**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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STATE OF ILLINOIS
Pollution Control Board

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| WILL COUNTY, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | |
| | ) | PCB 16-54 |
| VILLAGE OF ROCKDALE, BOARD OF | ) | |
| TRUSTEES OF VILLAGE OF ROCKDALE and | ) | (Pollution Control Facility Siting |
| ENVIRONMENTAL RECYCLING AND | ) | Appeal) |
| DISPOSAL SERVICES, INC., | ) | |
| | ) | |
| Respondents. | ) | |
| WASTE MANAGEMENT OF ILLINOIS, INC., | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | |
| | ) | PCB 16 - 56 |
| VILLAGE OF ROCKDALE, ILLINOIS | ) | |
| BOARD OF TRUSTEES and | ) | (Third - Party Pollution Control |
| ENVIRONMENTAL RECYCLING AND | ) | Facility Siting Appeal) |
| DISPOSAL SERVICES, INC., | ) | (Consolidated) |
| | ) | |
| Respondents. | ) | |

**NOTICE OF FILING**

TO: See Attached Service List

PLEASE TAKE NOTICE that on February 11, 2016, Waste Management of Illinois, Inc. filed with the Illinois Pollution Control Board, **WASTE MANAGEMENT'S POST-HEARING BRIEF**, in this proceeding, a copy of which is attached and served upon you.

Dated: February 11, 2016

Donald J. Moran
PEDERSEN & HOUPT
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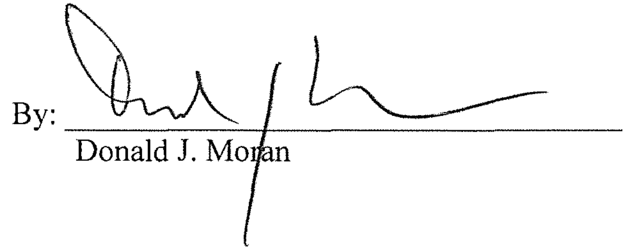
Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC

By: 
Donald J. Moran

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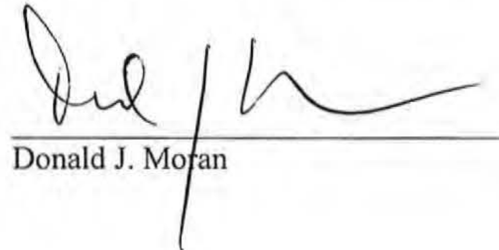
STATE OF ILLINOIS
Pollution Control Board

## CERTIFICATE OF SERVICE

I, Donald J. Moran, an attorney, certify that I have served the attached **WASTE MANAGEMENT'S POST-HEARING BRIEF** on the named parties by electronic service and by depositing same in the U.S. mail at 161 N. Clark Street, Chicago, Illinois 60601, at 5:00 p.m. on February 11, 2016.



Donald J. Moran

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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STATE OF ILLINOIS
Pollution Control Board

WILL COUNTY,

Petitioner,

v.

VILLAGE OF ROCKDALE, BOARD OF TRUSTEES OF VILLAGE OF ROCKDALE and ENVIRONMENTAL RECYCLING AND DISPOSAL SERVICES, INC.,

Respondents.

PCB 16-54

(Pollution Control Facility Siting Appeal)

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WASTE MANAGEMENT OF ILLINOIS, INC.,

Petitioner,

v.

VILLAGE OF ROCKDALE, ILLINOIS BOARD OF TRUSTEES and ENVIRONMENTAL RECYCLING AND DISPOSAL SERVICES, INC.,

Respondents.

PCB 16 - 56

(Third - Party Pollution Control Facility Siting Appeal)
(Consolidated)

**WASTE MANAGEMENT'S POST-HEARING BRIEF**

NOW COMES, Petitioner Waste Management of Illinois, Inc. ("WMII"), by its attorneys Pedersen & Houpt, P.C., and hereby submits its Post-Hearing Brief in its appeal of the September 3, 2015, decision of the Board of Trustees (the "Village Board") of the Village of Rockdale (the "Village"), granting site location approval for the proposed Moen Transfer Station.

