546-47, 555 N.E.2d 1178, 1181-82 (statements by village board members indicating that landfill would provide economic benefit to community not indicative of prejudgment of adjudicative facts).

The County contends that revenue or other financial considerations are not relevant as indicators of prejudgment or bias because neither the local siting authority, nor its members, will "realize and enjoy the additional potential revenues or pecuniary benefit. It is the community at large which stands to gain or lose from [the local siting authority] approving or disapproving this site." County Br. II at 45, citing Woodsmoke Resorts, Inc. v. City of Marseilles, 174 Ill. App. 3d 906, 909, 529 N.E.2d 274, 276 (3d Dist. 1988) (consideration of revenues not equivalent to prejudgment of adjudicative facts). In similar vein, the County reminds that the Illinois Supreme Court found:

> County boards and other governmental agencies routinely make decisions that affect their revenues. They are public service bodies that must be deemed to have made decisions for the welfare of their governmental units and their constituents." E & E Hauling, Inc. v. PCB, 107 Ill. 2d 33, 43, 481 N.E.2d 664,668 (1985) (County Board's consideration of landfill revenue not indicative of bias or prejudgment). County Br. II at 45.

Moreover, suggests the County, STMD has incorrectly claimed that the County "earmarked" host fees as "the only feasible means for financing the jail expansion". County Br. II at 48. But, even if it had "earmarked" fees, the County cites Gallatin National Co. v. Fulton County Board, PCB 91-256 (June 15, 1992) as establishing that such would not constitute pre-judgment. There, the County Board had explicitly committed the expansion revenue even before the filing of an application. The Board found that the bond issuance did not indicate prejudgment of the siting application, because the bond issuance did not concern the adjudicative facts because:

> [t]he County Board was not faced with the same issues in issuing bonds as are raised by an application for site approval. There is no indication in the record that the County Board's vote to grant siting approval was based upon the bonds rather than the [then-] six applicable criteria of Section 39.2." *Id* at 48.

The County discusses various other statements made by Board Members, arguing that they were often off-the cuff remarks that were not proof of bias or prejudgment of adjudicative facts. The County disputes STMD's assertion that the County failed to consider all public comments. County Br. II at 50-55.

**Board Analysis: Bias and Prejudgment**

The Board first addresses the arguments that STMD has waived its arguments concerning bias or prejudgment of County Board Members due to failure to raise it at the siting hearings. The Board finds that STMD, as a voluntary association of citizens represented by its non-attorney members, sufficiently raised the issue in its Motion to Terminate Proceedings. Considering all of the facts in this case, STMD's arguments cannot be said to have surprised respondents, or prevented them from addressing these issues during the siting hearings or before the Board.

Turning to the substantive issue, the case law interpreting Section 39.2 of the Act makes clear from the earliest cases that the standard for proof of prejudgment is high. County Board Members engaged in a landfill siting hearing under Section 39.2 of the Act are presumed to be objective and capable of fairly judging the particular controversy. Waste Management, 175 Ill. App. 3d at 1040, 530 N.E.2d at 695. "The presumption of the validity of the actions of a public official will be overcome only where it is shown by clear and convincing evidence that the official has an unalterably closed mind in critical matters." Fox Moraine, LLC v. City of Yorkville, PCB 07-146, slip op. at 60 (Oct. 1, 2009). Such a showing must depend on evidence of actual bias. Residents against a Polluted Environment v. Pollution Control Board, 293 Ill. App. 3d 219, 225-26, 687 N.E.2d 552, 556-57 (3d Dist. 1997). This Board may only find actual prejudgment of an adjudicative fact by a County Board Member or the County Board as a whole "if a disinterested observer might conclude that he, or it, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." E & E Hauling (2d Dist. 1983)116 Ill. App. 3d at 598, 451 N.E.2d at 565.

The E & E Hauling series of appeals is one of the earliest siting precedents. Factually, it involved many of the bias and prejudgment elements alleged here by STMD. While these arguments were persuasive before this Board and the Second District Appellate Court, they were ultimately rejected by the Illinois Supreme Court in E & E Hauling v. PCB, 107 Ill. 2d. 33, 481 N. E. 2d (1985), affirming 116 Ill. App. 3d at 598, 451 N.E.2d at 565 (2d. Dist. 1983), reversing Village of Hanover Park v. County Board of DuPage, DuPage County Forest Preserve District Commission and E & E Hauling, Inc., PCB 92-69 (Sept. 2, 1982.). In that, the DuPage County Forest Preserve District owned land on which the Mallard Lake Landfill was run by E & E Hauling; the District received tipping fees for waste disposal. By statute, the DuPage County Board Members were also members of the District. The County Board approved an application for expansion of the Mallard Lake landfill in a proceeding in which the District and E & E Hauling were applicants.

In its review of the case, this Board explained that:

> the County had approved, by ordinance, the landfill expansion and modification, agreed to earlier by the District and E & E. That agreement was embodied in a District ordinance, which itself reflected a stipulate settlement of litigation between the District and E & E. these actions all encompassed extensive conditions concerning the expansion, operation, and use of the landfill. The County ordinance expressly approved the application of the District and E & E to the Illinois Environmental Protection Agency for a permit.
>
> Thus, by using its land use or zoning power, the County Board members had approved the site, and as District Commissioners had contracted with E & E Hauling to operate the site—all before the public had a chance to participate in a hearing mandated by SB 172 [codified as Section 39.2]. Village of Hanover Park, PCB 92-69, slip op. at 12 (record citations omitted).

As a result, this Board found that the County Board, under those particular circumstances,

Could not act in conformance will all provisions of Section 39.2 and still comply with fundamental fairness requirements. The Board remanded the application to the County for a decision by a different set of decisionmakers: "a panel of County officers acting in lieu of the County." Village of Hanover Park, PCB 92-69, slip op. at 14.

On appeal, the appellate court agreed with this Board in part, finding that:

> the actions of the County Board adequately demonstrate a disqualifying bias and prejudgment of the merits of the application. . . . The [County]Board's unequivocal public pronouncements in favor of the proposed expansion amounted to a sufficient pre-judgment of the merits of the case to warrant the finding of disqualifying bias. E & E Hauling (2d Dist. 1983), 451 N.E. at 598.[17]

Rather than directing the matter be heard by another decisionmaker, however, the appellate court found that the County was required to hear the case under "the ancient Rule of Necessity", allowing "an otherwise disqualified adjudicator [to] hear a case if the case could not be heard otherwise". E & E Hauling (2d. Dist. 1983), 451 N.E. at 599. The court then proceeded to analyze the County's decision on the criteria. The appellate court ultimately reversed the decision of this Board and reinstated the County Board's siting approval.

