**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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| ROXANA LANDFILL, INC.<br><br>Petitioner,<br><br>v.<br><br>VILLAGE BOARD OF THE VILLAGE OF CASEYVILLE, ILLINOIS; VILLAGE OF CASEYVILLE, ILLINOIS; and CASEYVILLE TRANSFER STATION, LLC,<br><br>Respondents. | PCB 15-65<br>(Third Party Pollution Control Facility Siting Appeal) |
| VILLAGE OF FAIRMONT CITY, ILLINOIS,<br><br>Petitioner,<br><br>v.<br><br>VILLAGE OF CASEYVILLE, ILLINOIS BOARD OF TRUSTEES and CASEYVILLE TRANSFER STATION, LLC,<br><br>Respondents. | PCB 15-69<br>(Third Party Pollution Control Facility Siting Appeal) |

ORIGINAL

**NOTICE OF FILING**

TO: SEE ATTACHED CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on October 22, 2014, we filed with the Illinois Pollution Control Board, **Village of Fairmont City's Motion for Sanctions and to Strike Respondent Caseyville Transfer Station, LLC's and Respondent Village of Caseyville, Illinois' Joint Motion to Strike and to Dismiss Fairmont City's Petition for Hearing to Contest Site Location Approval**, a copy of which is attached and served upon you.

By: _____
Donald J. Moran

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PEDERSEN & HOUPT
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Suite 2700
Chicago, Illinois 60601
Telephone: (312) 641-6888

## CERTIFICATE OF SERVICE

Donald J. Moran, an attorney, on oath states that he served the foregoing Village of Fairmont City's Motion for Sanctions and to Strike Respondent Caseyville Transfer Station, LLC's and Respondent Village of Caseyville, Illinois' Joint Motion to Strike and to Dismiss Fairmont City's Petition for Hearing to Contest Site Location Approval, on the following parties by depositing same in the U.S. mail at 161 N. Clark Street, Chicago, Illinois 60601, on this 22nd day of October, 2014.

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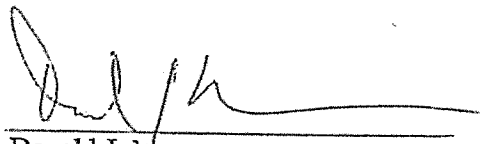

Donald J. Moran

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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| ROXANA LANDFILL, INC.<br><br>Petitioner,<br><br>v.<br><br>VILLAGE BOARD OF THE VILLAGE OF CASEYVILLE, ILLINOIS; VILLAGE OF CASEYVILLE, ILLINOIS; and CASEYVILLE TRANSFER STATION, LLC,<br><br>Respondents. | ) | PCB 15-65<br>(Third Party Pollution Control Facility Siting Appeal ) |
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**VILLAGE OF FAIRMONT CITY'S MOTION FOR SANCTIONS AND TO STRIKE RESPONDENT CASEYVILLE TRANSFER STATION, LLC'S and RESPONDENT VILLAGE OF CASEYVILLE, ILLINOIS' JOINT MOTION TO STRIKE AND TO DISMISS FAIRMONT CITY'S PETITION FOR HEARING TO CONTEST SITE LOCATION APPROVAL.**

NOW COMES Petitioner Village of Fairmont City ("Fairmont City"), by its attorneys Sprague & Urban and Pedersen & Houpt, P.C., pursuant to Section 101.506 of the Pollution Control Board Procedural Rules and for its Motion for Sanctions and to Strike Respondent Caseyville Transfer Station, LLC's ("CTS's") and Respondent Village of Caseyville, Illinois' ("Caseyville's") Joint Motion to Strike and to Dismiss Fairmont City's Petition for Hearing to Contest Site Location Approval (the "Joint Motion"), states as follows:

## INTRODUCTION

The Joint Motion is not well grounded in fact, and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law and is imposed for an improper purpose. It is, further, rife with facts asserted that are not of record and are not supported by oath, affidavit or certification. Fairmont City has advised counsel for Caseyville and CTS of these defects in the Joint Motion and counsel has refused to withdraw it. The Pollution Control Board Procedural Rules and the Illinois Supreme Court Rules authorize this Board to sanction Caseyville and CTS and the Board should, in fact, do so. Fairmont City moves this Board for an order striking the Joint Motion and awarding Fairmont City the cost of bringing this motion, including its reasonable attorneys' fees, to be paid by CTS, Caseyville and their counsel in whatever proportion the Board deems fit.

## FACTS

### A. The Joint Motion

On February 14, 2014, CTS filed with Caseyville an Application for Local Siting Approval (the "Application") for a municipal solid waste transfer station. Caseyville held a public hearing regarding the Application on May 29, 2014. On August 6, 2014, Caseyville's Board of Trustees approved the Application.

Fairmont City filed a timely Petition for Hearing to Contest Site Location Approval on September 8, 2014 (the "Petition"). On October 8, 2007, Fairmont City was served with the Joint Motion. The Joint Motion was signed by counsel for CTS and Caseyville: Penni Livingston of the Livingston Law Firm in Fairview Heights, Illinois; and J. Brian Manion of the Weilmuenster Law Group, P.C., in Belleville, Illinois. The Joint Motion argues, in summary, that Fairmont City lacked standing to file the Petition because, according to the Joint Motion,

Fairmont City is not "so located as to be affected by the proposed facility." *See* PCB R. 107.200. (Joint Mot., p. 2).

The Joint Motion admits that Fairmont City has alleged, in the Petition, that it is a municipality located approximately one mile from the proposed facility and is within the proposed service area of the facility. (*Id.*; Pet., ¶ 5) The Joint Motion does not deny the accuracy of these allegations; neither CTS nor Caseyville claim that Fairmont city is *not* within a mile of the proposed facility or that it is *not* within the proposed service area. Nor does the Joint Motion deny that these facts, if proven, would be sufficient to establish standing. Instead, the Joint Motion argues that Fairmont City lacks standing because, although it was represented at and participated in the siting hearing, it did not establish its proximity to the proposed facility or its location within the proposed service area through witness testimony during the siting hearing itself. (*Id.* at 2-4). This is the only legal argument advanced by the Joint Motion.

The remainder of the Joint Motion is devoted to what can only be described as a speculative and unfounded rant regarding what CTS and Caseyville presume to be the ulterior motives — not of Fairmont City — but of its attorney and of a non-party, Waste Management of Illinois, Inc. ("WMII"). (*Id.* at 3-4). In the course of this rant, the Joint Motion makes unsupported assertions of fact regarding the attorney's motives, prior representations and experience, the activities of WMII, and agreements between WMII and Fairmont City. (*Id.*) It submits unauthenticated, hearsay-within-hearsay meeting minutes which, it is asserted, record what Fairmont City's police chief told the Fairmont City Board of Trustees that the attorney told him. (*Id.*) It caps off its "argument" by suggesting that the Board can dismiss Fairmont City's Petition on the ground that it is "really" being brought by WMII and that WMII is "abusing" the local siting appeal process. (*Id.* at 4-5).

