BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WILL COUNTY, ILLINOIS Petitioner, v. VILLAGE OF ROCKDALE, BOARD OF TRUSTEES OF VILLAGE OF ROCKDALE and ENVIRONMENTAL RECYCLING AND DISPOSAL SERVICES, INC., Respondents.	)	PCB No. 2016-054 (Pollution Control Facility Siting Appeal)

NOTICE OF FILING

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on February 11, 2016, Will County, Illinois filed with the Illinois Pollution Control Board, its **Opening Brief**, in this proceeding, a copy of which is attached and served upon you.

Dated: February 11, 2016

Respectfully submitted,

On behalf of WILL COUNTY, ILLINOIS

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CERTIFICATE OF SERVICE

I, Charles F. Helsten, an attorney, certify that I have served the attached **Opening Brief** on the named parties below by electronic service and by depositing the same in the U.S. mail at 100 Park Avenue, Rockford, Illinois 61101, at 5:00 p.m. on February 11, 2016.

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OPENING BRIEF

NOW COMES the Petitioner, Will County, Illinois by and through its attorneys HINSHAW & CULBERTSON, LLP, and hereby submits its Opening Brief on review by the Illinois Pollution Control Board ("PCB") of the decision of the Board of Trustees of the Village of Rockdale ("Village Board") granting site location approval to Environmental Recycling and Disposal Services, Inc. ("ERDS" or "Applicant") for the proposed transfer station to be located at 2277 Moen Avenue in the Village of Rockdale (hereinafter the "Moen Transfer Station").

For the reasons set forth herein, Petitioner Will County respectfully requests that this Honorable Board overturn the decision by the Village Board to grant siting approval for the Moen Transfer Station. The Applicant did not provide the notice required by Section 39.2(b) of the Illinois Environmental Protection Act (the "Act") and the Village Board therefore lacked jurisdiction to grant such approval. Furthermore, the Village Board granted "conditional approval" of the siting application, conditioned upon a subsequent demonstration that the Applicant had met the applicable statutory criteria, which is neither contemplated nor permitted by Section 39.2. The application was also amended twice by the Applicant, in direct contradiction of Section 39.2(e). Finally, the Village Board's decision that Criteria 1, 2, and 5

were met is against the manifest weight of the evidence. Therefore, the decision of the Village Board to grant siting approval to ERDS should be overturned.

I. BACKGROUND

This matter relates to Applicant's proposal to site, construct, permit and operate the Moen Transfer Station on 2.16 acres at 2277 Moen Avenue in Rockdale, Will County, Illinois. The Moen Transfer Station is a "Pollution Control Facility," as defined by Section 3.330(b) of the Act, for which local siting approval is required. 415 ILCS 5/3.330(b); 39(c).

At various dates between November 18, 2014 and November 21, 2014, ERDS disseminated and also caused to be published the Pre-Filing Notice required by Section 39.2(b) of the Act. The Pre-Filing Notice stated:

> The proposed facility would be a non-hazardous transfer station which will accept non-hazardous waste for temporary storage, consolidation, and further transfer to a waste disposal/treatment facility. The Applicant will develop and operate the transfer station only as approved by the Illinois Environmental Protection Agency, other applicable regulatory agencies, and as authorized by applicable statutes and regulations. The waste accepted for transfer will be general municipal waste, landscape waste, recyclables and construction and demolition debris generated by residential, commercial and industrial sources. The facility proposes to handle *an average of 200 tons per day of solid waste*. The facility will not accept liquid or hazardous waste. C1469-C1538 (emphasis added).

On December 12, 2014, ERDS filed its Application with the Village requesting siting approval for the Moen Transfer Station. Hearing Officer Rpt. at 1. ERDS later disseminated a Notice of Public Hearing, which also included a description of the "nature of the activity proposed." The Notice of Public Hearing provided, in pertinent part, as follows:

> *Nature of Activity*: Develop and operate a non-hazardous waste Transfer Station *to accept, on average, approximately 200 tons of municipal solid waste* during a typical operating day. Waste materials will be temporarily stored, consolidated, for further transfer to approved disposal sites. No treatment, storage, or

> disposal of liquid or hazardous waste will occur at the Transfer Station. C1539-C1567 (emphasis added).

In both of its statutorily required notices, the Applicant stated that the probable operating life of the Facility is a period of at least twenty years.

The Village commenced a public hearing on the Application on March 23, 2015. However, the Applicant produced at that time a voluminous "Errata," which the Hearing Officer ruled effectively amended the Application. Hearing Officer Rpt. at 1-2; C1568-C1618. On March 23-24 and May 20-21, 2015, the Village held public hearings regarding the Application. Village of Rockdale Ordinance No. 1026, at 1 (hereinafter "Ordinance 1026").