## I. INTRODUCTION

The Pollution Control Board (the "PCB") should reverse the Village Board's site location approval because (1) Environmental Recycling and Disposal Services, Inc. ("ERDS") failed to comply with the mandatory pre-filing notice procedures set forth in Section 39.2(b) of the

Illinois Environmental Protection Act (the "Act") and the Village Board, therefore, lacked jurisdiction to hear ERDS's application; (2) ERDS failed to demonstrate compliance with criteria (i), (ii), (v) and (viii) of Section 39.2(a) of the Act; (3) the Village Board's findings regarding criteria (i), (ii), (v) and (viii) are against the manifest weight of the evidence; and (4) the Village Board lacked authority to cure ERDS' failures by imposing special conditions. The Village Board's decision to approve ERDS's application was erroneous as a matter of law and must be reversed.

## II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

On December 12, 2014, ERDS filed an Application with the Village of Rockdale requesting local siting approval for a new pollution control facility, the Moen Transfer Station, pursuant to Section 39.2 of the Act, 415 ILCS 5/39.2 (2010). (Ex. 1). The proposed municipal solid waste ("MSW") transfer station would be located on a 2.16-acre parcel at 2277 Moen Avenue in the Village of Rockdale, Illinois. (*Id.* at 1-17). The proposed facility's service area is the Prairie View Recycling and Disposal Facility ("RDF") service area, plus portions of Kendall and Grundy Counties. (*Id.* at 1-2). The Prairie View RDF service area includes all communities in Will County and those municipalities located at least partially in the County. (*Id.*)

A Hearing Officer appointed by the Village Board conducted a public hearing on the Application on March 23rd and 24th and May 20th and 21st of 2015. (C2421-3549). The Village of Rockdale, the City of Joliet, the County of Will, WMII and ERDS participated in the public hearing as parties. (VB Tr., pp. 3-4). After the hearing and public comment period closed, WMII and Will County moved to dismiss the Application on the ground that ERDS's statutory pre-filing notice to landowners under Section 39.2(b) of the Act was defective and the Village Board, therefore, lacked jurisdiction to hear the Application. (C2292-335).

On or about August 14, 2015, the Hearing Officer issued his Report and Recommended Findings of Fact. (8/14/15 Rpt.). The Report recommended that the Village Board deny the Application because ERDS failed to demonstrate that the proposed facility satisfied the first of Section 39.2(a)'s nine criteria, *i.e.*, that it is "necessary to accommodate the waste needs of the area it is intended to serve." 415 ILCS 5/39.2(a)(i). (8/14/15 Rpt., p. 8). The Hearing Officer further recommended findings that ERDS failed to demonstrate compliance with criterion (ii), *i.e.*, that the proposed facility is "so designed, located and proposed to be operated that the public health, safety and welfare will be protected;" and criterion (v), *i.e.*, that "the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents." 415 ILCS 5/39.2(a)(ii) & (v). (8/14/15 Rpt., pp. 13, 18). The Hearing Officer stated, however, that criteria (ii) and (v) "can be met through the imposition of and compliance with special conditions," which he recommended. (*Id.*) The Report recommended denying WMII's and Will County's motions to dismiss.

On September 3, 2015, the Village Board adopted Ordinance 1026 approving the Application (the "Ordinance"). (9/3/15 Ord.) The Ordinance incorporated the Hearing Officer's Report by reference and adopted its findings and recommendations, except with respect to criteria (i), (ii) and (v). (*Id.* at § 2). The Village Board rejected the Hearing Officer's recommendation with respect to criterion (i) (need) and replaced that portion of the Hearing Officer's Report with its own findings of fact. (*Id.* at §§ 2-3).