**B. The Joint Motion's Defects**

None of the "facts" asserted in the Joint Motion are of record in this proceeding; indeed, they are presented without citation. Nor are those facts supported by oath, affidavit or certification in accordance with Section 1-109 of the Code of Civil Procedure, as required by Section 101.504 of the Board's Procedural Rules. The one document attached to the motion, which the Joint Motion describes as the minutes to the May 7, 2014, meeting of the Fairmont City Board of Trustees, is not certified or otherwise authenticated and is, in any case, hearsay within hearsay and therefore inadmissible. *See* PCB R. 101.626 ("the hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois").

The Motion does not, furthermore, cite any legal authority of either of its arguments, namely, (1) that this Board must dismiss a Petition to review a local siting decision that alleges facts sufficient to establish standing if the Petitioner did not prove those facts through witness testimony at the local siting hearing itself and (2) the Board must strike and dismiss such a petition on the ground that the petition is "really" being filed by a non-party.

Fairmont City is unaware of any authority supporting the latter argument, and this Board has already addressed the former. In ruling on a "motion to strike the entire petition, or motion to dismiss, the Board must take all well-pleaded allegations as true and may not dismiss the petition unless it clearly appears that no set of facts could be proven which would entitle petitioner to relief." *Timber Creek Homes, Inc. v. Village of Round Lake Park*, PCB No. 14-99 (Mar. 20, 2014) (citation omitted). It is undisputed (a) that the Petition alleges that Fairmont is a municipality located approximately one mile from the proposed facility and is within the proposed service area of the facility and (b) that these facts, if proven, would establish Fairmont City's standing to appeal. Indeed, the Board has already found, in *Valessares v. County Board of*

*Kane County*, PCB 86-36 (July 16, 1987), slip op. at 12-13 (attached as Ex. A), that an individual living between five and six miles from a proposed facility was "so located as to be affected" by the proposed facility because he lived within the facility's proposed service area and was, therefore, so located as to be affected by the County Board's determination on the need criteria of local siting. Surely, then, a municipality located within *one* mile of the proposed facility and within the facility's proposed service area is also so located as to be affected by the facility and the Caseyville Village Board's determination as to the need for the facility. The Petition alleges facts sufficient to establish standing and there is no basis to grant the Joint Motion.[1]

**C. CTS and Caseyville Stand by the Joint Motion.**

Fairmont City contacted Ms. Livingston and advised her of the legal and factual defects found in the Joint Motion, namely, that (1) its assertions of fact are not well-grounded, particularly in that those assertions violate Section 101.504 of the Board's Procedural Rules; and (2) that it is not well-grounded in law, in light of *Valessares*. Fairmont City also specifically advised Ms. Livingston of its intention to seek sanctions if the Joint Motion was not withdrawn. Ms. Livingston responded that CTS and Caseyville would not withdraw the Joint Motion, but declined to identify any further factual or legal support for the Joint Motion or the arguments stated therein.

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[1] This Board also held, in *Valessares*, that Section 40.1(b) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/40.1(b) — from which the "so located as to be affected" language is derived — does not provide standards for who may participate in county board hearings and it was, therefore, unnecessary and, indeed, "not possible" to challenge a party's standing to appeal a local siting decision during the local siting hearing itself. If it is "not possible" to challenge standing to appeal during the local siting hearing, it stands to reason that it is not necessary to establish standing to appeal during that hearing. The Joint Motion, certainly, cites no authority suggesting otherwise. In any case, "Official notice may be taken of all facts of which judicial notice may be taken ...." PCB Rules, § 101.630. "Courts may judicially notice geographical facts ...." *Hinshaw v. Coachmen Indus.*, 319 Ill. App. 3d 269, 272 n.2 (1st Dist. 2001) (citation omitted).

## ARGUMENT

The Board should strike the Joint Motion and sanction CTS, Caseyville and their counsel under both Section 101.800 of the Board's Procedural Rules and Illinois Supreme Court Rule 137 by striking the Joint Motion and awarding Fairmont City the cost of bringing this motion, including its reasonable attorneys' fees.

Firstly, "[i]f any person unreasonably fails to comply with any provision of 35 Ill. Adm. Code 101 through 130 ... the Board may order sanctions." PCB R. 101.800. The Joint Motion violates Section 101.504 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.504, by asserting facts not of record in this proceeding without a supporting oath, affidavit or certification in accordance with Section 1-109 of the Code of Civil Procedure. Neither CTS, Caseyville nor their counsel deny that they have violated Section 101.504, nor do any of them offer any explanation for the violation. The unreasonableness of their violation is underscored by the nature of the unsupported assertions of fact, namely, inflammatory and personal attacks on opposing counsel's motives and unsupported conspiracy theories regarding non-parties unrelated to any legitimate legal theory. CTS's, Caseyville's and their counsel's actions are without excuses and inexcusable and the Board should impose sanctions.

Second, the Board should sanction CTS, Caseyville and their counsel for signing and filing a motion that is not well grounded in fact or in law and is, instead, interposed for an improper purpose in violation of Illinois Supreme Court Rule 137. Again, the Board may order sanctions if any person "unreasonably fails to comply with any provision of 35 Ill. Adm. Code 101 through 130 ...." PCB R. 101.800 Section 101.100(b) states that "the Board may look ... to the Supreme Court Rules for guidance where the Board's procedural rules are silent." The Board's Procedural Rules are silent on the obligation of attorneys to only sign and file such

pleadings, motions and other papers as are well-grounded in law and fact. Accordingly, the Board should look to Supreme Court Rule 137 for guidance.

Supreme Court Rule 137(a) states that

> [e]very pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. ... The signature of an attorney ... constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ... If a pleading, motion, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other document, including a reasonable attorney fee.

The Joint Motion was signed by both Ms. Livingston and Mr. Manion, who jointly represent CTS and Caseyville. (Joint Mot., p. 5). Accordingly, both Ms. Livingston and Mr. Manion certified that the Joint Motion was well-grounded in fact to the best of their knowledge, information and belief formed after a reasonable inquiry. They also certified that the Joint Motion is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

Yet the Joint Motion is not well-grounded in fact. Indeed, it cites no facts at all and, instead, indulges counsels' unfounded speculation and *ad hominem* attacks, including on the character and motives of a fellow member of the bar. The Joint Motion describes no inquiry, nor have counsel described any such inquiry when confronted with the Joint Motion's factual defects.