During the course of those public hearings, the presentation made by the Applicant painted a much different picture of the proposed "nature of the activity" and made it clear that the plan for the facility was to take significantly more than 200 tons per day on average. At the hearing, the 200 ton per day "average" throughput figure, which was included in both the Notice of Intent to File Siting Application and the Notice of Public Hearing, was instead characterized as the *minimum* throughput expected at the facility. (May 20 Tr. at 509)[1] In actuality, the Applicant acknowledged that its intent was for the facility to receive anywhere from 600 to 700 tons per day (May 20 Tr. at 512-16; May 21 Tr. at 954-55). Further testimony was that if the market and throughput operations would bear such a figure, the Facility might accept up to 2,200 tons per day (May 20 Tr. at 514-15), or, even more illusory, an indefinite throughput with no cap or maximum throughput limitation (May 21 Tr. at 945-46, 954-59).

Respondents Will County and Waste Management, Inc. consequently moved to dismiss the Application on the grounds that the notice was deficient and that the Village Board therefore

[1] The transcripts from the siting hearing are included in the Record as follows: March 23, 2015 – C2421-C2717; March 24, 2015 – C2718-C2940; May 20, 2015 – C2941-C3165; May 21, 2015 – C3166-3549. For ease of reference, these transcripts will be cited by date and original pagination.

lacked jurisdiction to grant the Application. Hearing Officer Rpt. at 3. The Hearing Officer recommended that the Village had jurisdiction over the Application but also found "that the evidence in the Record *fails to establish* that the proposed Facility satisfies all of the criteria for local siting approval set forth in Section 39.2 of the Act." *Id.* (emphasis added). The Hearing Officer found that "the Applicant ha[d] failed to establish that the proposed Facility is 'necessary to accommodate the waste needs of the area it is intended to serve.'" *Id.* at 3-4. Further, the Hearing Officer found "that the design and plan of operations for the Facility, *as proposed*, is deficient to protect the public health, welfare and safety (Criterion 2) and to minimize the risk of operation accidents (Criterion 5), but that, through the imposition of, and compliance with, special conditions, the design and operation of the proposed Facility *can be made to satisfy the statutory criteria*." *Id.* at 4 (Emphasis added).

The Village Board adopted the Hearing Officer's findings and recommendations, except with respect to Criterion 1 and the special conditions proposed for Criteria 2 and 5.[2] Ord. 1026, at p. 3. Nonetheless, the Village Board granted the Application by "conditionally approv[ing] the request of [ERDS] for site approval of its proposed non-hazardous solid waste transfer station." *Id.* For the reasons set forth herein, the Village Board lacked both jurisdiction and statutory authority to grant that "conditional approval," and such approval is therefore contrary to law and should be overturned.

[2] The Village Board stated that it adopted "the Hearing Officer's Findings as the bases of [its] decision as to … whether the Applicant met the Criterion [*sic*] under Section 39.2, except the Hearing Officer's findings with respect to Criterion 1 'The facility is necessary to accommodate the waste needs of the area it is intended to serve,' and desire to replace the special conditions regarding Criterion 2 and Criterion 5 with the special conditions provided below." Ord. 1026, at 3. The Village Board therefore adopted all of the Hearing Officers findings and conclusions as to Criteria 2 and 5, and simply imposed its own special conditions rather than adopting the Hearing Officer's proposed conditions.

II. DISCUSSION

A. The Application Was Not Approved According to Section 39.2(a).

In Ordinance 1026, the Village Board "conditionally approved" ERDS' application for siting approval. With respect to Criteria 2 and 5, the Village Board found that the application did not meet the criteria, but imposed special conditions in order to find the criteria met. Ord. 1026, at pp. 1-2 (noting that the Hearing Officer had found that ERDS had "*not demonstrated* that the proposed Facility meets [Criteria 2 and 5]; however, with the imposition of and compliance with the following special conditions, the proposed Facility meets [those Criteria]" (emphasis added)); 3 (adopting the Hearing Officer's findings as to all except Criterion 1 and the special conditions recommended for Criteria 2 and 5).

This was an improper exercise by the Village Board. The statute and accompanying cases clearly place the burden on the *applicant* to show that its Application meets the criteria set forth by the statute, rather than on the Village Board to offer conditions that, arguably, bring the Application into compliance. Section 39.2(a) requires a siting authority to "*approve or disapprove* the request for local siting approval." 415 ILCS 5/39.2(a) (emphasis added). The statute provides that "an Applicant for local siting approval shall *submit sufficient details* describing the proposed facility to *demonstrate compliance* …, and local siting approval should be granted *only if* the proposed facility meets the [nine statutory] criteria." 415 ILCS 5/39.2(a) (emphasis added). The statute expressly requires that *the Applicant* shall submit sufficient detail; not the Applicant shall submit some details and the siting authority shall submit what is still necessary to ensure compliance with the criteria or that the Applicant shall submit some details, which do not demonstrate compliance with the criteria, and then following approval, submit additional information that may or may not demonstrate compliance..

