BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROXANA LANDFILL, INC. Petitioner, vs. VILLAGE BOARD OF THE VILLAGE OF CASEYVILLE, ILLINOIS; VILLAGE OF CASEVILLE, ILLINOIS; and CASEYVILLE TRANSFER STATION, L.L.C. Respondents.	)	No. PCB 15-65 (Pollution Control Facility Siting Application)
VILLAGE OF FAIRMONT CITY, ILLINOIS, Petitioner, vs. VILLAGE OF CASEYVILLE, ILLINOIS BOARD OF TRUSTEES and CASEYVILLE TRANSFER STATION, LILAC. Respondents.	)	No. PCB 15-69 (Pollution Control Facility Siting Application)

NOTICE OF FILING

TO:

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Hearing Officer Carol Webb *(Carol.Webb@illinois.gov)*	Penni S. Livingston 5701 Perrin Rd. Fairview Heights, IL 62208 (*penni@livingstonlaw.biz*)	

PLEASE TAKE NOTICE that on November 7, 2014, we filed electronically with the Illinois Pollution Control Board, (1) this Notice of Filing and (2), the attached **Petitioner Roxana Landfill, Inc.'s Post-Hearing Reply Brief**, a copy of each is attached and electronically served upon you.

Dated: November 18, 2014

PETITIONER ROXANA LANDFILL, INC.

Clark Hill PLC
150 N. Michigan Ave., Suite 2700
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BY: /s/ Jennifer J. Sackett Pohlenz
One of its attorneys

PROOF OF SERVICE

I, Jennifer J. Sackett Pohlenz an attorney, certify[1] that I served the above referenced documents on the persons identified above by e-mail, at the email addresses listed, before 5:00 p.m. on this 18th day of November 2014.

/s/ Jennifer J. Sackett Pohlenz

[1] Under penalties as provided by law pursuant to Illinois Rev. Stat. Chap. 110-, Sec. 1-109, I do certify that the statements set forth herein are true and correct.

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PETITIONER ROXANA LANDFILL, INC.'S POST-HEARING REPLY BRIEF

Now comes Petitioner Roxana Landfill, Inc., by and through one of its attorneys, Jennifer J. Sackett Pohlenz at Clark Hill PLC, and files this Post-Hearing Reply Brief in support of its Post-Hearing Brief and in opposition to Respondent Caseyville Transfer Station, LLC's [sic] and Respondent Caseyville's Post-Hearing Brief in Reply to the Post Hearing Briefs of Petitioners Roxana Landfill, Inc. and Village of Fairmont City ("Response Brief").

A. INTRODUCTION

Respondent Caseyville Transfer Station, L.L.C. ("CTS") and the Village of Caseyville ("Village")[2] want the Illinois Pollution Control Board ("Board") to ignore Section 39.2 of the Illinois Environmental Protection Act ("Act"), and rely on attorney hyperbole about "oligopolies." (CTS & Village's Response p. 3). CTS and the Village fail to present this Board with legal argument based on the evidence in the Record and pile-on improper post-hearing comment, without citation to and outside of the Record. The Board should all comments in the

[2] The Village Board was not referenced in the CTS and Village's joint "Post-Hearing Brief in Reply to the Post-Hearing Briefs of Petitioners Roxana Landfill, Inc. and Village of Fairmont City."

Response Brief that are not supported by citations to the Record.[3] Further, the Board should reverse the Village's decision in this matter for the reasons stated below.

B. ARGUMENT

The CTS's siting approval by the Village Board should be **(1)** reversed as it is against the manifest weight of the evidence; **(2)** vacated as there is no evidence that the Village of Caseyville filed the siting application on the date stated in the pre-filing notice under Section 39.2 of the Act; and, **(3)** vacated and remanded based on the fundamental unfairness of the public hearing. In the interest of efficiency, Petitioner Roxana Landfill, Inc. ("Roxana") joins in the Post-Hearing Reply of the Village of Fairmont City and adopts that Reply Brief as if restated herein.[4]

(1) CTS's Siting Approval By The Village Board Is Against The Manifest Weight Of The Evidence

i. The Village Board's Decision On Criterion 2 Is Against The Manifest Weight Of The Evidence

