BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

ORIGINAL

NOTICE OF FILING

TO: SEE ATTACHED CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on the 22nd day of January, 2015, we filed with the Illinois Pollution Control Board, **Village of Fairmont City's Motion for Reconsideration**, a copy of which is attached and served upon you.

By: _____
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CERTIFICATE OF SERVICE

Donald J. Moran, an attorney, on oath states that he served the foregoing **Village of Fairmont City's Motion for Reconsideration**, on the following parties electronically and by depositing same in the U.S. mail at 161 N. Clark Street, Chicago, Illinois 60601, on this 22nd day of January, 2015.

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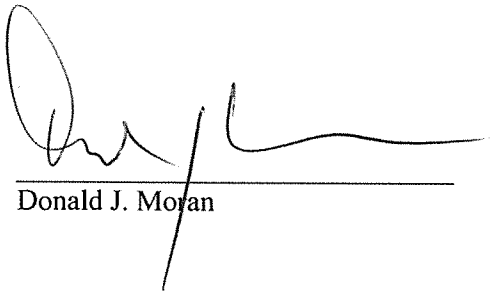

Donald J. Moran

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VILLAGE OF FAIRMONT CITY'S
MOTION FOR RECONSIDERATION

NOW COMES Petitioner Village of Fairmont City ("Fairmont City"), by its attorneys Sprague & Urban and Pedersen & Houpt, P.C., pursuant to Sections 101.520 and 101.902 of the Pollution Control Board Procedural Rules, and for its Motion for Reconsideration of this Board's December 18, 2014, Opinion and Order in the above-captioned matter, states as follows:

INTRODUCTION

This Board should reconsider its December 18, 2014, Opinion and Order (the "Opinion") as it is based on an erroneous interpretation and application of Illinois law. Under long-standing precedent, participants in a local siting hearing under Section 39.2(a) of the Illinois

Environmental Protection Act, 415 ILCS 5/39.2(a) (the "Act"), have a statutory fundamental fairness right to cross-examine witnesses. By permitting the applicant, Caseyville Transfer Station, LLC ("CTS"), to present the statements of its one and only witness — CTS's owner, John Siemsen ("Siemsen") — as unsworn public comment and denying the other participants in the hearing — Roxana Landfill, Inc. ("Roxana") and the Village of Fairmont City ("Fairmont City") — an opportunity to cross-examine Mr. Siemsen, the Village Board of the Village of Caseyville, Illinois ("Caseyville") rendered the local siting proceedings fundamentally unfair. By giving its stamp of approval to Caseyville's unprecedented process, this Board risks transforming the local siting hearing from an adjudicatory proceeding into a legislative-type hearing.

Unsworn testimony given as public comment, furthermore, cannot, by itself, be sufficient evidence of compliance with Section 39.2(a)'s statutory criteria because it must be given less weight than sworn testimony and other evidence. In this case, Siemsen made conclusory statements, in unsworn testimony, that were directly contradicted by sworn testimony to which Caseyville and this Board were required to give greater weight. Siemsen's unsworn statements cannot, absent additional evidence, prove compliance with Section 39.2(a)'s criteria. This Board should reconsider and reverse its Opinion and Order in this case.

ARGUMENT

A. The Village of Fairmont Had a Statutory Right to Cross-Examine Siemsen.

Participants in local siting proceedings — including nonapplicant participants — have the right to cross-examine adverse witnesses. That right is meaningless if every witness — including the witnesses presented by the party bearing the burden of proof — may simply provide unsworn public comment. By permitting the applicant to "testify" only through public

comment, Caseyville denied the nonapplicant participants their right to cross-examine and, thereby, rendered the local siting hearing fundamentally unfair.

Nonapplicant participants have a right to cross-examine adverse witnesses.

> A nonapplicant who participates in a local pollution control facility siting hearing has no property interest at stake entitling him to the protection afforded by the constitutional guarantee of due process. However, under Section 40.1 of the Act, such a party has a statutory right to 'fundamental fairness' in the proceedings before the local siting authority. ... [C]ourts have interpreted the right to fundamental fairness as incorporating 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 Co v. Illinois Pollution Control Bd., 319 Ill.App.3d 41, 47-48 (3d Dist. 2000) (internal quotations and citations omitted).