Based on the plain language of the statute, the Applicant must, on its own, make a *prima facie* showing that it has met the criteria. The PCB's own cases reiterate that the Applicant must first "submit sufficient details describing the proposed facility to demonstrate compliance with [the statutory] criteria." *Peoria Disposal Co. v. Peoria County Bd.*, PCB 06-184, 2008 WL 1816891, at *7, *24 (PCB June 21, 2007). The courts have underscored this point; in *Waste Management of Illinois, Inc. v. PCB*, the court noted that "it was not the County's responsibility to demonstrate need; it was the applicant's, and the Board finds that it failed to do so." 122 Ill. App. 3d 639, 643 (1984). The siting authority may then impose conditions to *improve* the performance of the facility or tailor it to suit the authority's needs, but it may not do the Applicant's job for it.

The first paragraph of 39.2(a) specifically provides that local siting approval shall be granted only if the "proposed facility" meets the statutory criteria. Section 39.2(a) does not provide that the Applicant's "proposal" along with special conditions imposed by the siting authority may be used to demonstrate compliance. It is then the Applicant that "proposes" a facility, and not the siting authority. Notably, in siting cases, the siting authority sits in a quasi-judicial capacity and should not be the co-author of the Applicant's efforts to demonstrate compliance with the statutory criteria. *See, e.g., E&E Hauling, Inc. v. PCB*, 116 Ill. App. 3d 586, 598 (1983) (holding that the siting authority was engaging in adjudication in siting proceedings). This would constitute an impermissible shifting of the statutory burden of compliance (which is clearly put on the Applicant in Section 39.2(a), clearly rests at all times thereafter with the Applicant, and is never placed upon the siting authority). It is therefore clear from the first paragraph of 39.2(a) that the facility *as proposed by the Applicant* must meet the

nine statutory criteria in the first instance (*i.e.*, without the siting authority bootstrapping the proposal into compliance by adding special conditions).

The preceding interpretation is borne out by the "special conditions" subsection of 39.2(e), whereby a siting authority "*may* impose" conditions on the Applicant. The language in Section 39.2(e) comes well after, and in a distinct section from, the threshold language in Section 39.2(a) concerning the need to demonstrate compliance with the nine criteria. The fact that the Legislature used permissive terms in discussing special conditions – i.e., provided that a siting authority "*may* impose" special conditions – in 39.2(e) underscores the impermissibility of the Village Board's approval here. The language does not say that the siting authority *shall* impose such conditions as are necessary to achieve compliance with the nine statutory criteria; it instead uses the permissive term "may" because the purpose of special conditions is to further compliance already established by the Applicant in its case.

The Report of the Hearing Officer makes it clear that ERDS did not meet its burden here. The Hearing Officer stated: "I find that the design and plan of operations for the Facility, *as proposed*, is deficient to protect the public health, welfare and safety (Criterion 2) and to minimize the risk of operational accidents (Criterion 5), but that, through the imposition of, and compliance with, special conditions, the design and operation of the proposed Facility *can be made* to satisfy the statutory criteria." Hearing Officer Rpt. at 4 (emphasis added). The Village Board adopted the Hearing Officer's findings and conclusions as its own, except with respect to Criterion 1 and certain special conditions for Criteria 2 and 5. The Village Board therefore found that the facility *as proposed* did not meet Criteria 2 or 5. The Village Board then took it upon itself to attempt to make the facility compliant. As is discussed more fully in Section II.D.3 and II.D.3 herein, the Village Board actually has allowed the Applicant to demonstrate

compliance with these Criteria at a later date. That is simply not a proper exercise of its authority and is wholly inconsistent with Section 39.2

Section 39.2 requires the siting authority to take final, appealable action on an application for siting a pollution control facility. However, that was not done here. Instead, the Village Board "conditionally approved" the application, likely because it was aware (as is set forth in detail below) that the Applicant had not met its burden with respect to several of the criteria. This "conditional approval" effectively allows the Applicant to demonstrate compliance on a rolling basis at some later date. Hearing Officer Rpt. at 16 (noting that the Applicant bears the burden to show compliance with Criterion 2, that "the present state of the Application does not satisfy this concern," but that the Applicant could submit information at some later date to demonstrate compliance). The Village Board's "conditional approval" therefore makes the process of demonstrating compliance with the nine criteria a moving target and a work in progress. Such "conditional approval" is clearly not what the Legislature intended and, moreover, is clearly against sound public policy.

B. The Applicant Did Not Comply with the Notice Requirements of Section 39.2, and the Village Board Therefore Lacked Jurisdiction to Grant Siting Approval.

Section 39.2 of the Act contains procedural requirements that must be followed in order to obtain local siting approval for a pollution control facility. 415 ILCS 5/39.2. One of those requirements provides, in pertinent part, that no later than fourteen days before the Applicant requests siting approval for such a facility, the Applicant must provide written notice of such request, in the manner prescribed, to certain persons and parties. *Id.* § 39.2(b). This is referred to as pre-filing notice, and must comply with the following:

> Such notice shall state the name and address of the applicant, the location of the proposed site, *the nature and size of the development, the nature of the activity proposed, the probable life*

> *of the proposed activity*, the date when the request for site approval will be submitted, and a description of the right of persons to comment on such request as hereafter provided. 415 ILCS 5/39.2(b) (emphasis added).