The Village Board further rejected the Hearing Officer's findings on criteria (ii) (public health) and (v) (danger to surrounding area) but made no factual findings of its own. (*Id.* at §§ 2, 4). Instead, the Village Board summarily found that ERDS "has met its burden of proof as to Criterion 2 ... provided that [ERDS] operates the Facility in accordance with [certain] special

conditions," which were not, notably, the same conditions recommended by the Hearing Officer. (*Id.* at § 4). The Village Board also summarily found that ERDS "has met its burden of proof as to Criterion 5, ... subject to the following special conditions," which, again, were not the same conditions recommended by the Hearing Officer. (*Id.*)

On October 6th and 7th of 2015, Will County and WMII timely filed Petitions to this Board for review of the Village Board's decision. (10/7/15 Pet.). The appeals were consolidated on November 19, 2015. This Board conducted its hearing on January 12, 2016.

## III. ARGUMENT

The Village Board's approval of the Application should be reversed for several reasons. First, the Village Board lacked jurisdiction to decide ERDS's Application because ERDS misrepresented the "nature and size" of the proposed Moen Transfer Station in its pre-filing notice, under Section 39.2(b), to landowners and members of the Illinois General Assembly. Second, ERDS's Application omits an essential design element — the proposed transfer station's throughput capacity — and, therefore, lacks sufficient detail. Third, the Village Board's decision with respect to criterion (i) was against the manifest weight of the evidence because ERDS failed to conduct a disposal or transfer capacity analysis and, therefore, failed to establish a need for the proposed facility. Fourth, the Village Board erred when it approved the Application despite finding that ERDS failed to prove compliance with criterion (ii); the Village Board cannot use special conditions to excuse ERDS's failure to meet its burden of proof. Fifth, the Village Board's decision with respect to criterion (v) was not founded in the evidence and the opposite conclusion was clearly evident — indeed, it was recommended by the Village Board's appointed Hearing Officer. Finally, the Village Board's determination of compliance with criterion (viii) ignored multiple provisions of Will County's Solid Waste Management Plan and, therefore,

failed to recognize the proposed facility's inconsistency with that Plan. The Village Board's approval of ERDS's application was both against the manifest weight of the evidence and void for lack of jurisdiction. The Village Board should be reversed.

## A. The Village Board Lacked Jurisdiction to Decide ERDS's Application.

The Village Board lacked jurisdiction to hear ERDS's application because ERDS failed to comply with the mandatory notice procedures set forth in Section 39.2(b) of the Act. Section 39.2(b)'s notice requirements are jurisdictional, meaning they must be satisfied in order to vest the Village Board with jurisdiction to hear ERDS's application. ERDS's notice under Section 39.2(b) (the "Notice") misrepresented "the nature and size" of the proposed Moen Transfer Station and falsely stated that ERDS "propose[d] to handle an average of 200 tons per day of solid waste" at the Moen Transfer Station when, in fact, "[t]hat is not what [ERDS is] proposing." (Ex. 3; VB Tr., p. 957). Instead, ERDS is "absolutely proposing to accept or demonstrating that [it] can accept at least 600 and there is not a specific tonnage limit proposed." (*Id.*) Because ERDS's Notice misrepresented the proposed facility's "nature and size," ERDS failed to satisfy Section 39.2(b)'s jurisdictional requirements. The Village Board, therefore, lacked jurisdiction to hear ERDS's application and its approval of that application must be reversed.

### 1. The Village Board's jurisdiction is reviewed *de novo*.

"The issue of whether or not proper notice to landowners was provided under Section 39.2(b) of the Act is a threshold issue in a pollution control siting appeal to the [Pollution Control] Board." *City of Kankakee v. County of Kankakee*, PCB Nos. 03-125, 03-133, 03-134, 03-135 (cons.), slip op. at 15 (Aug. 7, 2003) (internal citations omitted). "Failure to meet the strict notice requirements of Section 39.2(b) of the Act divests the County [or Village] Board of

jurisdiction to hear the matter. The law is well settled that when reviewing a question of law the reviewing court should use the *de novo* standard of review. … Clearly whether or not the County [or Village] Board had jurisdiction is a question of law and therefore the [Pollution Control] Board will use the *de novo* standard of review." *Id.* (same).