Nor is the Joint Motion warranted by existing law or any good-faith legal argument. The Joint Motion advances arguments that, frankly, strain credulity: (1) that the Board can dismiss a

petition for review based on a party's assertion — unsupported by any evidence — that the petition is "really" being brought by a non-party and (2) that the Board can dismiss a Petition — even though it alleges facts that, if proven, would establish standing — on the ground that the petitioner should have, for some reason, established standing to appeal during the local siting hearing. The Joint Motion cites no authority whatsoever to support these arguments. When confronted with precedent discrediting these arguments, moreover, counsel offers no response other than to announce her intent to stand on her motion. Given that the Joint Motion is not well grounded in the facts or the law, the Board may infer that it is, instead, interposed for an improper purpose, such as to harass or to needlessly increase the cost of this appeal.

Section 101.800 of the Board's Procedural Rules and Supreme Court Rule 137(a) authorize the Board to strike the Joint Motion and to impose the costs incurred by Fairmont City in bringing this motion, including its reasonable attorneys' fees, on CTS, Caseyville and their counsel. PCB R. 101.800(b)(5); ILL. S. CT. R. 137(a). For all of the reasons stated above, the Board should do so.

WHEREFORE, for all of the foregoing reasons, Fairmont City respectfully requests that the Board enter an order:

A. Striking CTS's and Caseyville's Joint Motion to Strike and to Dismiss Fairmont City's Petition;

B. Imposing the costs incurred by Fairmont City in bringing this motion, including its reasonable attorneys' fees, on CTS, Caseyville and their counsel in such proportion as the Board deems fit and just; and

C. Providing such other and further relief as the Board deems appropriate.

October 22, 2014

Respectfully submitted,

VILLAGE OF FAIRMONT CITY

By: _____

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ILLINOIS POLLUTION CONTROL BOARD
July 16, 1987

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|---|---|---|
| PETER VALESSARES and EDWARD F. HEIL, Petitioners, | ) | |
| RICHARD L. COOPER, PETER COOPER and TOBEY COOPER, Intervenors, | ) | |
| v. | ) | PCB 87-36 |
| THE COUNTY BOARD OF KANE COUNTY, ILLINOIS, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents. | ) | |

THOMAS W. MCNAMARA, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF PETITIONERS;

DAVID R. AKEMANN, WILLIAM F. BARRETT AND PATRICIA JOHNSON LORD, ATTORNEYS-AT-LAW, APPEARED ON BEHALF OF KANE COUNTY STATE'S ATTORNEY;

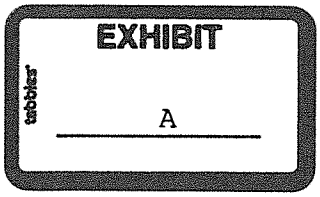
DONALD J. MORAN, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF WASTE MANAGEMENT; AND

RICHARD COOPER, APPEARED PRO SE, ON BEHALF OF INTERVENORS.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes to the Board on a March 17, 1987, Petition for Review and Reversal of County Board Decision. That petition was filed by Peter Valessares (hereinafter "Valessares or Mr. Valessares"), and Edward F. Heil (hereinafter "Heil or Mr. Heil"). The petition challenges a decision by the County Board of Kane County (hereinafter "Kane County") which granted site location suitability approval to Waste Management of Illinois, Inc. (hereinafter "Waste Management"). The proceeding involves local government review of requests to site a new regional pollution control facility under what is commonly known as the SB-172 process. That process is more specifically defined in the Environmental Protection Act (hereinafter "the Act") at Sections 3.32, 39(c), 39.2 and 40.1.

On April 24, 1987, Richard L. Cooper, for himself and on behalf of his minor grandchildren, filed a Petition to Intervene



(hereinafter "the Coopers or Mr. Cooper"). The Coopers sought intervention to oppose site approval. That intervention was granted by the Pollution Control Board on April 30, 1987. Pollution Control Board hearings on this matter were held May 14, 1987 and May 22, 1987. Final Briefs were filed by Valessares and by Heil on June 1, 1987, and by the Coopers on June 1, 1987. Response briefs were filed by Kane County on June 5, 1987, and by Waste Management on June 5, 1987.

This proceeding arises from a desire by Waste Management to expand an existing sanitary landfill in Kane County. Waste Management currently operates Settler's Hill Sanitary Landfill for Kane County, Illinois. The landfill is primarily located in unincorporated Kane County. The facility is a sanitary landfill site which accepts municipal wastes and selected non-hazardous special wastes.

The current permitted acreage of the site consists of 150 acres. Of this amount, 101 acres are used for disposal area and 19 acres are used for a stormwater retention area. The remaining approximate 30 acres are used for buffer and access areas. Twenty-seven acres of the 150-acre existing site are located in the City of Geneva. There will be no increase in refuse disposal capacity in this 27 acre area under the proposed expansion. The remaining acreage of the existing site will have an increase in disposal capacity.

Waste Management is proposing to expand the Settler's Hill Sanitary Landfill to include an additional 141 acres of land. Of this amount, 78 acres, all within unincorporated Kane County, will be used for the actual disposal of solid waste. The remaining acreage will be used for buffer areas, access roads and drainage. The total acreage that will be used for actual waste disposal, including the existing permitted acreage and proposed expansion acreage, will be 179 acres. The new facility is known as "Settler's Hill II".

On August 28, 1986, Waste Management served a Notice of Application on adjacent landowners and members of the General Assembly by registered mail. On that same date, a Notice of Application was published in a newspaper of general circulation in the area. On September 17, 1986, the Request for Siting Approval was filed with Kane County. On December 4, 1986, Kane County prepared a Notice of Hearing which was published in a newspaper of general circulation and served on members of the General Assembly. On December 18, 1986, a public hearing was held before the Executive Committee of the Kane County Board. That hearing lasted one day and generated approximately 150 pages of transcript. On February 5, 1987, the Executive Committee of the Kane County Board recommended that site location suitability be approved. On February 10, 1987, Kane County passed Resolution 87-33, granting site location suitability approval with conditions.

This proceeding presents three types of issues for Board resolution. First, Waste Management has challenged the standing of the Petitioners to bring this appeal. Second, there are issues relating to the fundamental fairness of the proceedings below. Third, there are issues about whether the proposed facility meets the six statutory criteria for approval.

## STANDING

On April 7, 1987, Waste Management filed a Motion to Dismiss the Petition for Review; that motion asserts that Valessares is not so located as to be affected by the proposed facility and that Heil did not participate in the public hearing conducted by Kane County. On April 15, 1987, petitioners responded asserting that Valessares is so located as to be directly and adversely affected, and that Heil "sufficiently participated in the public hearing". By Order of April 16, 1987, the Board requested briefs on several issues. After reviewing the April 27, 1987 briefs, the Board concluded:

> Waste Management's motion to dismiss Heil and Valessares is denied. It is apparent from the motions and briefs that the issues raised involve mixed questions of law and fact. While the parties provided a limited stipulation of facts in order to dispose of these issues, the factual record before the Board is presently inadequate. The issue of Heil's participation is in factual dispute regarding both degree and effect and could be intertwined with the fundamental fairness of the hearing procedure, in light of the hearing officer's statements on "participation" (R., 6, 7, 123, 124). The issue regarding the effect of the proposed facility on Valessares is almost exclusively factual. Waste Management speculates as to Valessares ability to make a requisite factual showing. These factual issues should be addressed at the scheduled Pollution Control Board hearing. Waste Management is at liberty to renew its motion to dismiss after an opportunity to develop a sufficient factual record has been afforded. (Order, April 30, 1987)

On May 28, 1987 Waste Management filed a Supplemental Motion to Dismiss the Petition for Review. Valessares and Heil replied to the motion on June 5, 1987.