The Pre-Filing Notice prepared by the Applicant in this case stated, *inter alia*:

> The proposed facility would be a non-hazardous transfer station which will accept non-hazardous waste for temporary storage, consolidation, and further transfer to a waste disposal/treatment facility. * * * The facility proposes to handle *an average of 200 tons per day of solid waste*. The facility will not accept liquid or hazardous waste. C1469 (emphasis added).

Section 39.2 of the Act also requires the Applicant to file a Notice of Public Hearing prior to the requisite public hearing. Applicant's Notice of Public Hearing in this matter also included a description of the "nature of the activity proposed." The Notice of Public Hearing provided, in pertinent part, as follows:

> *Nature of Activity*: Develop and operate a non-hazardous waste Transfer Station *to accept, on average, approximately 200 tons of municipal solid waste during a typical operating day*. Waste materials will be temporarily stored, consolidated, for further transfer to approved disposal sites. No treatment, storage, or disposal of liquid or hazardous waste will occur at the Transfer Station. C1539 (emphasis added).

In both of its statutorily required notices, the Applicant stated that the probable operating life of the Facility is a period of at least twenty years. The reference to the Facility handling (on a "typical operating day") an average of 200 tons per day of solid waste, coupled with a projected probable operating life for the Facility of at least twenty years, left the unmistakable impression that the long-term (i.e., for a period of two decades or more), “typical” daily waste throughput for the Facility would be approximately 200 tons per day. However, as noted in Section I herein, once the Applicant commenced the hearing, it became obvious that the plan was to receive significantly higher volumes (between 600 tons per day and an unlimited amount).

The complete deviation between the unrealistically small throughput figure included in the two statutory Notices and Applicant's presentation at the public hearing rendered Applicant's notice as to the nature of the activity proposed misleading and essentially meaningless as to this component of the Notice. The Applicant's true intent to, if possible, take on an average daily tonnage throughput greatly in excess of the figure set forth in both statutory Notices. This dramatic understatement in the potential throughput of the Facility in both Notices, and most significantly, the Notice of Intent to File, failed to satisfy a material element that was required to be included in such Notice(s), grossly understated the potential impact of the Facility, and failed to provide a true and accurate description of the nature of activity proposed to be conducted at the Facility for those persons and parties entitled to statutory notice, as well as all other interested members of the public. Because they were missing an essential component required by Section 39.2(b) and (d), these notices were null and void.

Illinois Courts have consistently held that "Section 39.2(b)'s notice requirements are jurisdictional prerequisites that the applicant must follow in order to vest the county board with the power to hear a landfill proposal." *Maggio v. IPCB*, 2014 IL App (2d) 130260, ¶ 15 (2014). If a requirement of Section 39.2 has not been complied with, it follows that the siting authority does not have jurisdiction to hear an application for a pollution control facility.

The content of a Section 39.2(b) notice is not a matter of first impression. Instead, the notice requirements, including "the nature and size of the development" and "the nature of the activity proposed" have been thoroughly discussed by Illinois courts and the Illinois Pollution Control Board ("IPCB"). Applicant argued that the requirement to provide notice of the "nature and size of the development" and "nature of the activity proposed" was satisfied with Applicant's description of the facility simply as a "transfer station." ERDS Response Mot. Dism. at 2. This

interpretation was completely inconsistent with well-settled maxims of statutory interpretation. The statute requires an applicant to include in the notice *both* the "nature and size of the development" and the "nature of the activity proposed." It is well settled that "a statute should not be construed so that its specific language is rendered meaningless or superfluous." *Maske v. Kane County Officers Electoral Bd.*, 234 Ill. App. 3d 508, 512 (2d Dist. 1992). Therefore, the two separate requirements of "nature and size of the development" and "nature of the activity proposed" must require more than simply a statement that the facility will be a "transfer station."

A more logical and plain language reading of the statute is that the notice must include a description of the magnitude and intensity – i.e., the "nature" – of the activity proposed. "Nature" is defined as "[t]he basic or inherent features of something." *Oxford English Dictionary*. The Applicant argued that the "nature and size" of a transfer station can be encapsulated merely by stating its acreage and use as a transfer station, and that its capacity, or throughput, is not descriptive of the nature of the facility. However, the Applicant obviously believed that the throughput was relevant, as it included a (misleading) description of the throughput in the notice. The capacity of a transfer station is an inherent feature integral to the "nature of the proposed activity," and therefore must have been included in the Pre-Filing Notice.