CTS and the Village misstate the law. Respondents refer this Board to *Wabash and Lawrence Counties Taxpayers and Water Drinkers Ass'n v. Pollution Control Board*, 555 N.E.2d

[3] The Act "requires that hearings conducted by the Board on . . . siting decision are to be based 'exclusively on the record before the county board or governing body of the municipality.'" *Am. Bottom Conservancy, et al. v. Village of Fairmont City, et al.* ,PCB No. 01-159 (October 18, 2001) quoting 415 ILCS 5/40.1(b). "All public comments that are submitted after a hearing must present argument or comments based on the evidence contained in the record." *Id.* citing 35 Ill. Admin. Code 101.628.(c)(2). The unsupported and uncited to references in Respondents' Response should be stricken as they are not based in the Record. For example, Respondents' allegation that Roxana was "engaging in ex parte [sic] communication" is not evidence in the Record. There is absolutely no evidence, be in in the Record or in an offer of proof (which Respondents fail to distinguish) of any contact between any participant that occurred after the Village Board and Village had knowledge that CTS' siting application was on Village property that was outside the record between one in a decision-making role and a party before it.

[4] The arguments discussed in the Village of Fairmont City's Opening Brief and the Standard of Review, because adopted by Roxana, are not discussed or repeated in this Brief.

1081, 1086 (5th Dist. 1990) for legal support of Respondents' allegation that "the fact that a facility will be designed and operated in accordance with . . .[the Act]. . . is sufficient evidence for approval. . ." (Response p. 12). In the context of this case, where there is no engineer or expert report and no sworn testimony, the concept of, essentially stating the law is met being sufficient for siting approval is absurd. Further, that is not what the 5th District Appellate Court holds in *Wabash.*

The applicant in *Wabash,* unlike CTS, presented witnesses under oath and subject to cross-examination at the siting hearing. *Id.* In addition, in *Wabash* the testifying experts disagreed, unlike this case, in which only one person, an expert witness, Dustin Riechmann testified that Criterion 2 was **not** met and his was the only testimony concerning Criterion 2.

Likewise, *Tate v. Pollution Control Board,* 544 N.E.2d 1176 (4th Dist. 1989), relied on by Respondents, does not support their position. In *Tate,* unlike this case, witnesses testified on behalf of the applicant. In *Tate,* unlike this case, there was testimony supporting the Section 39.2 criteria. This is not a case about "anticipating and addressing any objections" as argued by Respondents – rather, it is a case where the applicant has not met its *prima facie* burden.

This is not a case about the detail level in drawings, as argued by Respondents, it is a case in which there the only "detail" is a crude schematic that does not even identify ingress and egress to the proposed facility. (05/29/14 Tr. 110-111; E-0169-0170). An applicant is required to provide ***sufficient detail*** to meet Section 39.2 of the Act. That simply was not done by CTS, rendering the Village Board decision against the manifest weight of the evidence.

Dustin Riechmann an Illinois Professional Engineer, adjunct professor at Southern Illinois University, and a professional traffic operations engineer, who has prepared more than 50 on-site traffic plans and over 100 traffic studies, testified about the failures of CTS and its proposed site. (05/29/14 Tr. 104-124; E-0163-0183). John Siemsen, allegedly an attorney-turn-

waste-entrepreneur spoke, without being under oath, and without presenting for cross-examination or even identifying the persons who prepared the siting application, in a conclusory manner that Criterion 2 was met.

Respondents have failed to present this Board with even a single case stating that an a siting decision is not against the manifest weight when the only testimony is expert testimony in opposition to the siting application and it is not contradicted by anything in the Record. Does the Board want to set the precedent that a crude schematic presented by an attorney in an unsworn comment is all that is needed to meet Criterion 2?