On appeal of the appellate court decision, the Illinois Supreme Court rejected the village's argument that the $30,000 per month in landfill tipping fees received by the District did not amount to a disqualifying pecuniary interest, where the annual 1982 budget of the district was $163.5 million. The Supreme Court held:

> the [County] [B]oard should not be disqualified as a decisionmaker simply because revenues were to be received by the [C]ounty. County Boards and other governmental agencies routinely make decisions that affect their revenues. They are public service bodies that must be deemed to have made decision for the welfare of their governmental units and their constituents. Their members are subject to public disapproval; elected members can be turned out of office and appointed members replaced. Public officials should be considered to act without bias. E & E Hauling (1985), 481 N. E. 2d at 825 (citations omitted).

Applying the 25-year old lesson of E & E Hauling to the facts here, the Board finds no credible evidence here of bias or prejudgment by the County Board Members of adjudicative facts. Any inferences that potentially could be drawn about possible bias or predisposition from various comments made at various times by County Board Members are more than negated by

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[17] Section 39.2 of the Act itself now makes clear that:

> The fact that a member of the county board . . . has publicly expressed an opinion on an issue related to a site review proceeding shall not preclude the member from taking part in the proceeding and voting on the issue. 415 ILCS 5/39.2 (2008).

their sworn testimony. County Board Members swore under oath that they voted solely on the basis of the evidence and argument concerning the Section 39.2 criteria as presented during the siting hearings. STMD has failed to present evidence to counteract that sworn testimony and the presumption that the County Board Members acted in good faith to consider the merits of the siting application based on the evidence presented during the siting proceedings about the Section 39.2 siting criteria.

**Board Conclusion: No Fundamental Fairness**

The Board finds that the siting proceedings were conducted in a fundamentally fair manner, rejecting all STMD challenges on this issue to the contrary. The Board next proceeds to consider the challenge that the County's decisions on the three challenged criteria were against the manifest weight of the evidence.

## SITING CRITERIA

In this part of the opinion, the Board will first discuss the general legal standards governing the Board's review of local governments' decisions on siting criteria. Next, the Board reviews the parties' arguments about the County's determination that Waste Management satisfied the siting criterion (i) on "need." This is followed by the Board's legal analysis and ruling. Next, the Board discusses the parties' arguments concerning the City's determination that Waste Management satisfied siting criterion (ii) on "facility design to protect the public health, safety, and welfare.", and criterion (vi) on "proposed traffic patterns to minimize impact on existing traffic flows." The Board then provides its legal analysis and ruling on each of those criteria.

### Standard for This Board's Siting Criteria Review: Manifest Weight of the Evidence

As discussed above, siting approval is to be granted only if a proposed facility meets all nine of the criteria set forth in Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2008)). *See* Town & Country Util., Inc. v. PCB, 225 Ill.2d 103, 866 N.E.2d 416 (2007)("a negative decision as to one of the criteria is sufficient to defeat an application for site approval of the pollution control facility"); *see also* Concerned Adjoining Owners v. PCB, 288 Ill. App. 3d 565, 576, 680 N.E.2d 810, 818 (5th Dist. 1977); Land and Lakes, 319 Ill. App. 3d at 45, 743 N.E.2d at 191.

The Board will not disturb a local siting authority's decision regarding the applicant's compliance with the statutory siting criteria unless the decision is contrary to the manifest weight of the evidence. *See* Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818; *see also* Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197. "That a different conclusion may be reasonable is insufficient; the opposite conclusion must be clearly evident, plain or indisputable." Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818, quoting Turlek v. PCB, 274 Ill. App. 3d 244, 249, 653 N.E.2d 1288, 1292 (1st Dist. 1995). The Board may not reweigh the evidence on the siting criteria to substitute its judgment for that of the local siting authority. *See* FACT, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3d Dist. 1990); Waste Management of Illinois, Inc. v. PCB, 187 Ill. App. 3d 79, 81-82, 543 N.E.2d 505, 507 (2nd Dist. 1989); Tate v. PCB, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist.

1989). "[T]he manifest weight of the evidence standard is to be applied to each and every criteria on review." *See* Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818.

It is for the local siting authority to weigh the evidence, assess witness credibility, and resolve conflicts in the evidence. *See* Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818; *see also* Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; FACT (3rd Dist. 1990), 198 Ill. App. 3d at 550, 555 N.E.2d at 1184; Tate, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195. Where there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits one group of witnesses and does not credit the other. *See* Waste Management, 187 Ill. App. 3d at 82, 543 N.E.2d 505, 507. "[M]erely because the [local siting authority] could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the [local siting authority's] finding." File, 219 Ill. App. 3d at 905-906, 579 N.E.2d at 1235.

Petitioner STMD argues that this Board should take a more active role in landfill siting cases and may re-weigh the evidence presented below. (Pet. Br., p. 34; *citing inter alia* Town & Country Util., Inc. v. PCB, 225 Ill.2d 103, 120 (2007). But, the Board and Third District appellate court have recently rejected the suggestion that Town & Country has changed the Board's standard of review on the criteria in landfill siting appeals. PDC, 385 Ill. App. 3d at 799, 896 N.E.2d at 476; Fox Moraine, PCB 07-146 (Oct. 1, 2009). In Fox Moraine, the petitioner argued that Town & Country was an invitation for the Board to conduct a technical review of the record to determine whether the record supported the local siting decision. Fox Moraine, PCB 07-146, slip op. at 67. In response, the Board held:

> The decision in Town & Country made clear that the Board's decision is reviewed by the appellate court in a siting appeal; however, the Illinois Supreme Court did not disturb the existing case precedent on siting appeals. The Board's position is shared by the appellate court in Peoria Disposal, where the applicant argued that Town & Country changed the standard by which the Board reviews the local siting decision. The appellate court rejected that argument. Peoria Disposal, 385 Ill. App. 3d at 800, 896 N.E.2d at 477. The precedent is well-settled that the Board reviews the local siting decision to determine if that decision is against the manifest weight of the evidence. Fox Moraine, PCB 07-146, slip op. at 67.

## Criterion (i): Necessary to Accommodate Waste Needs

One of the two Section 39.2 siting criteria at issue is whether the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve. *See* 415 ILCS 5/39.2(a)(i) (2008). The presentations at the County hearings on the issue are summarized *infra,* pp. 23-28.

In brief summary, need has been established where an applicant shows that a proposed facility is reasonably required by the disposal needs of the service area, taking into account the waste production and waste disposal capacity of the area. Waste Management of Illinois, Inc. v. PCB, 112 Ill. App.3d 639,461 N.E.2d 542,546 (3d Dist. 1984). An applicant is not required to

show absolute necessity to satisfy criterion (i). Landfill 33, PCB 03-43, 03-52 (cons.), slip op. at 26.