Here, Applicant's description of the nature of the activity in the notice – i.e., a transfer station with an average capacity of 200 tons per day – did not accurately describe the nature of the activity. Applicant acknowledged throughout its Response that, despite the representation in the notice, what it actually meant by "average throughput" was "*initial* throughput," which could increase by somewhere between three and ten times, depending on market demand. ERDS Resp. Mot. Dism. at 3-5 (conceding that the intent of the applicant is to "*initially accept* an average of 200 tons per day of waste" but that the facility could accommodate more than 600 tons per day).

The Illinois Supreme Court has clearly held that the potential for increased adverse impacts dictates strict compliance with the Illinois Environmental Protection Act, and, more specifically, Section 39.2 of the Act. *See M.I.G. Investments, Inc. v. Environmental Protection Agency*, 523 N.E.2d 1 (1988). The purpose of the Section 39.2 pre-filing notice is to provide those persons most likely to be impacted by the proposed facility with notice as to the true nature, extent and character of operations proposed to be conducted at the pollution control facility. *Id.* at 5. The Court specifically noted that "the *nature of a landfill* contemplates more than a mere surface utilization of the land." *Id.* at 4 (emphasis added). The Court noted the significance of an increase in capacity at a pollution control facility in the context of the siting process. The Plaintiff in *M.I.G. Investments* operated a landfill pursuant to a permit that provided that the landfill's operations would be conducted in accordance with the design plan submitted by the Plaintiff, including the lateral and vertical size of the landfill. *Id.*

The Plaintiff later petitioned the Agency for a supplemental permit to vertically increase the landfill, thus adding additional disposal capacity. The Agency denied the Application because the Plaintiff had failed to obtain local siting approval for the proposed expansion as required by Section 39(c) of the Act. The Supreme Court ultimately upheld the Agency's decision, holding that any increase in capacity at a landfill (either by virtue of lateral *or* vertical expansion) was a change to the nature of the landfill and triggered the potential for increased impacts to occur, thus prompting the need to obtain siting approval. *Id.*

Here, as in *M.I.G. Investments*, the proposal put forth by ERDS should not be allowed to go forward, as those parties intended by the Legislature to have the benefit of adequate and full pre-filing notice had no proper notice of the true potential impact of the facility. In *M.I.G. Investments*, the Court clearly equated the "nature of operations" at a pollution control facility

with the volume of waste received, not the lateral footprint of the facility. In summary, the Court noted that any increase in the stated capacity of a pollution control facility in turn gives rise to potential impacts which must be properly evaluated through the Illinois siting process. In the present case, the stated capacity is the 200 ton per day figure set forth in the Applicant's Pre-Filing Notice. However, because the *actual* intended capacity of the Facility was not properly set out in the Pre-Filing Notice, the potential impacts of the Facility as identified by the Section 39.2 Siting Criteria could not be properly evaluated. In turn, the interested public and all parties entitled to notice were not properly apprised of the true potential impact of the Facility.

The Applicant improperly relied on two cases to argue that its notice was sufficient. The first case, *Daubs Landfill, Inc. v. IPCB,* held that when a narrative site description was sufficient to identify the location of a pollution control facility, thereby putting interested parties on notice, an error in the accompanying legal description would not divest the County of jurisdiction. 166 Ill. App. 3d 778, 782 (1988). A critical distinction is that the narrative description in *Daubs* "*accurately described* the . . . tract of land," *id.*, while the information included in Applicant's notice here was plainly inaccurate.

Likewise, the *Bishop* case relied on by Applicant does not further its argument. *See Bishop v. IPCB*, 235 Ill. App. 3d 925, 932 (1992). Section 39.2 requires an applicant to provide notice to certain adjacent landowners, "said owners being such persons or entities which appear from the authentic tax records of the County." The Court found that the applicant's reliance on records in the county treasurer's office, rather than the county clerk's office, was consistent with the requirement to use "authentic tax records." The "commonly understood meaning" of the phrase "authentic tax records" could include the tax records utilized by the applicant. In contrast, in the present case, where the magnitude and intensity of the activity were not accurately set

forth in the notice, that notice cannot legitimately be said to be "[g]enerally . . . in compliance with the notice requirements set forth" in Section 39.2. *Id.* at 932-33. Here, Applicant included only a minimal, "initial" throughput number which was materially inconsistent with evidence later introduced in the siting hearing. This information was insufficient to "place[] potentially interested persons on inquiry" regarding the actual nature of the proposed facility, contrary to the purpose underlying the statutory notice requirement. *Id.*

As such, the Pre-Filing Notice in question in the present case was void *ab initio*, and therefore never effective (even as to the 200 ton per day throughput figure included in the Notice). The deficiency in the Notice seriously offends applicable law and public policy given the Applicant's declared intent at the public hearing to realize daily waste throughput figures greatly in excess of the figure included in the Pre-Filing Notice.

Proper statutory notice in proceedings for site location approval of a pollution control facility is a jurisdictional requirement. Because the Applicant failed to satisfy an essential component of the notice requirements, the Rockdale Village Board was without jurisdiction to hear the request for site location approval, and the Application for site location approval filed by ERDS should have been dismissed in its entirety. Instead, the Village Board granted siting approval. Because it did not have the jurisdiction to do so, this approval must be overturned.