### 2. ERDS's Section 39.2(b) notice misrepresented the proposed transfer station's "nature and size."

Section 39.2(b) of the Act "sets forth the notice requirements which must be met before a county [or village] board can take action on a request for site location approval." *Daubs Landfill, Inc. v. Pollution Control Bd.*, 166 Ill. App. 3d 778, 790 (5th Dist. 1988). It requires "written notice of such request to be served either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property." 415 ILCS 5/39.2(b). The written notice must "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." *Id.* (emphasis added).

"The notice requirements contained in section 39.2 of the Environmental Protection Act have been held to be jurisdictional prerequisites which must be followed in order to vest the county board with the power to hear a landfill proposal." *Daubs Landfill*, 166 Ill. App. 3d at 780 (citations omitted). "Substantial compliance with notice provisions has been held to be insufficient where the statutory provisions are not merely technical requirements, but are jurisdictional." *Id.* (same). "The purpose of the notice is obviously to notify interested persons of the intent to seek approval to develop a new site or to expand an existing facility. The notice is

sufficient if it is in compliance with the statute and it places potentially interested persons on inquiry about the details of the activity." *Tate v. Pollution Control Bd.*, 188 Ill. App. 3d 994, 1019 (4th Dist. 1989).

In this case, ERDS's notice under Section 39.2(b) was defective because it did not correctly state "the nature and size" of the proposed Moen Transfer Station. ERDS's Notice identifies the proposed facility as a "non-hazardous transfer station which will accept non-hazardous waste for temporary storage, consolidation, and further transfer to a waste disposal/treatment facility." (Ex. 3). The Notice specifically states that "[t]he facility proposes to handle an average of 200 tons per day of solid waste." (*Id.*)

ERDS does not, in fact, propose to handle an average of 200 tons per day of solid waste at the Moen Transfer Facility. At the hearing before the Village Board, Mr. John Hock, ERDS's lead design engineer, stated that "we are not requesting to limit the amount that we take in to 200 tons per day. That is not what we are proposing. *We are absolutely proposing to accept ... at least 600* and there is not a specific tonnage limit proposed." (VB Tr., p. 957) (emphasis added). He further stated that the proposed facility "could readily manage 600 tons per day so, yes, that is proposed." (*Id.* at 954). At a minimum, therefore, ERDS proposes a 600-ton-per-day facility, not the 200-ton-per-day facility identified in the Notice.

ERDS also reserved the option to increase the facility's tonnage-per-day even further to, perhaps, as much as 2,200 tons-per-day. On cross-examination, Mr. Hock specifically disagreed "that you can determine an absolute maximum number" for the facility. (*Id.*) Instead he claimed that, while the proposed facility "could readily manage 600 tons per day[,] ... it could accept a larger tonnage ...." (*Id.* at 954-55). He then testified as follows:

> Q. So in other words, what we have now established is the applicant is requesting this Village to approve a solid waste transfer station with no specific throughput capacity?
>
> A. Correct, I thought I had been very clear on that.

(*Id.* at 958). To remove all doubt, ERDS's attorney specifically clarified that ERDS was "asking the Village to approve the application without a tonnage cap." (*Id.*) In its Closing Argument and Proposed Findings, finally, ERDS stated that the facility would have "sufficient stacking and on floor storage capacity that it could theoretically manage 2200 tons per day if open for twentyfour [*sic*] hours." (6/22/15 ERDS Arg., p. 7).

The Notice, therefore, specifically misrepresented the "nature and size" of the Moen Transfer Station. It stated without equivocation that "the facility proposes to handle an average of 200 tons per day of solid waste." (Ex. 3). Mr. Hock, however, unequivocally stated that a 200 ton-per-day facility "is not what [ERDS is] proposing" and that, at a minimum, a 600 ton-per-day facility "is proposed." (VB Tr., pp. 954). In fact, ERDS is clearly and unambiguously "asking the Village to approve the application without a tonnage cap." (*Id.* at 958). The Notice is patently false.