**STMD's Position: Need**

The analysis of the needs criterion in STMD's opening brief (STMD Br. I at 42-45) commences by stating that the Third District Appellate Court has construed "necessary" as a degree of requirement or essentiality and found that a landfill must be shown to be 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 capacity along with any other relevant factors. Waste Management of Illinois, Inc., v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d 542 (3d Dist. 1984). The Court in Waste Management, at 461 N.E.2d 546, 547, specifically found that when other available facilities are sufficient to meet the future waste needs of the service area, expansion is not "reasonably required."

STMD criticizes the Needs Report prepared and summarized by Sheryl Smith of the URS Corporation (*see infra* p. 22-23) as failing to address the element of "urgency". STMD states that the analysis instead focuses on whether there would be a net disposal capacity shortfall in the service area within the projected 46 year life of the Expansion. Referencing Table 6 of the Report (C0000116), STMD asserts that the Needs Report evidences remaining capacity for between 12 and 19 years of disposal, depending on the assumptions made. STMD Br. I at 42-45. STMD asserts that this does not prove "need" within the meaning of prior precedent concerning the criteria, noting that in one case the court held no need where 9 years of disposal capacity remained. *Id* at 44-45. STMD claims that Ms. Smith refused to characterize the need for the Expansion as "urgent" (*see* C0006996). STMD further suggests that Ms. Smith, who acknowledges that Illinois landfill capacity is at an all-time high, is biased in favor of whatever "need" position a particular client takes, based on her prior 23 analyses. *Id* at 44. STMD contends, then, that Waste Management has failed to make a *prima facie* case that expansion is necessary, noting that Courts have previously held that a nine-year capacity supported a finding criterion (i) was not met. *Id* at 44-45.

In its response brief (STMD Br. II at 17), STMD again claims that Ms. Smith "refused to characterize the need as 'urgent'." STMD agrees that the "statistical evidence presented by her affirmatively demonstrates that while there will be an eventual disposal capacity shortfall in the service area, the same will not occur for an extended period of time." STMD charges that this does not prove need as defined by the appellate courts. *Id.*

**Waste Management's Position: Need**

In its opening brief (WM Br I at 10), Waste Management reminds that Ms. Smith was the only person who presented testimony at the County hearing concerning the need criterion. Ms. Smith stated that the available capacity of the service area (206.6 million tons) compared to the amount of waste generated over the operating life of the Expansion requiring disposal (490.4 million tons) results in a capacity shortfall of 283. 8 million tons, while the capacity of the Expansion is 23.2 million tons, less than one-tenth of the shortfall identified in the service area. C0006994. Ms. Smith gave her opinion that, based on the disposal capacity shortfall, there is

insufficient capacity available to meet the waste needs of the service area and the Expansion is necessary to meet the waste needs of the area it intends to serve. C000083; 6994.

In its response brief (WM Br. II at 22-25), Waste Management argues that STMD fails to correctly articulate the appellate precedent concerning what satisfies the "urgent need" standard, noting that the criterion:

> 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. WM Br. II at 22.

Ms. Smith and the Needs Report did consider "urgency", in Waste Management's view. Waste Management relates that when specifically asked by STMD about how the data demonstrates 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. WM Br. II at 24, citing C00006996. Waste Management states that Ms. Smith concluded that, in her expert opinion, there is a need to develop the Expansion. No evidence was offered at the hearing that contradicted or impeached Ms. Smith's testimony that the Expansion is necessary. *Id.*

Waste Management also asserts that STMD's contentions about Ms. Smith's "bias" are unsupported by the record. *Id.*

Waste Management argues that precedent exists showing that existence of remaining capacity does not negate a showing of need. *See* E&E Hauling (2d Dist. 1983), 116 Ill.App.3d at 608, 451 N.E.2d at 572-73 (finding of need affirmed, where remaining capacity in the service area was 10 years, and no evidence or witnesses presented to challenge applicant's showing of need); *see also* American Bottom Conservancy, PCB 07-84, slip op. at 85-91 (Dec. 6, 2007) (unrebutted testimony established need despite 17 years of remaining capacity).

Waste Management states that the only evidence in the record supports the County's decision on need, and 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, Waste Management contends; 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). Consequently, Waste Management argues that the County Board should be affirmed on this criterion.

**The County's Position: Need**

In its opening brief (County Br. I at 5-7), the County cited case law to establish that the need criterion requires the applicant to prove that the new facility or expansion 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 of Illinois, Inc. v.PCB, 122 Ill. App. 3d 639, 645, 461 N.E.2d 542, 546 (3d Dist. 1984). The applicant need not show absolute necessity. Waste Management of Illinois, Inc.v. PCB, 123 Ill. App. 3d 1075, 1084, 463 N.E.2d 969, 976 (2d Dist. 1984). Proper reasons to deny siting do not include opposition to the service area size, or to accepting waste from outside the county. Metropolitan Waste Sys., Inc. v. PCB, 201 Ill. App. 3d 51, 55, 558 N.E.2d 785, 787 (3d Dist. 1990).

The County found relevant and noted virtually the same need calculations of Sheryl Smith as did Waste Management in its briefs. County Br, at 6-7, referencing Ms.Smith's written report at C0000050-0116. The County repeated that Ms. Smith calculated the amount of waste generated in the 16-county service area and compared that calculation to the total amount of available disposal capacity in the twenty-eight facilities (spread over four states) that accepted or intended to accept solid waste from these counties in 2008. C0006993-94. Ms. Smith further examined the additional potential capacity available in facilities that have not yet received operating permits, but have obtained preliminary siting approvals. C0006994. Upon comparison of the amount of expected solid waste and the available existing and potential capacity, Ms. Smith concluded that the service area would have a 283.8 million ton capacity shortfall over the life of the Expansion. *Id.*. Given that the Expansion would accept 23.2 million tons, Ms. Smith concluded that the Expansion was necessary to accommodate the capacity shortfall. *Id.*

The County stated that it assessed the report and testimony of Ms. Smith, who it found credible, and found that STMD had presented no evidence to the contrary. Consequently, the County argued that the Board should affirm its decision as consistent with the manifest weight of the evidence.

In its response brief (County Br. II at 68-70), the County alleges that STMD's assertion that the applicant must prove an "urgent need" for the new facility is the result of mis-reading or mis-citation of relevant precedents. The County notes that in Waste Management (2d Dist. 1984), the appellate court first reviewed the Third District's discussion of the need criterion in the appellate court decision in E & E Hauling (2d Dist.1983):

> The use of "necessary" in the statute does not require applicants to show that a proposed facility is necessary in absolute terms, but only that the proposed facility is "expedient" or "reasonably convenient" *vis-a-vis* the area's waste needs. It would be unreasonable to require petitioners to prove that every other potential landfill site in the region is unsuitable; such a construction would prevent any landfill development if more than one suitable site could be found. This

> construction of the statute should be avoided as unworkable and implausible. 116 Ill. App. 3d at 609, 451 N.E.2d at 573 (citations omitted).