C. The Application Was Impermissibly Amended a Second Time and Should Have Been Denied

ERDS submitted a deficient and seriously flawed application, a fact that became obvious on the first day scheduled for the hearing. ERDS then submitted significant additional information regarding the Application, calling it an "errata." C1568-C1618. The Hearing Officer found that the "errata" was actually a *de facto* amendment to the Application and delayed the hearing so that all parties would have time to review the additional information. Hearing

Officer Rpt. at 1-2. Then, at the hearing itself, as discussed more fully above, ERDS significantly altered the proposed size and nature of the Facility by more than tripling the estimated throughput.

This dramatic change to the size and nature of the facility amounted to a second amendment to the Application – one that had not been properly noticed – which is not permitted under Section 39.2(e). 415 ILCS 5/39.2(e) ("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 boy of the municipality and any participants, the applicant may file *not more than one* amended application . . . ." (emphasis added)).

Because the Application was amended twice, contrary to Section 39.2(e), it should have been dismissed. The Village Board lacked jurisdiction to review the Application and lacked authority to grant "conditional approval" of the same. Therefore, the Application should have been denied, and the Village Board's decision to "conditionally approve" the Application should therefore be reversed.

D. Criteria 1, 2, and 5 Were Not Met.

The Village Board must have found that all of the statutory criteria were met in order to grant siting approval. 415 ILCS 5/39.2(a); *County of Kankakee v. PCB*, 396 Ill. App. 3d 1000, 1008 (2008) (noting that "*all* of the statutory criteria must be met as a precondition for local siting approval" (emphasis added)). The Applicant's failure to demonstrate compliance with even one criterion would require denial of the Application. As discussed below, the Applicant wholly failed to demonstrate that it met three of the Criteria. The Application should therefore have been denied, and the Village Board's decision to "conditionally approve" the Application must be overturned.

1. ERDS did not demonstrate that "the facility is necessary to accommodate the waste needs of the area it is intended to serve."

The hearing officer, in his Report, found that the "Applicant has not demonstrated that the proposed Facility meets Criterion 1." Hearing Officer Rpt. at 3-4. The Village Board did not accept this finding by the Hearing Officer, instead finding that ERDS had met Criterion 1. The Village Board acknowledged that ERDS' expert "failed to conduct a traditional comprehensive transfer capacity analysis that analyzed, specifically, waste production and waste disposal capacities (in this case, transfer station and direct-haul capabilities) in the service area set forth in the application." Ord. 1026, Sec. 3, at p. 6. The Village Board characterized ERDS needs analysis as a demonstration "that more waste is being generated and will be generated in the service area than is presently being transferred out by facilities in the service area." *Id.* at 7. This type of generalized analysis, which was characteristic of the Applicant's "needs analysis," was not sufficient to demonstrate need as that criterion has been interpreted by this Board and the Illinois courts.

The Village Board instead relied on economic, environmental, and competitive benefits allegedly provided by the Moen Transfer Station in determining that Criterion 1 had been met. The Village Board found that "the Applicant presented evidence that the Moen Transfer Station Facility is needed in the area it is intended to serve in part because of these environmental and economic factors but also to help divert material that would otherwise burden existing transfer stations." *Id.* Notably absent from the Village Board's findings – and the Applicant's evidence – was an analysis of whether there was existing transfer capacity in the service area. Generalized, anecdotal "evidence" that existing transfer stations would be "otherwise burden[ed]" by the waste intended for the Moen Transfer Station simply does not equate to an analysis of the

available transfer station capacity in the service area, which is required for a showing of need under Criterion 1.

In fact, Applicant's expert acknowledged that he did not analyze the capacity available at transfer stations that are located physically outside the service area but that do serve the service area. Hearing Officer Rpt. at 10. He also acknowledged that some waste could be directly hauled to Prairie View Recycling and Disposal Facility ("Prairie View"), which is the landfill to which waste in the service area would eventually be hauled, but did not quantify the amount of such direct-haul waste. *Id.* Further, it is unrebutted that there is sufficient capacity at Prairie View for the service area. *Id.* at 11. As noted by the Hearing Officer, the "Applicant's case contains no determination of the amount of waste requiring disposal that is or could be directly hauled to a landfill or some other transfer station and contains no calculation of transfer station capacity (i.e., disposal capability) available to the intended service area." Hearing Officer Rpt. at 11. In other words, the Applicant did not demonstrate a deficiency in disposal capacity, which is the required showing to meet Criterion 1.