Therefore, the Village Board's approval of criterion (ii) is against the manifest weight of the evidence. The evidence clearly showed that:

a. There was no expert report or testimony in support of Criterion 2 presented by CTS;

b. The siting application and oral comment presented by CTS lacked any detail that would be necessary to meet the burden of proof on Criterion 2;

c. There are four residential zoned parcels each of which is located within 1000 feet of the proposed transfer station;

d. The location of the proposed transfer station violates Section 22.14(a) of the Act;

e. There is no site plan for the proposed facility;

f. The proposed facility violates AASHTO site distances for exiting vehicles; and

g. The proposed facility fails to disclose and address significant encroachment of transfer trailers exiting the proposed facility into the opposite lane of traffic on Bunkum Rd.

ii. The Village Board's Decision That Criterion 6 Was Met Is Against The Manifest Weight Of The Evidence

At a bare minimum, an applicant is required to provide a traffic pattern design to and from the proposed facility and show how that design minimizes the impact on existing traffic flows. (415 ILCS 5/39.2(vi)). CTS does not provide any traffic pattern design to and from the facility. Indeed, it is questionable whether CTS can provide such a design without an engineer, and be in compliance with the Illinois Professional Engineering Practice Act of 1989 (225 ILCS 325).

CTS and the Village respond to the complete lack of evidence supporting Criterion 6 in the siting application and otherwise in John Siemsen's unsworn presentation, by arguing "Exhibit 2, Figure 2" is sufficient to meet Criterion 6 and trying to argue that the testimony of Dustin Riechmann does not provide a "basis for denial." (Response p. 19). Both arguments must fail.

First, Figure 2 is the Arial Land Use Map in the siting application (A-0049) and provides no information concerning traffic patter design or existing traffic flows. Assuming Respondents intended to reference Figure 7 titled Area Roadways (A-0054), this too provides no information concerning traffic patter design or existing traffic flows. Figure 6 in the siting application (A-0053) titled Site Traffic Pattern Map is a crude on-site schematic and likewise fails to support Criterion 6.

Second, there is no basis in the Record for approval of Criterion 6 – there simply is no traffic pattern design and no data concerning existing traffic flows. Without these basics, how can any applicant meet a *prima facie* case. Even without Dustin Riechmann's testimony, the

Village Board's decision on Criterion 6 must be reversed, as CTS never met its *prima facie* burden. Dustin Riechmann's testimony only reinforces CTS's failure to meet Criterion 6 and the Village Board's decision being contrary to the manifest weight of the evidence. Respondents apparently argue that Riechmann's testimony is "premature," because CTS has not done what it was supposed to do to meet its *prima facie* burden, but plans on doing that after siting when it has to get permitted by the County DOT. (Response pp. 18-19). Respondents' argument makes no sense and, if anything, supports the reversal of the Village Board on Criterion 6. A siting applicant cannot present its evidence and prove its case after the public hearing, and after the opportunity for public participation in the siting forum has passed.

Therefore, the Village Board's approval of criterion (vi) is against the manifest weight of the evidence. The evidence clearly showed that:

a. There was no expert report or testimony in support of Criterion 6 presented by CTS;

b. There was no traffic study presented by CTS and the siting application and oral comment presented by CTS lacked any detail that would be necessary to meet the burden of proof on Criterion 6;

c. CTS's siting application failed to include: a traffic study; existing traffic counts; build condition of the proposed facility (including location and design of ingress and egress); site conditions; nearby roadway conditions; crash counts; and other site-based, safety-related information (such as the railroad crossing close to the proposed facility location;

d. The existing condition of Bunkum Road, the access road to the proposed facility, is very poor;

e. The intersection with Route 111 is highly congested and has insufficient turning radius for transfer trailer vehicles;

f. The proximity of the railroad crossing, just west of the proposed site and situated such that existing cueing issues can block access to the proposed site;

g. A school bus depot located to the east of the proposed site that generates a large amount of traffic based on routing and return of school buses, including associated cars parked on both sides of Bunkum and pedestrians crossing in this area;

h. A Head Start program for 244 children between the ages of 2 and 5 with program drop-off and pick-up times in direct conflict with the peak traffic generation times of the proposed CTS facility;

i. The site egress fails to meet the AAHSTO standards as site visibility is obstructed in exiting the proposed transfer station location; and

j. Transfer trailers exiting the proposed facility do not have a proper turning radius and would be forced to encroach significantly into the opposite lane of traffic.