Through its actions, ERDS ensured that no one receiving the Notice would or could know that the proposed facility might accept, at a minimum, three times the amount of waste specified in the Notice. As of this writing, those members of the public entitled to notice but who did not appear at the hearing do not and cannot know that the proposed facility may receive at least three times the trucks, process at least three times the waste and generate at least three times the odors and other negative externalities as originally represented. No one would argue that a landfill applicant could legitimately misrepresent the proposed landfill's size in its public notice, and for good reason: a neighbor who might not object to a small facility might have serious objections to

one three or ten times its size. The outcome should be no different here, particularly where the Notice is knowingly false.

By misrepresenting the facility's proposed tonnage per day, the Notice failed to accurately state the proposed facility's "nature and size," misled the public and, therefore, failed to satisfy Section 39.2(b)'s requirements. Because ERDS failed to satisfy Section 39.2(b), the Village Board lacked jurisdiction to hear the application. The Village Board's decision approving that application must be reversed.

**B. ERDS Failed to Submit a Legally Sufficient Application for Site Location Approval.**

ERDS failed to submit details sufficient to allow evaluation of the proposed facility under all nine of Section 39.2(a)'s criteria. By refusing to specify the proposed transfer station's waste throughput, ERDS rendered any meaningful evaluation under criteria (i), (ii), (iii), (v) and (vi) impossible. ERDS's application is, therefore, legally insufficient and the Village Board's decision approving it must be reversed.

The Village Board was required to determine whether the Application satisfied the nine statutory criteria set forth in Section 39.2(a) of the Act. That Section states, in pertinent part:

> The … governing body of the municipality … shall approve or disapprove the request for local siting approval for each pollution control facility which is subject to such review. An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if the proposed facility meets the following criteria:
>
> (i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;
>
> (ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
>
> (iii) the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

* * *

(v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents;

(vi) the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows;

* * *

(viii) if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan; ....

415 ILCS 5/39.2(a).

A local siting body may grant siting approval for a proposed new pollution control facility only if it finds that the applicant demonstrates compliance with all nine statutory criteria. *Town & Country Utils., Inc. v. Ill. Pollution Control Bd.*, 225 Ill. 2d 103, 117 (2007). The application or request must contain sufficient details of the proposed facility to demonstrate that it satisfies each of the nine criteria by a preponderance of the evidence. *Land & Lakes Co. v. Ill. Pollution Control Bd.*, 319 Ill.App.3d 41, 45 (3d Dist. 2000). If the applicant fails to establish any one of the criteria, the application must be denied. *Waste Mgmt. of Ill., Inc. v. Pollution Control Bd.*, 175 Ill. App. 3d 1023, 1034 (2d Dist. 1988).

An application for local siting approval of a MSW transfer station of unspecified waste throughput is insufficient as a matter of law. By failing to specify the quantity of waste to be processed, ERDS omitted an essential design element of the proposed facility and rendered an evaluation of compliance with Section 39.2(a)'s nine criteria impossible. No rational decisionmaker can evaluate the proposed facility's compliance with, at a minimum, Section

39.2(a)'s first, second, third, fifth and sixth criteria because any such evaluation requires, at the very least, an understanding of just how much waste will be accepted and processed by the facility. An application that fails to provide this basic information does not provide detail — an essential design element — sufficient to demonstrate compliance with Section 39.2(a)'s criteria and is, therefore, insufficient as a matter of law.

In this case, ERDS refused to specify the proposed Moen Transfer Station's waste throughput for which it sought approval, much less an upper limit on that throughput. Though it submitted evidence regarding the proposed facility's ability to process 200 or, alternatively, 600 tons per day, it claimed the facility would not be limited to those amounts. (VB Tr. at 746). Instead, the applicant insisted that "as long as it meets the conditions of the permit and operates appropriately, it could accept a larger tonnage recognizing the fact that at some point it does not become realistic or practical to accept larger volumes." (*Id.* at 954-955.)