The December 18, 2014, Opinion's suggestion that applicants and nonapplicant participants have different fundamental fairness rights is incorrect. (Ex. A, p. 21). Though Fox Moraine, LLC v. United City of Yorkville, 2011 IL App (2d) 100017, refers to "the applicant's right to fundamental fairness," it does so only because the applicant — rather than a nonapplicant participant — was claiming fundamental unfairness in that particular case. Fox Moraine, 2011 IL App (2d) 100017, ¶60. As support for the proposition that the applicant's right to fundamental fairness includes the right to cross-examine adverse witnesses, Fox Moraine cites Land and Lakes, which plainly extends the same fundamental fairness rights to nonapplicant participants; indeed, Fox Moraine cites the very page of Land and Lakes quoted above. Id.

There can be no question that Roxana and Fairmont City participated in the local siting proceeding and, therefore, have a right to a fundamentally fair hearing, including the right to cross-examine adverse witnesses. Both were represented by counsel and both presented witnesses who were subject to cross-examination. Both were, therefore, "participants" in the local siting hearing and, as such, had the right to cross-examine adverse witnesses. Stop the

Mega-Dump v. County Bd., 2012 IL App. (2d) 110579, ¶ 43 (defining "participants" as those who "appear as a party and fully participate, including presenting evidence and cross-examining *the applicant's* witnesses at the public hearing.") (emphasis added).

Roxana and Fairmont City were denied their right to cross-examine Siemsen, and the local siting hearing was, therefore, fundamentally unfair. Controlling precedent in Land and Lakes and Stop the Mega-Dump unequivocally gives nonapplicant participants the right to cross-examine the applicant's witnesses — in this case, Mr. Siemsen. Caseyville shielded Siemsen from cross-examination by permitting him to present unsworn public comment only — an unprecedented procedural device that rendered Roxana's and Fairmont City's right to cross-examine meaningless. The local siting hearing was fundamentally unfair.

If the Board approves Caseyville's procedural sleight-of-hand, the local siting hearing will change from an adversarial adjudication of disputed facts into a legislative-type hearing. Local siting hearings have always been both adjudicatory and adversarial in nature. "While the line between adjudication and rule making may not always be a bright one, the basic distinction is one between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicated disputed facts in particular cases on the other. Under Section 39.2 the [County] Board's decision on the grant or denial of a permit turns on its resolution of disputed fact issues, whether the [new pollution control facility] meets the specific factual criteria set out in Section 39.2 of the Act. The facts that the [County] Board relies on are developed primarily by the immediate parties rather than acquired through the [County] Board's own expertise." E & E Hauling, Inc. v. Pollution Control Bd., 116 Ill. App. 3d 586, 598 (2d Dist. 1983) (internal quotations omitted). Cf. Town & Country Utils., Inc. v. Illinois Pollution Control Bd., 225 Ill. 2d 103, 121 (2007) (distinguishing local siting hearings

from IEPA permit decisions on ground that permit decisions "lack ... an adversarial hearing"); Waste Management of Illinois, Inc. Pollution Control Board, 175 Ill.App.3d 1023, 530 N.E.2d 682, 693, 698 (2nd Dist. 1988) (local siting proceeding is an adjudicatory process).

Facts are developed in adjudicatory, adversarial hearings through cross-examination. "Meaningful cross-examination is central to our adversarial system of justice. Cross-examination is the truth seeking engine. ... The right to challenge the reliability and trustworthiness of the adduced evidence through cross-examination is fundamental to our adversarial system of justice." People v. Safford, 392 Ill. App. 3d 212, 224 (1st Dist. 2009).