The Act provides the procedures for regional pollution control facility siting approval, and establishes the elements for standing to appeal. Section 40.1 (b) provides, in relevant part :

> If the county board or the governing body of the municipality as determined by paragraph (c) of Section 39 of this Act, grants approval under Section 39.2 of this Act, a third party other than the applicant who participated in the public hearing conducted by the county board or governing body of the municipality may petition the Board within 35 days for a hearing to contest the approval of the county board or the governing body of the municipality. Unless the Board determines that such petition is duplicitous or frivolous, or that the petitioner is so located as to not be affected by the proposed facility, the Board shall hear the petition in accordance with the terms of subsection (a) of this Section and its procedural rules governing denial appeals, such hearing to be based exclusively on the record before the county board or the governing body of the municipality. The burden of proof shall be on the petitioner. The county board or the governing body of the municipality and the applicant shall be named as co-respondents.

Thus, third parties have standing to appeal if: (1) they participated in the public hearing conducted by the County; (2) the petition is not duplicitous or frivolous; and (3) they are so located as to be affected by the proposed facility. These elements have not been explored by the appellate courts in the SB-172 context. These elements all involve mixed issues of fact and law. It is also likely that the disposition of these issues will have an impact on the manner in which future hearings will be conducted by local governments.

Heil argues that filing a written comment after the public hearing is adequate "participation" to confer standing to appeal; the Board disagrees. The statutory language provides that a third party may petition for review of site approval if they, "participated in the public hearing conducted by the county." By its plain language, this statutory phrase limits the universe of potential petitioners to those persons who physically attended the public hearing or were present by a duly authorized representative. The Act uses the terms "public hearing" and "public comment" in different contexts within Section 39.2, which provides the relevant procedures for county board action. Appeal rights established in Section 40.1(b) only use the term "public hearing." Consequently, the Board holds that simply submitting a public comment after the close of the public hearing does not constitute an adequate basis for standing to seek review. Heil's arguments that he participated in the manner prescribed by the

Hearing Officer (C.B.H., pp. 6, 7, 123, 124) are misplaced. The Act defines standing to petition for review of county board SB-172 proceeding. The Hearing Officer lacks authority to override the statutory language which requires participation at the public hearing. Attendance at the public hearing (in person or by an authorized representative) is a necessary and adequate prerequisite to petition for review.

The Board is painfully aware of the difficulties faced by county boards and other units of local government in conducting these public hearings. Past and present SB-172 cases brought to this Board have involved public hearings which: (1) had hundreds of interested citizens in attendance; (2) had thirty-one days of hearings; or (3) had hearings which lasted until 1:30 a.m. in small cramped quarters. These difficulties arise in proceedings for which the Act sets stringent time deadlines. In such circumstances, the desire of interested citizens to "participate" in a manner which preserves their appeal rights may occasionally appear to conflict with the desire of the hearing authorities to ensure that the hearing does not become unmanageably large in terms of the number of people asking questions or making statements. To avoid confusion, the Board feels it is appropriate to address this issue with particular clarity.

The Act provides two processes for the development of new regional pollution control facilities. The first is the SB-172 process which is the subject of this proceeding. The second process is found in Section 39.3. By evaluating and comparing the two processes, the Board believes additional insight can be gained on what the General Assembly intended by the term "participated in the public hearing."

At the time it was adopted by the General Assembly, Section 39.3 applied to requests to the Illinois Environmental Protection Agency ("Agency") for a permit to develop a new regional pollution control facility for the disposal of hazardous waste. That process provides for notification to the public and government officials, the opportunity for a public hearing conducted by the Agency, a final decision, and (pursuant to Section 40(c)) an appeal to this Board. The process under Section 39.3 is not only similar to the process under Section 39.2 (the SB-172 process), the Act specifically allows the hearings to be conducted jointly. Section 39.3 (e)(3). However, the Section 39.3 process provides substantially more formalized mechanisms for citizen involvement and standing to appeal to this Board. In order for a third party to become involved in a public hearing held by the Agency under Section 39.3, they must formally petition the Agency to intervene under Section 39.3 (d):

> Within sixty days after the date of the Agency notice required by subsection (c) of this Section, any person who may be adversely

> affected by an Agency decision on the permit application may petition the Agency to intervene before the Agency as a party. The petition to intervene shall contain a short and plain statement identifying the petitioner and stating the petitioner's interest. The petitioner shall serve the petition upon the applicant for the permit and upon any other persons who have petitioned to intervene. Unless the Agency determines that the petition is duplicitous or frivolous, it shall admit the petitioner as a party.

After the Agency makes its final decision, petitions for review can be filed with this Board only by individuals who were granted status as a party. Section 40 (c).

In contrast, the SB-172 procedures do not mandate petitions to intervene or admission as a party as necessary prerequisites to filing a petition for review with this Board. Since the General Assembly specifically required petitions to intervene and full party status as an element of standing to appeal under Section 39.3 and did not require those actions under SB-172, the Board concludes that "party" status at the county board hearing is not a necessary element for standing to file a petition for review.

The SB-172 procedures only require individuals to "participate" in the county board hearing. Black's Law Dictionary defines "participate" as:

> **PARTICIPATE.** To receive or have a part or share of; to partake of; experience in common with others; to have or enjoy a part or share in common with others; partake; as to "participate" in a discussion. To take a part in; as to participate in joys or sorrows. Bew v. Travelers' Ins. Co., 95 N.J.L. 533, 112 A. 859, 860, 14 A.L.R. 983. To take equal shares and proportions; to share or divide. 6 Ch. 696. Participate in an estate. To take as tenants in common. 28 Beav. 266. (Black's Law Dictionary, 1275 (4th ed. 1968))

This definition, especially the "experience in common with others" , is sufficiently broad to cover those individuals who take the time and effort to attend the public hearing and listen to the testimony, even if they do not ask questions or make statements on the record. For these reasons the Board holds that personal attendance at a county board hearing is adequate participation to meet this element of standing.

The question of whether Mr. Heil participated in the public hearing was explored at his deposition (the deposition was admitted at the PCB hearing (P.C.B.H., p 88)):

[Questioning of Mr. Heil by Mr. Moran]

Q Did you attend that meeting?

A No, sir.

* * *

Q Did you instruct anyone to appear on your behalf at the hearing?

A Yes.

Q Who did ask to appear on your behalf?

A My attorney.