In its review of the siting record before it, the Second District went on to state:

> [a]n expedient is defined as "a means devised or used in an exigency" thereby connoting *an element of urgency* in the definition of need. (Webster's New Collegiate Dictionary 399 (1979).) Reasonable convenience also requires a petitioner to show more than convenience. Recently, the third district of our appellate court defined this higher level of proof as a showing that the landfill be reasonably required by the waste needs of the area including consideration of its waste production and disposal capabilities. 123 Ill**.** App. 3d at 1084, 463 N.E.2d at 976 (citing Waste Management, 122 Ill. App. 3d at 645, 461 N.E.2d at 546) (emphasis added).

The Appellate Court affirmed the order of the Board affirming the decision of the County. The County had found that the need criterion was not satisfied. The Third District noted that "the conclusions of the witnesses in the case at bar were confliction on the need criterion and [one witness'] testimony was substantially impeached. In light of the disputed testimony, the court affirmed the County and Board's findings. The respondent County Board here argues, therefore, that the correct reading of Waste Management (2d Dist. 1984) is that an applicant must make a showing that a facility is "reasonably required", rather than "urgently needed". County Br. II at 68-69.

The County went on to state that it rejects STMD's claim that Ms. Smith is inherently biased in favor of the applicant here. The County stated that it had weighed her credibility and found her to be unbiased noting that "[e]xpert witnesses are expected to testify only to those conclusions that they are able to support through their own analyses." *Id* at 70. The County stated that it had considered Ms. Smith's opinion that the Expansion was needed in light of the most recent IEPA landfill capacity report, which had been incorporated into her Needs Report. The County stated that it had relied on her opinion, and reasonably could do so. The County requests that its determination on criterion (i) be affirmed. *Id.*

**Board Analysis: Need**

The Board agrees with the respondents that STMD has overstated the effect of the statement of the Second District in its discussion of the need criterion Waste Management (2d Dist. 1984), and that the Court's interpretation of the term there is akin to "reasonably convenient". The "urgent need" standard forwarded by STMD has not been embraced by any court since then, whereas "reasonably convenient" has been a common articulation. The Board echoes the opinion of one appellate district panel that declined to enter "what appears to be a semantic battle" over different articulations of the meaning of "necessary", but instead concluded "[t]hat different courts may use different phraseology does not, in our view, mean that the various districts of the appellate court apply substantively different definitions." Industrial Fuels, 227 Ill. App. 3d at 545-46, 592 N.E.2d at 156 (1st Dist. 1992).

As in Waste Management (2d Dist. 1984), the testimony before the County concerning the need for the Expansion is uncontroverted. In her testimony before the County Board, Ms. Smith was asked whether her Report demonstrates existence of an "urgent need" for the Expansion. While shying away from use of the term "urgent need" for the Expansion, she replied that her report:

> demonstrates a need for two reasons; one, the existing facility is projected to close; two, . . .by the year 2015 of the 14 landfills that were operating in 2008 in the service area, only nine of those facility are projected to be open by 2013 [the first year the Expansion could be projected to come on line]. . . the sites that have been permitted are losing capacity, some of them are closing, and it's a more costly option to transport the waste out of county than to continue disposing of it in county. And it takes time to permit and develop these plans for these landfills.
>
> So it's not unusual for it to take five or 10 years to plan the development of a new landfill project and take it through all the steps of doing the site investigation, going through the siting hearing and getting [I]EPA permit approvals and going ahead and constructing the facility. C0006996.

Ms. Smith was, however, willing to state that "[i]t's an urgent need to develop additional disposal capacity in DeKalb County." C0006996.

The Board concurs with the County that there is no "inherent bias" to be properly inferred from the fact that Ms. Smith has been retained by persons in other proceedings and provided expert opinions that in some situations a new facility is needed and in others it is not. The Board finds that the County reasonably relied on the uncontroverted testimony in the record before it to determine that the applicant satisfied criterion (i).

As Waste Management points out, the case law does not establish that any "magic number" of years of remaining capacity must exist in order for the siting authority to determine that a facility is necessary. *See* E&E Hauling (2d Dist. 1983), 116 Ill.App.3d at 608, 451 N.E.2d at 572-73 (finding of need affirmed, where remaining capacity in the service area was 10 years, and no evidence or witnesses presented to challenge applicant's showing of need); *see also* American Bottom Conservancy, PCB 07-84, slip op. at 85-91 (Dec. 6, 2007) (unrebutted testimony established need despite 17 years of remaining capacity). Each siting application is viewed on the basis of the totality of the circumstances in the defined service area and the unit of local government hosting the facility. The Board finds that the County's decision on criterion (i) is not against the manifest weight of the evidence.

**Criterion (ii): Facility Protection of Public Health, Safety, Welfare.**

Section 39.2(a)(ii) of the Act requires that an applicant for local siting approval demonstrate that the proposed facility "is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii) (2008). The presentations at the County hearings on the issue are summarized *infra*, pp. 27-28.

In brief summary, this criterion requires a demonstration that the proposed facility does not pose an unacceptable risk to the public health and safety. Industrial Fuels, 227 Ill. App. 3d 533,546,592 N.E.2d 148, 157 (lst Dist. 1992). It does not, however, require a guarantee against any risk or problem. Clutts v. Beasley, 185 Ill. App. 3d 543, 541 N.E.2d 844, 846 (5th Dist. 1989). The determination of whether a proposed facility satisfies criterion (ii) involves assessing the credibility of expert witnesses. FACT (3rd Dist. 1990), 198 Ill. App. 3d at 552,555 N.E.2d at 1185.

**STMD's Position: Facility Protection of Public Health, Safety, Welfare**

In its opening brief (STMD Br. I at 35-42), STMD alleges three problem areas exist that were not adequately considered or addressed relating to facility design, location, and operation as they relate to three main issues: groundwater protection, a hydrogen sulfide problem at the existing landfill, and the lack of a safety factor in the design for seismic events.

STMD notes with concern that the Application reports that there are two areas near the existing landfill where ground water has been negatively impacted and which are undergoing corrective action. As a result, two ground water management zones (GMZs)[18] have been established. STMD states that:

> A significant point of contention between the parties is the relevance of the undisputed fact that the existing landfill is impacting ground water in at least two areas, to the appropriateness of adding a vertical expansion over the existing facility. There seems to be no dispute that the Old Area is leaking and contaminating the ground water, as this point was readily conceded by WMII's engineer. (C 6878)[19] There is, however, a dispute as to whether the North Area, over which there will be a vertical overlay, is leaking. WMII's engineer, in direct response to a question to that effect, stated, "There is no evidence of that." (C6877). STMD Br. I at 36.