(2) The Village Board Had No Jurisdiction

CTS and the Village argue that the Board should turn a blind-eye to the fact that on February 10, 2014, the date the CTS Application for Site Location Approval needed to be **received**, (per Section 39.2(b) of the Act, by the Village and there is **no evidence** from the Village and Village Board that the siting application was received by either of them on that date.

CTS and the Village, ask the Board to find against precedent, the clear language of Section 39.2(b), public policy, and the Record; and, without any evidence of "receipt" by the Village or Village Board, assume that on February 10, 2014, CTS's siting application was filed. Respondents fail to cite any case law for this unique proposition. Further, it is a situation that was completely in CTS' control and could have been prevented by CTS. It is against public policy for any participate other than the siting applicant to be impacted by this failure - any consequences from the failure of there being evidence of the Village or Village Board's receipt on February 10, 2014, of CTS's siting application must be borne by CTS.

CTS's self-serving story is not evidence of what the Village and Village Board received. John Siemsen, the sole manager and owner of CTS, an attorney, with litigation experience, drove approximately 285 miles to deliver a banker's box with 4 binders and a cover letter to the Village Clerk, yet hands the banker's box to someone outside the Administrative Office of the Village, and walks out of the Village Hall **without a receipt, without a file-stamped copy, without a notice of filing or proof of service, and without a Village date-stamped copy of the cover letter.**. (05/29/14 Tr. 5; E-0064; 10/28/14 Tr. 59-70). Indeed, Mr. Siemsen agrees that there is simply no document produced by the Village evidencing its receipt of the siting application on February 10, 2014:

Q. Listen to my question, please, Mr. Siemsen.

As you sit here today, is it fair to say that you have absolutely no document from the Village of Caseyville showing and acknowledging a filing having occurred on February 10th, 2014?

A. No document. That is correct.

If someone at the Village or Village Board with the authority to receive documents on behalf of the Village confirmed receipt on February 10, 2014, of CTS's siting application, the lack of documentation may not be as critical, even if Village policy for stamping received on documents was not filed. (**Exhibit B,** Tr. R. Watt, p. 12-13; **Exhibit C**, Tr. L. McReynolds, pp. 7, 11, 33, 41-43)("No document should be coming in here without being stamped."). However, here, there is affirmative evidence in the Record that no one at the Village – not the Village Clerk, not the Deputy Village Clerk, not the Mayor, and not the Village Attorney John Gilbert – received or even knew of the presence of the CTS siting application anywhere in the Village Hall on February 10, 2014. (**Exhibit B**, Tr. R. Watt pp. 7-8, 12-13; **Exhibit C**, Tr. L. McReynolds, pp. 7, 11, 41-42; 10/28/14 Tr. 130-131).

CTS and the Village make the bold statement that the evidence that CTS's siting application was "physically delivered" to the Village on February 10, 2014, is "ample" and "uncontroverted." (Response Brief p. 6). Whether something is "delivered" to a municipal decision-maker is inconsequential to what the law requires – the law clearly states that the siting application must be "received." Certainly someone cannot claim to deliver legal documents to any person at a government entity and consider that proper receipt.

In addition, Respondents incorrectly contend that Roxana's argument is that only a municipal clerk is the proper recipient of legal documents on behalf of a municipality. Roxana makes no assertion in its Opening Brief, but does repeat what the testimony from the Village is concerning its policy and procedure for receiving documents. In this case, even after CTS's siting application was received (the date of which is not known), that policy and procedure was

not followed by the Village as no date received stamp was ever placed anywhere on the siting application. (**Exhibit B**, Tr. R. Watt, p. 33, 43, 47).

Changing the law from the stated "received" in Section 39.2 of the Act encourages gamesmanship on behalf of applicants like CTS who want to short-cut siting, without presenting evidence, and with a desire to limit public participation. The evidence of when the siting application was received by the Village was completely in CTS's control – CTS could have asked for a receipt or a received stamp from the Village, but CTS chose not to and the only evidence in the Record from the Village is that **there is no evidence** that the CTS siting application was received on February 10, 2014, as is required by Section 39.2(b) for jurisdiction to vest with the Village Board.