Applicant instead relied heavily on the economic benefit to Will County (from a supposed increase in waste hauled to Prairie View, which would result in more host fees to the County) and the benefit to Rockdale (because of the host agreement with Rockdale which obligates ERDS to provide free pick up and disposal services to Rockdale residents for 20 years). Ord. 1026, Sec. 3. These benefits, while certainly valuable and important, are simply not sufficient to show that the facility is "necessary to accommodate the waste needs of the area it is intended to serve." 415 ILCS 5/39.2(a)(i). Notably, these benefits do not inure to the entire service area, which is comprised of areas outside Will County and municipalities other than the Village of Rockdale. Ord. 1026, Sec. 3; Hearing Officer Rpt. at 9.

The law on Criterion 1 is unambiguous that an Applicant "must demonstrate an urgent need for the new facility as well as the reasonable convenience of establishing it." *Waste Management of Illinois, Inc. v. PCB*, 175 Ill. App. 3d 1023, 1031 (1988). An applicant must analyze the capacity of existing facilities to determine whether another is needed. The Village Board acknowledged that the applicant must "show the facility is reasonably required by the waste needs of the area intended to be served, *taking into consideration the waste production of the area and the waste disposal capabilities*, along with other relevant factors." Ord. 1026, Sec. 3, at p. 6 (emphasis added); *Waste Management of Ill. v. PCB*, 234 Ill. App. 3d 65, 69 (1st Dist. 1992). As the Hearing Officer noted, "[f]ailure to consider the available disposal capacity for the area to be served (including facilities outside of, but still serving, the area intended to be served) has been found to be deficient" to meet Criterion 1. Hearing Officer Rpt. at 8 (citing *A.R.F. Landfill v. PCB*, 174 Ill. App. 3d 82, 91 (1988)).

In order to show need, the Applicant must have shown "that the landfill is reasonably required by the waste needs of the area, *including consideration of its waste production and disposal capabilities*." *File v. D&L Landfill, Inc.*, 219 Ill. App. 3d 897, 906-07 (1991) (emphasis added) (citing *Waste Management*, 175 Ill. App. 3d at 1031). It is simply impossible to take into consideration the waste production and disposal capabilities of facilities in the area without analyzing, "specifically, waste production and waste disposal capacities," which the Village Board here found that the application did not do. Ord., Sec. 3, at p. 6.

In light of Applicant's failure to quantify, weigh, or even consider "the waste production and disposal capabilities of the service area," it did not meet its burden to show that the facility met Criterion 1. The Village Board implicitly acknowledged as much by improperly "conditionally approving" the Application. See Section II.A, *supra*. The Village Board's

decision to grant siting approval, on the basis of its unlawful "conditional approval" of the Application, was against the manifest weight of the evidence and should be overturned.

2. ERDS did not demonstrate that "the facility is so designed, located, and proposed to be operated that the public health, safety and welfare will be protected.

The Village Board also "conditionally approved" the Application as to Criterion 2. The Village Board adopted the Hearing Officer's findings and recommendations as to this Criterion, but imposed its own special conditions. The Hearing Officer explicitly stated that "the Applicant failed to demonstrate that the proposed Facility meets Criterion 2." Hearing Officer Rpt. at 2. The analysis should have stopped there, as the Applicant failed to meet the burden of proof clearly placed upon it by Section 39.2. The Hearing Officer and Village Board, however, went on to bolster the Applicant's facially insufficient demonstration by adding special conditions that would, arguably, allow the Applicant to bring the facility into compliance with Criterion 2.

The Hearing Officer noted numerous deficiencies in the Applicant's demonstration as to Criterion 2, and the Village Board adopted this analysis as its own in Ordinance 1026. For example, the Hearing Officer noted that

> "during the peak hours of the 600 tons per day volume, the Applicant assumed that loading of the transfer trailers and unloading of the hauler trucks could take place simultaneously – but the modeling did not prove that out. * * * At 600 tons per day, the plan for storing or sorting these materials becomes much more important and neither the Application nor Mr. Hock [the Applicant's expert] satisfactorily explained how sorting, storing and the other operations could go on simultaneously at 600 tons per day. * * * Use of a barrier wall as a push wall, [which will occur at higher volumes], even with a steel plate, violates the requirements of Criterion 2. Volumes accepted must be reduced to avoid that possibility." Hearing Officer Rpt. at 14-15.

The Hearing Officer ultimately found that "[t]he modeling demonstrated that the Facility could safely handle 200 tons per day – particularly as that will be primarily ERDS business with

known collection vehicles – and that the Facility could manage some modest volume above 200 tons per day." Hearing Officer Rpt. at 15. Despite adopting this finding as its own, the Village Board nonetheless approved the Application with a daily throughput limitation of 300 tons per day and the ability to seek "temporary operation in excess of the daily maximum tonnage as circumstances dictate." Ord. 1026, Sec. 4. Further, the Village Board explicitly allowed for the possibility of future operation with a maximum of 600 tons per day. *Id.* This approval was against the manifest weight of the evidence and, indeed, was contrary to the Village Board's own findings of fact and conclusions of law, as articulated by the Hearing Officer.