Moreover, the Act not only delegates adjudicatory power to the local decisionmaker, but it also requires the decisionmaker to conduct a public hearing on the siting request. 415 ILCS 5/39.2(d); Kane County Defenders, Inc. v. Pollution Control Board, 139 Ill.App.3d 588, 487 N.E.2d 743, 746 (2d Dist. 1985). As it provides the only opportunity for public comment, the public hearing is the most critical stage of the site approval process; its express purpose is to "develop a record sufficient to form the basis of appeal of the decision in accordance with Section 40.1 of this Act." 415 ILCS 5/39.2(d); Kane County Defenders, 487 N.E.2d at 746; Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, 123 Ill.App.3d 1075, 463 N.E.2d 969, 974 (2d Dist. 1984).

The public hearing, as an adjudicatory proceeding, must be conducted in accordance with the minimal standards of procedural due process: the right to present witnesses and introduce evidence, the right to cross-examine witnesses and the right to impartial rulings on the evidence. Stop the Mega-Dump v. County Board of DeKalb County, et al., 2012 IL App. (2d) 110579, ¶27; Concerned Adjoining Owners v. Pollution Control Board, 286 Ill.App.3d 565, 680 N.E.2d 810, 818 (5th Dist. 1997).

The essence of such an adjudicatory proceeding is the presentation and determination of disputed facts and evidence. The record developed by this proceeding includes the facts and evidence presented, and tested by cross-examination. Without cross-examination, the local decisionmakers are unable to perform their adjudicatory functions of weighing the evidence, assessing witness credibility, and resolving conflicts in the evidence. See Stop the Mega-Dump v. County Board of DeKalb County, et al., PCB 10-103, slip op. at 2, 55 (March 7, 2011) (it is for local siting authority in its adjudicatory role to weigh the evidence, assess witness credibility and resolve conflicts in the evidence). Without sworn evidence or testimony, evidence cannot be properly weighed or credibility properly assessed. Without cross-examination, none of those three adjudicatory functions can be properly performed. Without any sworn evidence and cross-examination in a contested proceeding, a record sufficient to form the basis for an appeal reviewed under a manifest weight of the evidence standard cannot be developed.

If the Board permits applicants for local siting to "testify" solely through public comment, the local siting hearing will no longer be an adversarial, adjudicatory process. Every applicant — and every objector, for that matter — will speak only through public comment and, thereby, shield him or herself from cross-examination. The "truth seeking" function of adversarial cross-examination will be eliminated and the overall proceeding will become in the nature of a legislative or investigatory hearing. Cf. Yellow Cab Co. v. City of Chicago, 23 Ill. 2d 453, 458 (investigatory legislative hearings generally do not require that testimony be taken under oath); Petersen v. Chicago Plan Comm'n, 302 Ill. App. 3d 461, 468 (1st Dist. 1998) (fact-finding investigation does not require cross-examination).

In sum, a hearing without sworn evidence, testimony and cross-examination, is no longer adjudicatory, but merely legislative, and any record based on such a hearing is not capable of

being reviewed under a manifest weight of the evidence standard. Unless this Board wishes to fundamentally transform local siting proceedings in violation of long-established and controlling precedent, such as E & E Hauling, it should reconsider and reverse its Order and Opinion.

B. Unsworn Statements Must be Given Less Weight than Sworn Expert Testimony.

Caseyville's determination that the application satisfied Section 39.2(a)'s first, second, third, sixth and eighth criteria, at a minimum, is against the manifest weight of the evidence. Siemsen's unsworn statements are not sufficient, absent additional evidence, to overcome contradictory, sworn expert testimony. Moreover, his unsupported, generalized statements, without more, are insufficient to satisfy CTS's burden of proof even if uncontradicted and even if made in sworn testimony. Siemsen's unsupported, unsworn and contradicted "testimony" is insufficient to satify CTS's burden of proof. Caseyville's approval of local siting was against the manifest weight of the evidence and this Board should reconsider and revise its Opinion and Order accordingly.

The local siting decision must be based in "evidence." As this Board has held, "[a] local body can only grant siting ... if it finds that the applicant meets all nine criteria by a preponderance of the evidence." American Bottom Conservancy v. Village of Fairmont City, PCB No. 01-159 (Oct. 18, 2001). This Board reviews local siting decisions, moreover to determine "whether the local decision is against the manifest weight of the evidence." Id. Section 39.2(a), furthermore, lists what the local siting authority may "consider as evidence." 415 ILCS 5/39.2(a).