STMD opines that existence of the two GMZs suggests that before criterion (ii) could be satisfied, "there would need to be a comprehensive understanding of conditions at the site", but that "[t]hat level of understanding is simply not present". STMD Br. I at 37. STMD contends

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[18] A ground water management zone is defined as "a three dimensional region containing ground water being managed to mitigate impairments caused by the release of contaminants from a site subject to corrective action approved by the IEPA." C0000146.

[19] In response to a question asking "[i]sn't it true that sometimes leaks [in liners] can occur in between the monitoring wells", the answers was, in pertinent part,

> If you're talking about the old area, old fill area there, I mean, yeah, it's possible that could leak in between well spacing areas. . . . over all the time I have worked on composite liners I have not seen a leak on all the sites I have worked with a composite liner. Very different from that old liner. So that, I don't believe that will ever happen myself. C0006878.

that the applicant has done less than is customary in characterizing the site, as there are no soil borings through the north area. *Id.* STMD is critical of Joan Underwood's conclusion that the north area is not leaking, believing she misunderstands the nature of the north area. *Id.*

STMD also asserts that the subsurface earth and rock materials have a high permeability, so that "one would have expected extensive ground water flow modeling", but none is reported in the application. STMD Br. I at 38. STMD also faults the lack of a groundwater impact assessment (GIA), finding no comfort in the supplemental County Staff report's comment that a GIA will be required by IEPA before it will issue an operating report. *Id*, citing C0008345. STMD charges that for the County to so rely on IEPA is an abdication of the County's duties. *Id* at 39, citing County of Kankakee v. City of Kankakee and Town & Country Util., PCB 03-31, slip op. at 27 (January 9, 2003).

STMD's second area of challenge is the "ongoing hydrogen sulfide problem at the existing landfill", which presents a "rotten egg smell". STMD Br. I at 39. STMD acknowledges the testimony of Mr. Hoekstra, who stated that the problem had occurred in 2008-2009, and that Waste Management has taken steps to remedy the problem. STMD remarks that the steps are not "particularly successful in light of testimony that the characteristic rotten-egg odor associated with hydrogen sulfide persists." *Id* at 39. STMD cites the concerns expressed about possible effects of the odors on students in the Cortland Elementary School, one mile north of the existing Landfill, as addressed in the public comments of, for instance, Ms. Lovings and Ms.Wilcox. STMD states that "even" Mr. Nickodem "admitted that he could understand why parents . . . might wonder what their kids are breathing when at school." *Id* at 40. STMD states that the applicant had not been so forthcoming about the problem before the siting hearings, as proven by a discussion at a March 10, 2009 County Executive Committee meeting about a methane problem. *Id* at 40.

STMD points to the County's inclusion of monitoring conditions concerning hydrogen sulfide in its approval of the criteria (C0008539) indicates "concerns may be very current and very real", despite the fact that the County Staff report "is dismissive of [hydrogen sulfide] as a current problem." STMD Br. I at 40. STMD cites the testimony of its witness Dr. Serewicz concerning the dangers of toxic, hydrogen sulfide gas. Dr. Serewicz states that he can smell the gas when he drives by the Landfill and rolls down his window, and that the gas is very harmful at the concentration which can be smelled. *Id* citing C0007389-7402.

STMD's last concern (STMD Br. I at 41-42) is what it views to be a lack of a safety factor in the Expansion's design for seismic events. While acknowledging the testimony of Mr. Nickodem that the Expansion was designed to withstand a peak horizontal ground acceleration of .08 g[20] and that the design had an adequate factor of safety for that peak acceleration. But, STMD believes that to be an "outdated standard," saying that the United States Geological Survey (USGS) changed the standard after the design was completed and before the start of the County's public hearings. *Id* at 41. STMD states that the County Staff Report recognized that

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[20] Peak ground acceleration can be expressed in "g", which is the acceleration due to Earth's gravity, equivalent to a "g"-force. When expressed as a decimal in meters per second squared, 1g equals 9.81 meters per second squared ($1g=9.81\ m/s^2$).

"the 1.38 factor of safety contained in the application will be reduced and may or may not be under the required 1.3 regulatory factor of safety. (C 8344)".

STMD concludes that

> This demonstrates, on its face, that the applicant did not prove that the design would be protective of the public health, safety and welfare from a seismic stability standpoint, and as such, the County's finding to the contrary is against the manifest weight of the evidence. The County Staff's conclusion that "the Illinois EPA will require the applicant to submit geotechnical evaluations that prove their designs and slopes meet the regulatory standards, including those for the seismic condition," is exactly the kind of improper delegation of a required public health, safety and welfare finding that is condemned by the Board in *County of Kankakee versus the City of Kankakee* (*sic*). The County Staff report even goes on to note that the Agency may require revision of the slopes in order to change the factor of safety so that the applicant meets or surpasses the regulatory standard. STMD Br. I at 42.

In its response brief (STMD Br. II at 18-21), STMD again addresses criterion (ii), stating that the opening briefs of the applicant and the County ignore "the elephant in the room":

> namely that the existing landfill is impacting ground water in at least two areas that have been identified by the Agency, that these impacts are sufficient to warrant remediation, and that WMII proposes to vertically expand over an area that is immediately adjacent to one of the impact related ground water management zones. The active leaking and contamination coming from the existing landfill should be a red flag for the local decision maker and for this Board on review. This red flag should mandate an extraordinary amount of investigation and understanding regarding ground water movement and interaction at the site. *Id* at 17-18.

STMD continues to challenge the conclusions of Ms. Underwood regarding whether contamination affects sources of drinking water, questioning the degree of connectivity between the shallow ground water and the Galena Aquifer. STMD Br. II at 18. STMD questions whether the Maquoketa shale is an effective barrier between these units, as she had testified. *Id* at 19-20.

Lastly, STMD reiterates its continued questions about the credibility of Mr. Hoekstra's testimony about lack of continuing hydrogen sulfide gas emissions from the existing landfill, in light of testimony at the County hearings from various members of the public. STMD Br. II at 21, citing testimony of Mr. Keys at C6895, Ms. Lovings at C6896, Ms. Wilcox at C6897, Mr. Chambliss at C6964, and Mr. Charvat at C6970). STMD concludes

> This represents part of a continuing pattern on the part of WMII witnesses to underestimate problems and overstate the positive. Just the opposite should be

> occurring when the public health, safety and welfare for now and for future generations are at issue. STMD Br. II at 21

**Waste Management's Position: Facility Protection of Public Health, Safety, Welfare**

In its opening brief (WM Brief I at 11-20, 25-26), Waste Management addressed the evidence its four witnesses had presented on all aspects of criterion (ii), in the absence of prior delineation by STMD of specific points of concern. The targeted presentation was therefore presented in Waste Management's response brief.