Similarly, the Hearing Officer found – and the Village Board adopted as its own conclusion – that the facility poses a substantial potential for the creation of leachate. Hearing Officer Rpt. at 16. "The Applicant bears the burden to demonstrate that the design of the facility and the storm water management plan is sufficient to safeguard the public from leachate leaving the premises. The present state of the Application does not satisfy this concern." Id. (emphasis added). The Hearing Officer nonetheless found that this concern could be addressed with a special condition requiring an additional demonstration from the Applicant that the stormwater management plan met Criterion 2. *Id.* The Ordinance adopted by the Village Board imposed as a special condition the following: "The Village Engineer must review and approve the final design and storm water management plan for compliance with the Will County Storm Water Ordinance and be satisfied that the Facility *will reasonably protect the public* from untreated leachate leaving the property." Ord. 1026, Section 4.5 (emphasis added). The Village Board's actions, which consisted of 1) finding that the Applicant had not demonstrated compliance with Criterion 2; 2) "conditionally approving" the Application despite this finding; and 3) imposing a

condition allowing the Applicant to make its demonstration at some future time, were against the manifest weight of the evidence as well as unlawful under the statute.

Another special condition imposed by the Village Board requires ERDS to "operate and maintain the facility in substantial conformance with the statements and representations contained in its Application." Ord. 1026, Sec. 4, at p. 8. This is impossible as a matter of course, as ERDS represented in its Application that the Facility would have an average throughput of 200 tons per day, while its testimony at hearing made it clear that its intent was to accept far more waste. Indeed, the Village Board explicitly left open the probability that ERDS would accept 600 tons per day. Thus, at the outset, the facility will not be operated in "substantial conformance with the statements and representations contained in [the] Application."

The Village Board's actions were flatly inconsistent with Section 39.2. The statute requires an Applicant to demonstrate compliance with the Criteria prior to granting siting approval. The Village Board explicitly found that the Applicant did not meet its burden to demonstrate such compliance. It nonetheless "conditionally approved" the Application allowing for a demonstration at some future time that the Applicant had met Criterion 2. This is not the procedure called for or contemplated by Section 39.2. The Village Board's analysis should have ended at the point at which it determined that the Applicant had not demonstrated compliance with any one Criterion. Its decision to allow the Applicant to make its demonstration as to compliance with Criterion 2 at some later date was contrary to the statute and against the manifest weight of the evidence. The Village Board's decision must therefore be overturned.

3. The plan of operations for the facility is not "designed to minimize the danger to the surrounding area."

As with Criterion 2, the Hearing Officer and Village Board found that the Applicant had "failed to demonstrate that the Facility meets Criterion 5." Hearing Officer Rpt. at 18; Ord. 1026, Section 2. The Hearing Officer flatly stated, "I find that the plan of operations has not been designed to minimize the danger from operational accidents arising out of on-site traffic movements." Hearing Officer Rpt. at 18. The Village Board adopted this finding as its own. Ord. 1026, at p. 3 & Sec. 2. The Village Board nonetheless went on to "conditionally approve" the Application on the basis of special conditions imposed by the Village Board. One of the special conditions was that the "Village Engineer must review and approve the final site plan, traffic circulation design, signage and plan of operations to minimize the danger from traffic conflicts." Ord. 1026, Sec. 4.

As with Criterion 2, the Village Board determined that the Applicant had not demonstrated compliance with Criterion 5 but that it could make that demonstration at some later date. And, as noted above, that procedure is simply not permitted by Section 39.2. Furthermore, the Hearing Officer's findings noted that there was "a concern for even more traffic conflicts on the site when handling the higher 600 tons per day volume." Hearing Officer Rpt. at 20. The Applicant's expert witness, Mr. Hock, admitted that "onsite traffic patterns would involve some cross-overs, [but that] the amount of trucks in the facility at any given time is so small that this is not a problem." *Id.* The Hearing Officer went on to note, "Mr. Hock's proposed explanation of the issue points to the fact that a special condition limiting the volume of waste would be necessary to preserve the validity of that assumption." *Id.*

Despite these acknowledged deficiencies in the Application, the Village Board improperly "conditionally approved" the Application, allowing for a future demonstration of

compliance with the Criteria. The Village Board also apparently disregarded its own adopted finding regarding the very real likelihood of traffic conflicts at a 600 ton per day volume and explicitly allowed for the possibility of such higher volume of waste at the Moen Transfer Station. The Village Board's decision was contrary to law and against the manifest weight of the evidence, and should be overturned.

III. CONCLUSION

For the reasons set forth herein — namely that the Village Board improperly "conditionally approved" the Application; lacked jurisdiction due to insufficient notice under Section 39.2; allowed an impermissible second amendment to the Application; and found that the Application met the statutory criteria of Section 39.2, when the manifest weight of the evidence does not support such a finding — the Village Board's "conditional approval" of the Application should be overturned, and the Application should be denied.

Dated: February 11, 2016

Respectfully submitted,

On behalf of WILL COUNTY, ILLINOIS

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