While unsworn public comments are considered "evidence" in the context of a local siting proceeding, they "are not entitled to the same weight as expert testimony submitted under oath and subject to cross-examination. Public comments receive a lesser weight." Landfill 33,

Ltd. v. Effingham County Bd., PCB 03-43 (Feb. 20, 2003). Unsworn testimony of the actual siting hearing participants, too, is treated as public comment and is given lesser weight. See Sierra Club v. City of Wood River, PCB No. 95-174 (Oct. 5, 1995) ("if the participants were allowed to testify on the record at hearing without being under oath and subject to cross-examination, the Board would have been required to given their testimony lesser weight"). Indeed, this Board has rejected such unsworn testimony entirely in earlier decisions. See Industrial Salvage, Inc. v. County Bd., PCB No. 83-173 (Aug. 2, 1984) ("[T]he attorneys at the Marion hearings recited several 'facts' not found in the testimony or exhibits. Since this was not sworn testimony subject to cross-examination, this Board has not considered these 'facts.'").

This Board has specifically held that it will accord public comments lesser weight than sworn testimony subject to cross-examination when deciding whether a local siting decision is against the manifest of the evidence. Rochelle Waste Disposal, LLC v. City Council of the City of Rochelle, PCB 03-218, slip op. at 10 (April 15, 2004). The Board, however, did not apply that standard here in assessing Mr. Siemsen's statements. To the contrary, the Board accorded equal weight to the unsworn statements of Mr. Siemsen and the sworn expert testimony of Ms. Smith and Mr. Reichmann.

Moreover, sworn testimony may be insufficient to prove compliance with the statutory criteria if is consists solely of "generalized statements" for which the witness "has not cited ... specific evidence." Waste Management of Illinois, Inc., 123 Ill. App. 3d at 1087 (generalized, unsupported statements insufficient to satisfy applicant's burden of proof).

In this case, Siemsen provided the applicant's only public comments or unsworn statements regarding criterion (i) ("need"). He stated that the proposed transfer station would increase competition and that it was environmentally friendly, but cited no supporting facts or

evidence other than some general language from a USEPA manual regarding the benefits of transfer stations. (Ex. A, p. 10) These generalized, supported statements are *per se* insufficient to prove compliance with criterion (i). See Waste Management, 123 Ill. App. 3d at 1087. His unsworn testimony, moreover, was contradicted by sworn expert testimony regarding the specific capacity of area landfills, the specific cost of transporting waste outside the service area, travel times to landfills outside the service area and the existing solid waste plans for the affected counties. Both Caseyville and this Board were required to give this testimony more weight than the unsworn testimony of Siemsen. Landfill 33, PCB 03-43. Neither did. Since CTS offered no other evidence regarding criterion (i), Caseyville's determination that the applicant satisfied criterion (i) was against the manifest weight of the evidence.

Similarly, Siemsen offered the applicant's only public comments regarding criterion (ii), which requires proof that the proposed facility is designed, located and proposed to be operated so as to protect the public health, safety and welfare. 415 ILCS 5/39.2(a)(ii). The applicant provided no expert testimony on criterion (ii). Mr. Riechmann was the only witness who provided expert testimony regarding criterion (ii). Illinois courts and this Board have long and repeatedly held that a determination of whether criterion (ii) is met "is purely a matter of assessing the credibility of expert witnesses ..." Fairview Area Citizens Taskforce v. IPCB, 198 Ill.App.3d 541, 555 N.E.2d 1178, 1185 (3rd Dist. 1990); File v. D&L Landfill, 219 Ill.App.3d 897, 579 N.E. 2d 1228, 1236 (5th Dist. 1991); Those Opposed to Area Landfills v. City of Salem, PCB 96-79 and 96-82 (cons.), slip op. at 22 (March 7, 1996); Fox Moraine, LLC v. United City of Yorkville, City Council, PCB 07-146, slip op. at 81-82 (Oct. 1, 2009). As CTS offered no expert testimony in support of criterion (ii), Caseyville's determination that the applicant satisfied criterion (ii) was against the manifest weight of the evidence.