By refusing to specify MTS's waste throughput, ERDS, by definition, failed to submit "sufficient details of the proposed facility to meet each of the nine statutory criteria." Section 39.2(a)'s criteria require assessments of, among other things, whether the proposed facility is necessary to accommodate the waste needs of the area (criterion (i)) and, stated broadly, what effect the proposed facility will have on the surrounding area (criteria (ii), (iii), (v) and (vi)). No legitimate assessment of these criteria can be performed without knowing how much waste MTS will process. (*Id.* at 753, 758, 766, 768-78, 796-99.)

For example, to comply with criterion (i), the proposed transfer station must be "necessary to accommodate the waste needs of the area it is intended to serve." 415 ILCS 5/39.2(a)(i). An analysis of this criterion requires a comparison of the amount of waste generated in the proposed service area to the proposed facility's capacity. An area with little need may

benefit from a low-capacity facility; a facility capable of processing three times the amount of waste generated in the service area would, on the other hand, simply not be "necessary."

By refusing to specify the waste throughput for which it was seeking approval, the applicant has rendered any such comparison of waste generated to available capacity impossible — one side of the comparison is completely missing. No decisionmaker can determine, on the current record, whether the proposed facility is "necessary" because it cannot know whether the facility's waste throughput exceeds or equals or falls short of the service area's need. There can be little doubt that the proposed Moen Transfer Station service area does not need, for example, a 1,000 ton-per-day waste transfer station, yet ERDS asks for a finding that just such a hypothetical facility — which ERDS reserves for itself the right to create — is every bit as "necessary" as a 600 ton-per-day facility, or a 200 ton-per-day facility or, for that matter, a token, 20 ton-per-day facility. This is simply illogical. By failing to specify the proposed facility's waste throughput, ERDS has rendered an analysis of the service area's true need for the proposed facility impossible. The Application lacks "sufficient detail" to demonstrate compliance with criterion (i) and is, therefore, deficient as a matter of law.

The same reasoning applies to criteria (ii), (iii) and (v) and (vi). The harm addressed by these criteria — risks to the public health and safety and negative impacts on surrounding property values and existing traffic flows — necessarily vary with the amount of waste processed. Again, however, ERDS has rendered impossible any comparison of the facility's actual health, safety, compatibility and traffic elements — which were evaluated, at various times, against capacities of 200 tons and 600 tons per day — with such greater capacities as ERDS hopes it will, someday, encounter. There is no evidence whatsoever that the proposed

facility's design is sufficient to address the risks proposed by a facility of any other capacity. The Application is, therefore, deficient as a matter of law.

### C. The Village Board's Findings on Criteria (i), (ii), (v) and (viii) Are Against the Manifest Weight of the Evidence.

As set forth in detail below, the Village Board's findings with respect to criteria (i), (ii), (v) and (viii) are against the manifest weight of the evidence. ERDS failed to conduct a disposal or transfer capacity analysis and, therefore, failed to establish a need for the proposed facility. The Village Board also erred when it approved the Application despite finding that ERDS failed to prove compliance with criterion (ii) and its decision with respect to criterion (v) was not founded in the evidence and the opposite conclusion was clearly evident Finally, the Village Board ignored multiple provisions of Will County's Solid Waste Management Plan and, therefore, failed to recognize the proposed facility's inconsistency with that Plan. The Village Board's findings are against the manifest weight of the evidence and must be reversed.