In its response brief, (WM Brief II at 26- 35), Waste Management asserts that 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. Waste Management contends that, instead, STMD presents only material about the existing landfill, "misrepresenting the evidence in the record and offering unsupported speculation." *Id* at 27.

Waste Management first challenges STMD's assertion (STMD. Br. I at 36) that the existing landfill is "leaking and impacting groundwater", stating:

> The old area is not leaking. 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 WMIIs 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. 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. WM Brief II at 27-28, record citations omitted.

Waste Management cites to the testimony of Mr. Nickodem, its design expert witness, that the existing landfill is not leaking. WM Brief II at 28, citing C0006880, 6972, and 6975. Ms. Underwood, the applicant's geology, hydrogeology and groundwater expert witness, testified that there is no evidence that the north area is leaking. WM Brief II at 28, citing C0007216.

Waste Management charges that STMD's criticisms of Ms. Underwood's methods and analysis are unwarranted, and that the geologic and hydrogeologic conditions at the site are well-characterized. WM Brief II at 28-29. Waste Management charges that, contrary to STMD's assertion (STMD Br. at 37-38), Ms. Underwood did not need to perform another groundwater impact assessment (GIA) for the Expansion to develop her analysis. WM Brief II at 30. This is because she reviewed the IEPA-approved and permitted GIA for the existing landfill, and noted

that yet another GIA must be completed as part of the IEPA permitting process. *Id*, citing 0007215, 7235. Waste Management asserts that the decisionmaker can place some reliance on the IEPA permit review process, provided that the applicant presents a *prima facie* case as to criterion (ii). WM Brief II at 30, citing Gallatin National Company v. Fulton County Board, PCB 91-256, slip op. at 55-59 (June 15, 1992).

Waste Management contends that the uppermost aquifer has been properly identified, and that there is no support for STMD's assertion that the uppermost aquifer is "precariously close" to the ground surface. Waste Management reports that:

a) 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;

b) 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;

c) 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. WM Br. at 31.

Concerning the alleged hydrogen sulfide problem at the existing landfill, Waste Management relates that the detection of a hydrogen sulfide problem at the existing landfill in 2008 does not undercut the testimony at hearing that there was no problem at the time of the County's public hearings. WM Br. at 31, citing C0007098, 7101, 7123-24, 71-28, 7136. Waste Management reminds that the 2008 problem 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 Waste Management'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. Additional gas extraction wells installed in October 2009 have not detected hydrogen sulfide. WM Br. at A-4, citing C0007391-7961.

Waste Management believes that the testimony of STMD's witness Dr. Serewicz' testimony does not support STMD's hydrogen sulfide claims as they relate either to alleged continuing problems at the existing landfill, or to the Application's compliance with criteria (ii). WM Br. II at 31-33. Dr. Serewicz testified concerning the dangers of hydrogen sulfide at levels of 200 parts per billion (ppb), the level at which it is already harmful and the level at which he said a person can smell it; Waste Management contends that the record reflects that the OSHA standard for toxicity of hydrogen sulfide starts at 10 ppb and that it can be smelled at one-half ppb. WM Br. II at A4-5. Waste Management recounts that Dr. Serewicz gave no opinion as to whether the Application demonstrates compliance with criterion (ii), which he had not read. Waste Management considers to be unsupported Dr. Serewicz' testimony that hydrogen sulfide from the existing landfill is moving downhill from the existing landfill, across Interstate-88, up the north enbankment and over to Cortland Elementary School, one-half mile away. WM Br. II at 32.

Waste Management states that, at best, the Serewicz testimony relates to the existing landfill, but notes that prior Board precedent holds that the operation of the existing facility is not relevant to whether the application for the new facility satisfies the criterion. WM Br. II at 32; citing Hediger v. D & L Landfill, Inc., PCB 90-163, slip op. at 25-26 (Dec. 20, 1990) (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.) Waste Management believes that the problems and inconsistencies in Dr. Serewicz' testimony were plain, and that the County Board was entitled to discount his testimony. WM Br. II at 31; citing Environmentally Concerned Citizens Organization v. Landfill LLC, 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.

Finally, STMD asserts STMD's argument on criterion (ii) concerning the factor of safety for seismic events is "without basis." WM Br. II at 33. The USGS did not, as STMD asserts (STMD Br. at 41-42), raise the peak acceleration standard at the site location to 0.1 g. Waste Management states that the standard is .081g, as indicated in the Application, the USGS National Seismic Hazard Mapping Project, 2008 Update, and as testified to by Mr. Nickodem. Waste Management acknowledges that STMD relied upon, and submitted to the County as a public comment, a preliminary USGS report of a specific February 2010 earthquake event. Waste Management points out that its design expert Mr. Nickodem testified he had reviewed the USGS website after the February 2010 event, and that the 3.8 magnitude event is a milder earthquake (*i.e.* lower ground acceleration and lower rated), than the .081 g used in the application. WM Br. II at 34-35.

STMD's concern (STMD Br. I at 34) is that the Application may or not comply with the 1.3 regulatory factor of safety of seismic safety. Waste Management contends that:

> 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. 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. 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. It represents nothing about the stability of any landfill component, much less the long-term stability of the constructed landfill. . . WM Br. II at 34, record citations omitted.

**The County's Position: Facility Protection of Public Health, Safety, Welfare**

In its opening brief (County Brief I at 7-12), the County addressed the evidence it had presented on all aspects of criterion (i), in the absence of prior delineation by STMD of specific points of concern. The targeted presentation is therefore presented in the County response brief.

In its response brief (County Brief II at 59-67), the County argues, as did Waste Management, that there is no evidence that the north area is leaking or that the Expansion poses issues about groundwater impacts. *Id* at 60-61. The County notes Ms. Underwood's testimony that the current GMZ associated with the north was placed due to gas impacts flowing east from the old area, not because the north area was leaking. C0007216-17.

The County defends Ms. Underwood's conclusions concerning local groundwater flow. County Brief II at 61. The County asserts that STMD's criticism of Ms. Underwood's local groundwater flow depiction misunderstands the distinction between regional groundwater flows, which develop within regional-scale (miles to tens of miles) topographical systems and which have the deepest and longest flow paths, and local flow systems, which have short, shallow flow paths and develop due to undulations in the ground surface. Pet. Br., p. 37; C191-94. The County asserts that:

> There is no inherent inconsistency in drawings that depict long, deep, regional groundwater flow paths traveling from west to east while, at the same time, some short, shallow, local groundwater flow paths traveling in the opposite direction. Petitioner presents no evidence to suggest otherwise. County Brief II at 61.