Q Who is that?

A. Mr. McNamara.

Q Did you request anyone else to appear in your behalf?

A No.

* * *

Q ...did you intend to object or send anyone to object in your behalf to any of the six statutory criteria?

A Yes.

Q Do you know which of the six statutory criteria?

A My attorney handled it.
No, I don't.

Q Okay. Did you instruct your attorney to retain any expert witnesses to testify with respect to the siting application?

A I did not instruct him to retain any expert witnesses. I did not instruct him not to, I instructed him to act on my behalf. (Deposition Transcript, pp. 31-34)

Consequently, the Board finds that Mr. Heil did not attend the public hearing in person. The question of whether Mr. Heil was represented at the Kane County public hearing must be viewed in light of the transcripts and evidence from that hearing. At the beginning of the hearing, the hearing officer asked for the entry of appearances:

> HEARING OFFICER AKEMANN: Are there any other attorneys of record that wish to identify themselves and enter their appearances today?
>
> MR. MC NAMARA: Thomas W. McNamara and Sandra Brown from the firm of Jenner & Block, One IBM Plaza, Chicago, representing Peter Valessares, V-A-L-E-S-S-A-R-E-S. (C.B.H., p. 12)

Mr. McNamara did, however, mention Mr. Heil's name during closing arguments:

> MR. MC NAMARA: May I proceed?
>
> HEARING OFFICER AKEMANN: Yes.
>
> MR. MC NAMARA: I represent Peter Valessares, who has been a resident of Kane County for the past nine years. He's a resident of the City of St. Charles. He does not live in immediate proximity to the landfill, but he is an interested and concerned citizen of the County.
>
> He objects to the proposed expansion of the Settlers Hill Landfill. From our review of the application, it appears that the existing Settlers Hill Landfill has an estimated life of nine years, based upon its present acceptance of 1,400,000 cubic yards of refuse per year.
>
> * * *
>
> I would urge the Board to get an independent appraisal of its value before any deal is negotiated with Waste Management or any other party.

> I represented Edward F. Heil, the former owner of E & E Hauling, Inc., which operates the Mallard Lake Landfill. Mr. Heil is experienced in the landfill business, and he advises me that any landfill operator would be willing to pay royalties of at least 50 percent more than Waste Management is presently paying and would still be able to make a very handsome profit. (C.B.H., pp. 126-128)

In addition, Mr. McNamara introduced a newspaper article at the public hearing which mentions both Waste Management and Mr. Heil (C.B.H., Valessares Ex. 2). Throughout the proceeding, Waste Management asserted that Mr. Heil was not represented at the hearing. At no point did Mr. Heil assert that he was actually represented at the public hearing. These facts do not demonstrate that Mr. Heil was represented at the public hearing.

In summary, the Board finds that Mr. Heil did not attend and was not represented at the public hearing conducted by Kane County. Consequently the Board finds that Mr. Heil has not "participated in the public hearing conducted by the county", and that Mr. Heil lacks standing to appeal the decision of Kane County to this Board. Accordingly, Waste Management's motion to dismiss Mr. Heil is granted.

The second element of standing is that the petition for review not be frivolous or duplicitous. This Board has consistently held that a petition is frivolous if it seeks relief this Board is not empowered to grant, and a petition is duplicitous if the same controversy is pending in another forum. Kenneth & Libby McNeil v. Continental Grain, PCB 86-44, April 10, 1986; Patrick Brandle et al. v. Donald Ropp, PCB 85-68, June 13, 1985; WIPE v. PCB, 55 Ill.App.3d 475 (First District, 1977). Here, the petition seeks to have the county board decision reversed. Since this Board has the statutory authority to reverse the Kane County decision, the petition is not frivolous. There is no assertion that this controversy is pending in another forum. Therefore, the petition is not duplicitous.

The last element of standing is whether the petitioner is "so located as to be affected by the proposed facility". Waste Management asserts in their motion to dismiss that Mr. Valessares is not so located as to be affected by the facility because : (1) he does not live within 400 feet of the proposed facility and is therefore not entitled to statutory notice, and (2) he does not live within the area intended to be served; the area impacted by public health safety and welfare concerns; the "surrounding area", as that term is used in Criteria Nos. 3 and 5; or the area impacted by traffic. Thus, he is not impacted under any of the statutory factors for decisionmaking.

In response, Mr. Valessares asserts that he is so located as to be affected and that Waste Management has waived objection to Mr. Valessares standing by failing to object at the Kane County hearing.

There is substantial law holding that the waiver rule applies in Illinois, applies to the issue of standing, applies to Pollution Control Board review of proceedings below and applies to the SB-172 process. Within the context of today's proceeding, the waiver rule would preclude raising a defense to standing for the first time before this Board if it could have been raised at the county board hearing below.

In Village of Hillside v. John Sexton Sand and Gravel, 113 Ill.App.3d 807, 447, N.E.2d 1047 (First District, March 31, 1983), the court held:

> We find it unnecessary to review further the arguments presented challenging Sexton's standing to apply for and receive transfer of Edison's permits, or the new supplemental development permit. The issue of Sexton's standing was not raised by objection before the Agency hearings, and we hold, therefore, that plaintiff has waived this issue. A defense not presented in the administrative hearing may not be raised in the court on review or upon appeal. (Robert S. Abbot Publishing Co. v. Annunzio (1953), 414 Ill. 559, 112 N.E.2d 101; Environmental Protection Agency v. Pollution Control Board (1976), 37 Ill.App.3d 519, 346 N.E.2d 427; Gordon v. Department of Registration & Education (1970), 130 Ill.App.2d 435, 264 N.E.2d 792.) This rule is based on the requirement of orderly procedure and the justice of holding a party to the results of his own conduct where otherwise a party would surprise his opponent and deprive him of an opportunity to contest the issue in the administrative hearing. (Robert S. Abbott Publishing Co.)

A similar result was reached in Mathers v. Pollution Control Board, 107 Ill.App.3d 729, 438 N.E.2d 213 (Third District, 1982). Mathers concerned an Agency denial of a landfill permit requested by Donald J. Hamman. On Appeal of the Agency decision to the Pollution Control Board, the Board granted intervention to various parties prior to a rehearing over certain objections raised by Hamman. The Board's decision was appealed to the Third District and Hamman again challenged the intervenors standing:

> Hamman has moved to strike and dismiss the initial brief submitted by the Township of Wheatland, Lampton, and Pentzien and to dismiss the three from this appeal. He argues that the township never petitioned for intervention at the administrative level, and that the latter individuals have not shown how they would be adversely affected by the Board's order. In their reply brief, all appellants except Greenberg respond, inter alia, that these arguments have been waived as they were not advanced at the administrative level. Hamman, in his supplemental brief, responds that he could not have known the township was claiming intervenor's status until it filed its brief in this court, and that Lampton and Pentzien did not petition to intervene in a timely fashion. This prompted the second motion taken with the case. All appellants except Greenberg moved to strike Hamman's supplemental brief, contending, inter alia, that while the timeliness issue was raised at the administrative level, it was not raised at the time of Hamman's initial objection to the individual intervenors on the ground that they were not adversely affected. (id., at 216)