Therefore, the Board should find that jurisdiction did not vest with the Village of Caseyville and vacate the siting approval in this case, as there is no evidence that the Village of Caseyville received CTS's siting application on February 10, 2014, the date stated in CTS's pre-filing notice.

ii. The Pre-Filing Notice Contained An Incorrect And Misleading Description Of The Location Of the Property

CTS and the Village misstate the standard of review on jurisdiction as "against the manifest weight." (Response p. 6). The Board reviews jurisdiction *de novo*. *City of Kankakee, et al. v. County of Kankakee, et al.*, PCB Nos. 03-125, 03-133, 03-134, 03-135, Slip Op. at 35 (August 7, 2003). Moreover, CTS and the Village misstate the record, asserting that there was an address on the pre-filing notices. The notice is attached to Roxana's Opening Brief as **Exhibit A** (and is included in the Agreed Supplemental Record) – there is no address. Otherwise, CTS and the Village make no argument in response to this portion of the Opening Brief.

Thus, CTS's description of the location of the proposed facility, which under the best-case scenario tells the reader that the proposed site is somewhere southeast of a roadway and a ditch, is incorrect and misleading and insufficient to meet the requirements of Section 39.2 of the Act.

(3) The Siting Public Hearing Was Fundamentally Unfair

Respondents have not sited a single case to support their argument that it is fundamentally fair for a siting applicant to present no evidence, under oath and subject to cross-examination. Respondents cite and rely on *Stop the Mega-Dump v. County Board of DeKalb County*, 979 N.E.2d 524 (2nd Dist 2012) *and Waste Management, Inc. v. Pollution Control Board*, 530 N.E. 2d 682 (2nd Dist 1988), neither of which supports the Respondents' position.

In both *Stop the Mega-Dump* and *Waste Management, Inc.* the siting applicants presented applications containing reports prepared by experts who then testified, under oath, at the public hearing and submitted to cross-examination. There is no law suggesting to limit fundamental fairness to "public inspection of the application. . . " and "public comment. . . " as suggested by Respondents.

Stop the Mega Dump references those statutory rights in Section 39.2(b) alone, without review or consideration of the underlying law concerning fundamental fairness and without review of even the remainder of Section 39.2. (*e.g.*, "At any time prior to completion by the applicant of the presentation of the applicant's factual evidence and an opportunity for cross-questioning by the county board or governing body of the municipality and any participants . . .). That reference is *dicta* and not a holding that overrules decades of case law holding the contrary. *See, Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 606 N.E.2d 1111 (S. Ct. 1992); *Van Harken v. City of Chicago*, 305 Ill. App. 3d 972, 713 N.E.2d 754 (1st

Dist 1999) ("the essence of due process is based on the concept of fundamental fairness"); *Peoria Disposal Company v. Illinois Pollution Control Board, et al,* 385 Ill. App. 3d 781; 896 N.E.2d 460 (3rd Dist. 2008)(citing *Abrahamson*); *Dimensions Medical Center, Ltd. v. Elmhurst Outpatient Surgery Center, L.L.C.,* 307 Ill. App. 3d 781, 718 N.E.2d 249 (4th Dist 1999); *Dombrowski v. The City of Chicago, et al.,* 363 Ill. App. 3d 420, 842 N.E.2d 302 (1st Dist. 2005); and *Klaeren v. Vill. of Lisle,* 352 Ill. App. 3d 831 (2d Dist. 2004).

Thus, Respondents fail to respond to the fundamental fairness argument submitted by Roxana. Further, as a result of any one or more of the issues of fundamental unfairness raised by Roxana, the Village Board decision on the CTS siting application should be reversed, as the public hearing and siting process before the Village of Caseyville and Village Board was fundamentally unfair.

WHEREFORE, Participant Roxana Landfill, Inc. respectfully requests this Honorable Board to reverse the decision of the Village Board of the Village of Caseyville approve the Caseyville Transfer Station, L.L.C. Application for Site Location Approval or, in the alternative, vacate the decision for lack of jurisdiction.

Dated: November 18, 2014

Respectfully submitted,

ROXANA LANDFILL, INC.

By: */s/ Jennifer J. Sackett Pohlenz*
One of Its Attorneys

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