As to the lack of a GIA, the County notes that its staff report addressed the issue satisfactorily. County Brief II at 61-62. The supplemental County Staff Report addressed Petitioner's concerns regarding the absence of a groundwater impact assessment. The report explained that Petitioner's concerns were related to the potential groundwater impact after the minimum 30-year post closure care period - 76 years after the Expansion's opening. C0008344. The report concluded that the inward hydraulic gradient at the site was likely to protect the surrounding aquifers from leachate and that there was no reason to believe that a groundwater impact assessment would suggest otherwise. C0008344-45. The report also noted that the proposed overlay liner system to be built over the existing landfill exceeds Illinois regulatory requirements and will reduce leachate generation in the existing portions of the landfill. C0008298.

The County asserts that it did not defer any of its criterion (ii) determination to IEPA, since it relied on the assertion in its staff's report that "the evidence of record indicates that the results of such a[] [GIA] assessment will support permitting." County Brief II at 62, citing C0008345. Thus, it believes County of Kankakee, PCB 03-31, 03-33, 03-35 (cons.), slip op. at 27 (January 9, 2003) is distinguishable from its situation.

The County asserts that STMD's "remaining criticisms are merely speculative." County Brief II at 62-63. It suggests that Mr. Nickodem failed to understand a question when he appeared to answer that "expanding over a leaking landfill is a good idea"; the County suggests that he may have been responding to the heard phrase "existing landfill" since he had already testified that there was no evidence of leakage in the Landfill's north area. The County further contends that:

> Although there is no evidence of leaking in the North Area, any such evidence, if it existed, would be entitled to little weight in the current siting proceedings. This Board has held that evidence of past problems with an existing facility "may be relevant to an enforcement action" but "the weight of this information is diminished in the context of evaluating the design and operational aspects of [a] proposed facility." Hediger, PCB 90-163, slip op. at 12 (Dec. 20, 1990) (affirming local siting approval of vertical expansion of existing landfill). *Id* at 63.

As to hydrogen sulfide problems, the County states that there is no evidence in the record that the problem persists at the existing landfill, as the County found Mr. Hoekstra's evidence credible. Moreover, the County Board reported that

> Environmental Monitoring and Technologies, Inc. (EMTI") conducted, at the Applicant's request, an air monitoring program during one week of the public comment period. (C7850, C7931-61). Of the 588 air samples collected over that week, only one had any detectible trace of hydrogen sulfide. (C7850, C7932, C7938-61). The single detection was found at a concentration 2,500 times lower than the federally-enforceable standards promulgated by the Occupational Health and Safety Administration and EMTI was unable to confirm the presence of hydrogen sulfide in follow-up sampling. (C7850, C7932). The County Board weighed this evidence and found it to be credible and persuasive. The County Board reasonably relied upon the reports of EMTI and the County Staff. County Brief II at 64-65.

As to the lay testimony regarding landfill odor and the presence of hydrogen sulfide, the County pointed out the testimony of Mr. Hoekstra that "a variety of natural gases, including methane in combination with other gases, could produce a similar smell, although he could understand why parents would wish to have the source of the smell identified. County Brief II at 65. The County also stated that it considered the testimony of Dr. Serewicz regarding hydrogen sulfide toxicity in amounts that could be smelled, but noted that its Staff was unable to produce any support for toxicity at such low levels in the scientific literature. *Id* at 65-66.

The County stated that its election to include in its approval condition for hydrogen sulfide monitoring is irrelevant to its determination that criterion (ii) was satisfied. County Brief II at 66.

Lastly, the County stated that there was no evidence in the record to prove that the facility design was inadequate in the event of a seismic impact. *Id* at 67. The County notes that its Staff was unable to confirm any USGS reclassification, and that the County reasonably relied on the County Staff report in reaching its conclusions. *Id.*

As to criterion (ii) overall, then, the County asserts that

> The County Board reasonably reached its conclusion that the Application satisfied criterion (ii) and an opposite conclusion is not clearly evident, plain or

indisputable. The County Board's determination was not against the manifest weight of the evidence and should be affirmed. County Brief II at 67.

**Board Analysis: Facility Protection of Public Health, Safety, Welfare**

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 Members 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 affirms the County Board's finding.

**Groundwater concerns.** As to STMD's contention that the existing landfill is leaking and impacting groundwater, the Board finds that there is no credible evidence that the old area is, in fact, leaking. Waste Management's witnesses testified to the contrary. The statements cited by STMD as indicating the contrary were, as respondents have argued, taken out of context. The GMZ was established to mitigate gas emissions from the old area, and not leachate flows.

Ms. Underwood's characterization of the groundwater is credible, notwithstanding STMD's suggestions to the contrary. And, as the County noted, the County Staff Report noted that, while a GIA would be required during the IEPA permitting process, evidence existed in the record to support a conclusion that there would be no permitting problem. Consequently, the Board agrees that the county did not improperly delegate its decisionmaking authority to IEPA, as distinguished from the situation in County of Kankakee, PCB 03-31, 03-33, 03-35 (cons.).

**Hydrogen Sulfide Concerns.** It is clear from the record in this proceeding that the existing Landfill had a hydrogen sulfide odor problem in 2008, which Waste Management took steps to remedy. It is also clear that members of the public smelled "rotten egg" odors of some type, as they testified at the County's public siting hearings. In recognition of that testimony, one week of air monitoring was undertaken resulting in only one detectible trace of hydrogen sulfide in 588 samples. Based on the record before it, including the Staff Report, the County determined that there was no ongoing hydrogen sulfide problem at the landfill, noting that other gases could have a similar smell and that Waste Management had increased measures to capture gas during the landfill in 2008 and 2009.

The record indicates that the County considered the testimony of Dr. Aubrey Serewicz, did not find it proved the existence of hydrogen sulfide at the existing Landfill, and noted that County Staff was unable to find support in scientific literature for his claims that concentrations of hydrogen sulfide in "smellable" quantities are harmful. Similarly, the County appears to have given no credence to the witness' testimony that Cortland School was being impacted by hydrogen sulfide. As previously stated, case law makes clear that it is the sole province of the County to weigh the evidence, resolve conflicts in testimony, and assess the credibility of witnesses. Tate v. PCB, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989). The Board finds that the evidence before it reasonably supports the County's conclusions, and

accordingly finds that the County's decision on this issue is not against the manifest weight of the evidence.

Finally, the Board cannot find that the County's inclusion of conditions for monitoring of hydrogen sulfide provides any basis for finding that criterion (ii) was not satisfied. As the County correctly argues, Section 39.2 (e) of the Act specifically allows for imposition of conditions "reasonable and necessary to accomplish the purposes of the Act." 415 ILCS 5/39.2(e) (2008). In light of public concerns, particularly related to Cortland School, monitoring provides an additional element of reassurance that the Expansion would perform as anticipated.

**Seismic concerns**. STMD's only support for its seismic concerns about facility design is relates to the assertion that the USGS raised the peak acceleration standard at the site location to 0.1 g, based on a February 2010 earthquake event. The County notes that its Staff was unable to confirm any USGS reclassification, and that the County reasonably relied on the County Staff report in reaching its conclusions. *Id.* The Board finds that the evidence before it reasonably supports the County's conclusions, and accordingly finds that the County's decision on this issue is not against the manifest weight of the evidence.