The court considered the standing issues which could not have been raised below and the standing issues which had been raised in a timely manner below. The court declined ruling on the standing issues which could have been raised in a timely manner below but were not raised:

> As for Lampton and Pentzien, we find Hamman's objection to their intervention at the administrative level on the basis of untimeliness to be waived in this court as it itself was untimely. (id., at 217)

The waiver rule has also been considered by the appellate courts in reviewing SB-172 proceedings regarding issues raised on appeal but not raised at the county board hearings. E & E Hauling v. Pollution Control Board , 116 Ill. App. 3d 586 (Second District, June 15, 1983).(Hereinafter "E & E #1") E & E Hauling, Inc. v. IPCB, 107 Ill. 2d 33 (1985)(Hereinafter "E & E #2). Concerned Citizens Group v. Pollution Control Board , Slip Opinion, Case No. 5-85-0383, (Fifth District, April 29, 1987).

The Board believes this represents an appropriate standard for our review of SB-172 proceedings; where an issue could have been raised at the county board hearing and it was not raised, the issue may not be raised for the first time on review by this Board.

The question then becomes whether Waste Management could have raised a timely objection to Mr. Valessares standing at the hearing before the county board. The Board believes that such action was not possible. Waste Management's primary argument is the Mr. Valessares is not "so located as to be affected". That language comes from Section 40.1 (b) of the Act which provides guidance on who may appeal county board determinations to this Board. Section 40.1 (b) does not provide standards for who may participate in county board hearings. The statutory provisions governing the public hearing are located in Section 39.2 of the Act; that Section does not limit participation in the public hearing to those who are "so located as to be adversly affected".

The Board finds that Waste Management could not have raised the issue of Mr. Valessares "standing" to appeal to this Board as a legitimate argument against Mr. Valessares ability to participate in a public hearing held before the county board. Consequently, the Board finds that Waste Management has not waived the right to challenge Mr. Valessares standing here.

The substantive arguments that Waste Management presents against Mr. Valessares standing are therefore appropriate for Board review. It is not disputed that Mr. Valessares lives between five and six miles from the proposed facility. Waste Management argues that this distance is too great for Mr. Valessares to be affected by a determination on any of the statutory criteria.

The Board sees some inconsistency in the position Waste Management takes in the motion to dismiss and their application for site approval. That application includes a "Report on Need for Expansion of the Settler's Hill Sanitary Landfill" (hereinafter "Report"). The report is intended to demonstrate that the "need" criterion of SB-172 is satisfied. Section 39.2 (a)(1). The report contains numerous references to the geographic and distance factors that affect need:

> The communities in Figure 1 are within an approximate ten mile radius of Settler's Hill. Hence, they are well within the fifteen mile radius which is considered as the typical service area radius for solid waste disposal facilities. This radius is based upon time and distance costs encountered by waste haulers. The disposal cost to customers in these communities would increase markedly if transportation distances were increased to the sites 45 miles away. (Report, p. 2)

* * *

> A number of other issues also affect the need for the expansion of Settler's Hill landfill. Among these are the remaining service lives of all disposal facilities in Northeastern Illinois, the effects of recycling and other alternative forms of disposal, and timeframes needed to develop new facilities. (Emphasis added) (Report, p. 5)

The report proceeds to evaluate the approximately 10 disposal facilities within 30 miles of Settler's Hill (Report, Table 2) and to evaluate the approximately 26 waste disposal facilities in Northeastern Illinois (Report, Table 3).

Waste Management asserts that the proposed facility is needed to accommodate waste generation from 1995 to about 2010:

> The current site is projected to be completely filled in about 1995. Camiros found that other sites in the region are projected to be completely filled at about the same time as the existing Settler's Hill Site. Therefore, it is unlikely that the service area can be served by alternate facilities and there is a need to provide solid waste disposal capacity to the service area after about 1995. The proposed expansion of the Settler's Hill Site would provide disposal capacity for the proposed service area until about 2010. (Report, Coverleaf)

After 1995, Waste Management shows only four operating landfills in Northeastern Illinois (Report, Figure 2), and the proposed facility would certainly be the closest to the Valessares property. The Board is unable to determine how facilities located over 30 miles away would "affect" the need criteria, while a resident located 5-6 miles away would not be "affected" by the need criteria.

Mr. Valessares challenges each and every factual and legal finding of Kane County (Petition for Review, Paragraph 15), which would certainly include the need criteria. His attorney cross-examined on the need criterion at the county hearing (C.B.H., pp. 18-20). His attorney questioned need in closing argument (C.B.H., p.126). Mr. Valessares has expressed concern about whether there is an immediate need for the facility in his deposition (Valessares Deposition, pp. 30,43,52). With these facts, the Board must find that Mr. Valessares is , "so located as to be affected" by the determination on need. Consequently, Mr. Valessares has standing to pursue this review.

On May 4, 1987, Waste Management filed a response to petition for leave to intervene. That response asserts that intervention by Mr. Cooper should be denied in that he seeks to raise new substantive issues and that an intervenor must "take the case as he finds it". The original petition for review in this matter challenges "each and every factual and legal finding, decision, order and determination favorable to the application made below, as well as the lack of fundamental fairness..." (Petition for Review, Paragraph 15). Since Mr. Cooper's arguments fall within those parameters, the Board will not dismiss his intervention.

In summary, the Board finds that Mr. Valessares has standing to petition for review, that Mr. Cooper's intervention is appropriate, and that Mr. Heil is dismissed for lack of standing.

## FUNDAMENTAL FAIRNESS

The Petitioner (Valessares) asserts that the proceedings below were fundamentally unfair because of ex parte contacts and conflicts of interest. Concerning the ex parte issue, Valessares argues that certain meetings between Waste Management and a county board member while the application was under consideration render the decision invalid. Concerning the conflict of interest issue, Valessares argues the three factors influenced the decision in a manner that invalidates the SB-172 determination. The first factor concerns contractual arrangements between Kane County and Waste Management regarding ownership and financial arrangements for the existing and proposed facility. The second factor concerns Waste Management's contingent decision to build a national laboratory adjacent to the proposed facility, once it was approved. The national laboratory would be a $15-16 million enterprise that would bring 150 scientific jobs to the area and provide a new sewer line from the City of Geneva. The third factor concerns a $1.2 million gift from Waste Management to Kane County for the construction of a minor league baseball stadium on land adjoining the existing Settler's Hill facility.