Siemsen also provided the applicant's only public comments regarding criterion (iii), which requires proof that the facility is so located as "to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property." 415 ILCS 5/39.2(a)(iii). These comments consisted entirely of the bald assertion that "there really are not incompatible land uses in close proximity" and made no mention of surrounding property values at all. (Ex. A, p. 12). Siemsen provided no support for his conclusions whatsoever. In addition, the Application stated, without factual support, that there are no residential land uses within 1000 feet of the site. R. at A-0030. However, it did not refute the evidence in Mr. Alley's affidavit that six parcels located within 1000 feet of the site are zoned for primarily residential uses. Nor did it establish the specific zoning classifications for those six parcels. Under the holding in Waste Management, this testimony is simply insufficient to satisfy CTS's burden of proof, and Caseyville's determination that the applicant satisfied criterion (iii) was against the manifest weight of the evidence.

Siemsen provided the applicant's only public comments regarding criterion (vi) (traffic). Though he provided a general assessment of the expected traffic flows, he admitted that CTS had yet to conduct a traffic study and cited no other supporting evidence. (Id. at 12). Siemsen's statements were contradicted by sworn expert testimony regarding the suitability of surrounding roads, existing congestion at the primary point of ingress/egress for the site, obstructed sight lines near the site, the expert's personal observations regarding traffic flows and a variety of other matters for which Siemsen has not accounted. (Id. at 12-13). Both Caseyville and this Board were required to give this expert testimony more weight than the unsworn testimony of Siemsen. Landfill 33, PCB 03-43. Since CTS offered no other evidence regarding criterion (vi),

Caseyville's determination that the applicant satisfied criterion (vi) was against the manifest weight of the evidence.

In its review of criterion (viii), this Board applied an incorrect legal standard. In determining whether Caseyville properly determined that the proposed transfer station was consistent with the county solid waste management plan, the Board may not, as it did here, merely look for any interpretation of the plan that supports Caseyville's decision. Rather, the Board must construe the plan so as to ascertain and effectuate the intent of the County. The Board does not have interpretative license to simply choose one of a number of possible meanings that happens to support Caseyville's decision. County of Kankakee, et al. v. Illinois Pollution Control Board, 396 Ill.App.3d 1000, 1022-23, 955 N.E.2d 1 (3d Dist. 2009).

Fairmont City does not believe the plan is ambiguous. But even assuming it were, the only reasonable interpretation that would reflect the meaning of the plan and carry out its purpose is that a solid waste transfer station is simply not an approved or necessary part of the county's solid waste management system. Thus, Caseyville's determination that the proposed transfer station satisfied criterion (viii) was against the manifest meaning and intent of the plan.

CTS cannot meet its burden of proof by providing unsworn statements of a conclusory and unsupported nature. Caseyville's determination that such statements satisfied CTS's burden of proof on, at a minimum, criteria (i), (ii), (iii), (vi) and (viii) was against the manifest weight of the evidence. This Board should reconsider its Opinion and Order accordingly.

C. Roxana Landfill, Inc.'s Motion for Reconsideration.

Fairmont City joins in Petitioner Roxana Landfill, Inc.'s Motion for Reconsideration filed January 22, 2015.

CONCLUSION

The local siting hearing in this case was fundamentally unfair because it denied Roxana and Fairmont City their right to cross-examine CTS's only witness, Mr. Siemsen. Mr. Siemsen's unsworn statements were, in any case, contradicted by sworn expert statements to which both Caseyville and this Board were required to give greater weight. Even if Mr. Siemsen's statements had been sworn and even if they were uncontradicted, however, it would still be insufficient to satisfy CTS's burden of proof because it consisted only of generalized statements unsupported by other evidence. Caseyville's grant of local siting was both fundamentally unfair and against the manifest weight of the evidence. This Board's Opinion and Order approving that grant ignores controlling precedent and gives improper weight to Siemsen's unsworn statements. This Board should reconsider and reverse its Opinion and Order accordingly.

January 22, 2015

Respectfully submitted,

VILLAGE OF FAIRMONT CITY

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