**Criterion (vi): Proposed Traffic Patterns to Minimize Impact On Existing Traffic Flows.**

Section 39.2(a)(vi) of the Act, requires that the applicant establish that "the traffic patterns to or from the facility are so designed as to minimize the impact on traffic flows." 415 ILCS 5/39.2(a)(vi)(2008). The presentations at the County hearings on the issue are summarized *infra*, pp. 27-28.

In brief summary, an applicant is 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.

**STMD's' Position: Traffic Patterns**

In its opening brief (STMD I at 45), STMD asserts that the applicant's traffic expert, David Miller, overlooked significant traffic items in preparing his report and making his conclusions: the impact of farm vehicles, particularly during the harvest when farm vehicular traffic is the greatest, and the impact of Cortland Elementary School traffic, during the time the school is in session. STMD concludes that:

> Given the fact that schools and farm traffic are the two most significant traffic elements in rural communities, the applicant failed to demonstrate sufficient understanding of traffic flows in order to draw any meaningful conclusion as to whether or not the traffic patterns will minimize impact on those flows. *Id.*

STMD's closing brief did not further address the traffic issue.

**Waste Management's Position: Traffic Patterns**

In its opening brief (WM Br. 1 at 27), Waste Management reminds that Criterion (vi) is satisfied upon a showing that traffic patterns to or from the Expansion will *minimize* impact on existing traffic flows, not that there is no impact or that all problems are eliminated. FACT, 198 Ill. App.3d at 554-555, 555 N.E.2d at 1187.

WMII states that it presented expert testimony and evidence that criterion (vi) was satisfied. No evidence was presented establishing that impact on existing traffic flows was not minimized. The record contains support for the County Board's finding that criterion (vi) was satisfied, and so Waste Management believes that the finding should be affirmed. File, PCB 09-94, slip op. at 3.

In its response brief (WM Br. II at 35-38), Waste Management states that 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 Exh. 1, Criterion 6 at 6; C7343-44. Waste Management points out that Mr. Miller specifically testified at the County hearings (C0007270) concerning farm vehicle traffic. 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. WM Br. II at 36.

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." C0007270. To determine if the traffic volume data collected needed to be adjusted to account for seasonal variations, Mr. Miller obtained data from the Illinois Department of Transportation (IDOT). 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. WM Br. II at 36-37.

Concerning school traffic, Waste Management says that 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. WM Br. II at 37. 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. *Id*, citing Pet. Exh. 1, Criterion 6 at 9 (*i.e.* C0000760).

The school bus data is provided in the Application (Traffic Impact Analysis, Appendix B) as part of the baseline counts. C0000793-0897. 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. Waste Management states that 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.

Waste Management believes that 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 restates that it presented expert testimony and evidence satisfying criterion (vi), and that no evidence was presented to the contrary. Waste Management concludes that the record supports the County Board's finding that criterion (vi) was satisfied, and that finding should be affirmed, citing File, PCB 09-94, slip op. at 3.

**The County's Position: Traffic Patterns**

In its opening brief (County Br. I at 16-17), the County reviews the evidence presented on this criterion by Mr. Miller. The County recites that Mr. Miller stated that the Expansion would have no statistically significant impact on existing traffic flows, and that he opined that the traffic patterns to and from the facility were so designed as to minimize the impact on existing traffic flows. *Id* at 16.

The County Board states that it weighed the testimony of Mr. Miller (who it found to be credible) together with the supporting documentation contained in the Application and the absence of any evidence to the contrary. The County points out that the DeKalb County Highway Department submitted a letter concurring with the conclusions of Mr. Miller's traffic study. The County therefore asserts that the testimony and supporting documentation in the County record provided a sufficient evidentiary basis in favor of the County Board's finding that the traffic patterns to and from the facility are so designed as to minimize the impact on existing traffic flow.

In its response brief (County Br. II at 70-72), the County challenges, as lacking support in or citation to the record, STMD's bald assertion (Pet. Br. at 45) that "schools and farm traffic are the two most significant traffic elements in rural communities". County Br. II at 72. As did Waste Management, the County too pinpoints where in the record Mr. Miller addressed the agricultural traffic issue, finding that such vehicles did not pose a significantly different challenge to traffic flows than trucks or similar vehicles. *Id* at 71. Plus, relates the County, the County Staff Report assessed that the largest one-way traffic impact to a single route from the Expansion would be less than five vehicles in the peak hour, with a maximum average of 1-2 vehicles per hour, which would "not impact the current flow of agricultural traffic." *Id*, citing C0007869.

Regarding school-related traffic, among other things the County observes that Mr. Miller's traffic counts for 2013, the year the Expansion would enter operation, includes traffic counts from the new Cortland Elementary School. County Br. II at 71-72, citing C0007259-7361. The County asserts that it "reasonably relied" on the evidence in the record in reaching its conclusion that the applicant had satisfied criterion (vi), and that "an opposite conclusion is not clearly evident, plain, or indisputable", so that the Board should find that the County Board's decision is not against the manifest weight of the evidence. *Id* at 72.

**Board Analysis: Traffic Patterns**

STMD has failed to present any evidence in the record that would lead the Board to conclude that the County's determination on the traffic criteria is against the manifest weight of the evidence. Despite STMD's assertions to the contrary, the applicant clearly did address the issues of agricultural and school-related traffic. The County could, and did, reasonable rely on the evidence in the siting record, as buttressed by the conclusions reached by its own DeKalb County Highway Department, that the applicant had minimized the impact of the Expansion traffic on existing traffic flows.

The County clearly indicated that it gave this criterion more than cursory consideration, since the County added conditions to its approval. Resolution #2010-31, Cond. 22-28, 32, C0008546-8547. The County's decision on criterion (vi) is supported by the manifest weight of the evidence, and is consistent with prior precedent concerning this criterion. *See, e.g.* FACT, 198 Ill.App.3d at 554-555, 555 N.E.2d at 1187; File, PCB 09-94, slip op. at 3. The Board affirms the County determination.

## CONCLUSION

The Board finds that that petitioner STMD has failed to prove that the County's siting procedures were fundamentally unfair, or that the County's determinations on siting criteria (i), (ii) and (vi) of Section 39.2(a) of the Act were contrary to the manifest weight of the evidence. Therefore, the Board affirms the County's decision granting siting approval to Waste Management for the Expansion of the DeKalb County Landfill.

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

## ORDER

The May 10, 2010 decision of the County granting Waste Management's application for site location suitability approved for the expansion of the DeKalb County Landfill is affirmed for the reasons expressed in the Board's opinion.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 17, 2011, by a vote of 5-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board