The issues which Valessares raises concerning ex parte contacts and conflict of interest have been before this Board and the courts in another proceeding which deserves particular attention. That case involved the application of E & E Hauling (hereinafter "E & E") and the DuPage County Forest Preserve District (hereinafter "the District") to the County Board of DuPage for SB-172 approval to expand the Mallard Lake Landfill. The DuPage County approval for Mallard Lake was appealed to this Board on June 1, 1982. That appeal particularly focused on fundamental fairness as it related to conflict of interest and ex parte contacts. On August 30, 1982, this Board overturned the county board decision on grounds of fundamental unfairness and remanded the matter for additional hearings. The Board's decision was appealed to the Second District which issued an

opinion on June 15, 1983, which focused on the conflict of interest and ex parte contact issues. E & E #1 The matter was appealed to the Illinois Supreme Court which issued its opinion on July 17, 1985. E & E #2 Both the Second District and the Supreme Court affirmed the DuPage County Board decision.

In E & E #1 the Second District reviewed the relevant law on ex parte contacts and chose to apply the PATCO standard to county board SB-172 proceedings. PATCO v. Federal Labor Relations Authority, 685 F. 2d 547 (D.C. Cir., 1982). Under PATCO, the moving party must demonstrate that the decisionmaking process is "irrevocably tainted", and the decision to vacate on review is an exercise of equitable discretion.

After reviewing the facts regarding ex parte contacts, the Second District concluded that the contacts were improper, and certainly ill-advised, but that they did not constitute reversible error. The ex parte contacts which the Second District reviewed all took place after the application for site suitability had been filed, but before the decision on the application had been rendered. The ex parte communications took place between representatives of E & E and the Finance Committee of the DuPage County Board. The Second District's summary of those five Finance Committee meetings show that the subject matter included a 1981 agreement under which E & E operated the existing facility, proposed conditions under which E & E would operate the proposed facility, financial arrangements with the County, funding for post-closure care, and landfill liability. At those meetings, the conditions which would be placed on the operation of the proposed facility were determined, "as negotiated by attorneys for all parties". The Second District found it significant that the petitioner did not, apparently, introduce evidence or argument on the desirability of the landfill expansion at the Finance Committee meetings, and found that the process had not been shown to be "irrevocably tainted". The Second District's holding on this issue was not disturbed by the Supreme Court in E & E #2.

The facts in the present proceeding before the Board are quite similar to those in E & E. After the application for site approval had been filed, but before a final decision had been reached, one county board member (Mr. Phillip Elfstrom) met approximately ten times with representatives of Waste Management. Those meetings were not public hearings within the meaning of SB-172. The subject matter of those meetings was amendments to a contract which governed Waste Management's operation of the existing landfill and which might govern operations of the proposed facility. The discussions focused on the financial arrangements between the County and Waste Management and resulted in amendments to the contract regarding financial benefits that would accrue to the County and regarding a post-closure care fund. The amended contract was presented to the Executive

Committee of the Kane County Board on February 5, 1987, and was presented to the full Kane County Board on February 10, 1987, prior to the vote to approve site location suitability. During the meetings between Mr. Elfstrom and Waste Management, there was no discussion of the pending application for site approval (P.C.B.H., p. 72).

The Petitioner has not presented, and the Board has been unable to find, any significant difference between the factual situation here and the facts in E & E. Consequently, the Board finds that the meetings constituted ex parte contacts and that the meetings were improper and ill-advised, but the meetings do not constitute reversible error. The Petitioner has failed to demonstrate that the ex parte meetings "irrevocably tainted" the decisionmaking process.

The second argument Petitioner presents regarding fundamental fairness is that Kane County had an improper conflict of interest which related to the financial arrangements with Waste Management. Again, this issue is legally and factually similar to the E & E proceeding and the Board must look to those court opinions for guidance. Because the Supreme Court in E & E #2 did not accept the reasoning of the Second District in E & E #1 ,only the Supreme Court Opinion is relevant.

In E & E #2 the Supreme Court was presented with a factual scenario where the county board was, in effect, one of the co-applicants for site approval, the county board, in effect, owned the land on which the proposed facility would be located, the county board had taken prior legislative action to endorse the filing of the application for site approval, and the county board would receive significant sums of money under contract if the site was approved. The Court found this did not overcome the presumption that elected officials should be considered to have acted without bias and in a manner that best serves the interests of their governmental units and constituents.

In today's proceeding, this Board is presented with a factual scenario where the county board owned or was acquiring the land on which the proposed facility would be located[1], took

[1] P.C.B.H., Pet. Ex. No. 7 - This agreement allows Kane County to purchase property from Waste Management for $430,248.38. The agreement contemplates that Waste Management will operate a sanitary landfill on the property and authorizes Waste Management "to apply for and attempt to secure" siting approval for the property.

prior legislative action to endorse the filing of the application for site approval[2], and the county board would receive significant sums of money under contract if the site was approved[3].

The Board does not believe that the national laboratory has a direct bearing on the conflict of interest issue. The $15 million, scientific jobs, and sewer line are not purported to be a gift to the county for use in the county budget. These items are ancillary activities to the proposed facility which would provide some unquantified benefit to the county's overall economy. The Board is unwilling to hold that ancillary benefits to a county's economy should be considered a conflict of interest rendering an SB-172 determination invalid.

The third factor also seems irrelevant to today's determination. The preliminary request to Waste Management for a donation was made before the application was filed with the county and that request was turned down (P.C.B.H., 62-63). The donation by Waste Management was made after the proposed facility had already been approved by the county; the record shows no discussions about the gift during the time the county was considering the application (P.C.B.H., p 73).

Again, the Petitioner has not presented, and the Board cannot find, any significant difference between this factual scenario and the one presented to the Supreme Court in E & E #2. Consequently, the Board finds that the petitioner has not demonstrated a conflict of interest or bias that would render the Kane County decision invalid for lack of fundamental fairness. In E & E #2, the Supreme Court held that a conflict of interest could arise where payments to the county generated a "substantial portion" of the county's annual revenues. Ward v. Village of Monroeville, 409 U.S. 57, 34 L.Ed 2d 267, 93 S.Ct. 80 (1972). No such showing is made in today's proceeding.

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[2] C.B.H., Hearing Officer Ex. No. 4 - Kane County Resolution 86-63 authorizes Waste Management to seek site location approval for land which Kane County owns, or has an option to buy. The resolution specifically does "not give approval to or prejudge in any manner" the subsequent application.

[3] P.C.B.H., Pet. Ex. Nos. 1 & 2 - The Amended and Restated Real Estate Lease provides that Kane County receive 10% of gross receipts or the percentage paid by Waste Management to any unit of local government contiguous to Kane County, whichever is higher. The agreement provides for imposition of a 0.10¢ per yard fee for post-closure care.

The Board believes it is important to note at this point what this proceeding does not involve. The assertions regarding ex parte contacts, conflict of interest, and bias have all involved the multiple official duties of elected county officials. There has been no claim that any county official was acting in a personal manner or would receive the slightest personal benefit from the challenged actions. Today's Opinion should not be construed as controlling in proceedings involving personal aggrandizement by SB-172 decisionmakers.

In summary, the Board finds that the Valessares has failed to demonstrate that the proceedings below were fundamentally unfair due to conflict of interest, bias, or ex parte contacts.

Mr. Cooper has challenged the fundamental fairness of the proceedings below for different reasons. Mr. Cooper asserts that the proceedings below were fundamentally unfair because Kane County did not make an affirmative effort to test or inquire about the assertions made by Waste Management at hearing and in their application. Mr. Cooper has demonstrated that no technical experts (other than those employed by Waste Management) advised the county board on the statements and exhibits supporting the application. Mr. Cooper points to several SB-172 proceedings which demonstrate that other county boards did retain independent experts to offer advice on the technical assertions of the site applicants. However, Mr. Cooper has not provided a legal theory to demonstrate that county boards have a statutory duty to retain such experts or why failure to do so would render the proceedings below fundamentally unfair. As the Board can find no such duty placed on the county board, the failure to do so does not constitute a lack of fundamental fairness.

Accordingly, the Board finds that there is no showing that the proceedings below were not fundamentally fair.

## THE SUBSTANTIVE CRITERIA

Section 39.2(a) of the Act requires a local governmental entity to apply seven criteria when making the determination to approve/disapprove a new regional pollution control facility. The seven criteria are:

1. the facility is necessary to accommodate the waste needs of the area it is intended to serve;

2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

3. the facility is located so as to minimize incompatibility with the character of the surrounding area and minimize the effect on the value of the surrounding property;

4. the facility is located outside the boundary of the 100 year flood plain as determined by the Illinois Department of Transportation, or the site is flood-proofed to meet the standards and requirements of the Illinois Department of Transportation and is approved by that Department;

5. the plan of operations for the facility is designed to minimize the danger to the surrounding area for fire, spills, or other operational accidents;

6. the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows; and

7. if the facility will be treating, storing or disposing of hazardous waste, an emergency response plan exists for the facility which includes notification, containment and evacuation procedures to be used in case of an accidental release.

As the present application does not cover the treatment, storage or disposal of hazardous waste, only the first six criteria are relevant.

Section 40.1(b) of the Act (when read in conjunction with Section 40.1(a)) provides that the burden of proof is on the petitioner. The applicant must prove to the county board by a preponderance of the evidence that the facility satisfied all seven criteria. However, in order to overturn a county board decision, a petitioner must prove to this Board that the local government entity's decisions on the seven criteria were against the manifest weight of the Evidence. E & E #1.

The Board's review of Petitioner's claim regarding the six criteria is substantially complicated by poor development of the issues. The Kane County determination on these issues is clearly challenged (Pet. For Review, par. 15) and Mr. Valessares has questioned the criteria regarding need (No. 1); health, safety and welfare (No. 2); and facility operations (No. 5), at the county board hearing (C.B.H., pp. 18-20, 35-40, 72-74, 126-135). However, Petitioner has failed to provide this Board with legal arguments or factual assertions from the record, which

would demonstrate why the county board determination is against the manifest weight of the evidence.

Petitioner's most clearly presented argument is that the existing facility has a remaining useful life of 8 to 9 years and that site approval and preparation of a landfill expansion normally takes only 2 to 3 years (C.B.H., p. 19). Based on these facts alone, this Board cannot determine that Kane County's decision was against the manifest weight of the evidence. Need certainly has been demonstrated at some point in the future (Report). Kane County may well have determined that thoughtful and deliberate long-term planning for future landfill capacity was in the county's best interests. The Board finds that Kane County's determination that the facility is necessary to accommodate the waste needs of the area it is intended to serve is not against the manifest weight of the evidence.

Petitioner's remaining arguments against the Kane County determination are so poorly developed that the Board cannot clearly define what the true nature of the conflict might be. Consequently, the Board finds that Mr. Valessares has not demonstrated that the decision of the Kane County Board is against the manifest weight of the evidence. Where a Petitioner fails to make a significant or detailed showing that a county board determination is in error, the Board can determine that petitioner has failed to carry the burden of demonstrating that the determination is in error. The Board need not provide a detailed review of the facts and evaluate all arguments which the petitioner might have made. Concerned Citizens Group et al. v. County of Marion, PCB 85-97, at p. 3, November 21, 1985.

Mr. Cooper's arguments are more clearly focused, particularly on the health, safety and welfare criterion. Mr. Cooper asserts that he and his grandchildren drink water from the Geneva water supply and that one of the wells for that source is on property immediately adjacent to the proposed expansion (Pet. to Intervene, par. 2). Mr. Cooper asserts that the proposed facility might accept toxic materials and that the toxic materials might leak. Mr. Cooper further asserts that reports introduced at the county board hearing show Waste Management disclaims responsibility for the quantity and toxicity of waste accepted at the facility (C.B.H., Cooper Ex. Nos. 1 & 2).

The reports Mr. Cooper introduced at hearing are waste analysis reports prepared by Waste Management, and appear to be chemical analyses of two wastes received at the existing Settler's Hill facility in 1983. The report forms are sent to Kane County (C.B.H., p. 81). Near the bottom of the chemical analysis form is a statement, "This report has been prepared for the exclusive use and benefit of Waste Management. No representation concerning sample validity or analytical accuracy or completeness is hereby made to any other person receiving this

report." The form appears to be an internal working document (Form WMI-52; Copyright 1982, Waste Management) rather than a governmental form submitted to fulfill a regulatory requirement. The Board does not believe that a disclaimer of accuracy on an internal working document can be construed as an abdication of responsibility by Waste Management for compliance with the laws governing waste disposal in landfills. There is a detailed framework of statutory and regulatory law in Illinois governing the construction and operation of landfills. There is no evidence in the record that Waste Management intends to accept waste at the proposed facility beyond those permitted by law.

The Board finds that Mr. Cooper has not made the requisite showing regarding leakage of pollutants from the proposed facility. The only evidence in the record regarding construction of the facility, permeability of the liner, and groundwater flow, come from Waste Management (Application for Site Location Approval, Part 2). That information shows that the area has 10 feet or more of low permeability clay ($10^{-7}$ cm/sec or less), that at least three feet of the clay will be recompacted for a liner, that groundwater flow is toward the west (away from area wells), and that groundwater monitoring will be conducted to ensure the integrity of the proposed facility. Kane County determined that the proposed facility is so designed, located and proposed to be operated as to protect public health, safety and welfare. Mr. Cooper has not demonstrated that determination to be against the manifest weight of the evidence.

As the determination of the Kane County Board has not been demonstrated to be against the manifest weight of the evidence on any of the relevant criteria, that determination is affirmed.

ORDER

The February 10, 1987, decision of the Kane County Board granting site location suitability approval to Waste Management for the proposed Settler's Hill II facility is hereby affirmed.

IT IS SO ORDERED

Board Member J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 16th day of July, 1987, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board