#### 1. The standard of review.

The PCB reviews local siting decisions to determine "whether the local decision is against the manifest weight of the evidence." *Id.* This Board is required to determine that the evidence supporting the Village Board's decision is competent, sufficient and presented by a credible witness. *Indus. Fuels & Res./Ill., Inc. v. Ill. Pollution Control Bd.*, 227 Ill. App. 3d 533, 543-50 (1st Dist. 1992). *See also Metro. Waste Sys., Inc. v. Pollution Control Bd.*, 201 Ill. App. 3d 51, 56 (3rd Dist. 1990) (PCB weighs credibility). In evaluating the sufficiency and credibility of the evidence, this Board, like the local decisionmaker, is not free to ignore or disregard competent and unrebutted testimony. *Indus. Fuels*, 227 Ill. App. 3d at 542, 549-50. *See also Carroll v. Chicago Housing Auth.*, 2015 IL App (1st) 133544, ¶ 26 (agency cannot "arbitrarily ignore" unrebutted testimony). A decision is against the manifest weight of the evidence where

the opposite result is clearly evident, or where the local decision maker's findings are unreasonable, arbitrary and not based on the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992); *Timber Creek Homes, Inc. v. Village of Round Lake Park*, PCB No. 14-99, slip op. at 12 (Aug. 21, 2014).

### 2. Criterion (i) – Need. ERDS failed to determine the service area's actual transfer station capacity and relied on irrelevant factors.

The Village Board's finding that ERDS met its burden of proof on criterion (i) by demonstrating "a need for the transfer station" was against the manifest weight of the evidence and must be reversed. Firstly, and most importantly, ERDS failed to conduct a disposal or transfer capacity analysis, as required by prevailing case law, and its claim to have identified a "transfer station capacity shortfall" is, therefore, based entirely on speculation and unfounded assumptions. The Village Board's decision to affirm despite this glaring error — identified for it in the Hearing Officer's Report — was against the manifest weight of the evidence and must be reversed for this reason alone. ERDS's remaining "needs analysis" consisted entirely of irrelevant considerations — such as the financial benefit to the Village of Rockdale — unrelated to the actual waste needs of the proposed service area. The Village Board's reliance on these factors was error and its decision should be reversed.

#### a. ERDS failed to produce competent evidence of need.

To prove criterion (i), ERDS was required to show that the transfer station is reasonably required by the waste needs of the service area, taking into consideration the waste production of the area and the waste disposal capacity available to it. *Waste Mgmt.*, 175 Ill. App. 3d at 1031. An applicant "must demonstrate an urgent need for the new facility as well as the reasonable convenience of establishing it." *Fox Moraine, LLC v. City of Yorkville,* 2011 IL App (2d) 100017, ¶ 110. Need involves consideration of increased costs of transporting and disposing waste, and

whether the proposed facility will ensure that service area waste will be disposed of in an environmentally sound and cost-efficient manner. *Wabash & Lawrence Counties Taxpayers & Water Drinkers Ass'n v. Pollution Control Bd.*, 198 Ill. App. 3d 388, 393 (5th Dist. 1990).

Failure to consider available disposal or transport capacity is fatal to a request to find need. *A.R.F. Landfill, Inc. v. Pollution Control Bd.*, 174 Ill. App. 3d 82, 91-92 (2d Dist. 1988). *Compare Landfill 33, Ltd. v. Effingham County Bd.,* PCB No. 03-43, slip op. at 29 (Feb. 20, 2003) (need for transfer station established by evidence of rapidly diminishing capacity of area landfills) *with Waste Mgmt. of Ill., Inc. v. Pollution Control Bd.*, 234 Ill. App. 3d 65, 69-70 (1st Dist. 1992) (need for transfer station not established when applicant did not consider local disposal capacity).

Mr. Hock testified for ERDS on criterion (i). While Mr. Hock has been involved in the development of five transfer station designs over the last ten years, his work for the proposed Moen Transfer Station was the first time he prepared a report himself on criteria (i). (VB TR., pp. 29, 255, 299). Mr. Hock's methodology consisted of three elements: (1) defining the proposed service area, (2) evaluating the "waste generation and disposal volume trends in the area" and (3) describing the supposed benefits of the proposed transfer station. (*Id.* at 183-84).

Mr. Hock considered waste disposal volume requiring disposal for the period 2010 to 2040. (*Id.* at 186). As of 2010, the proposed Moen Transfer Station service area generated between 2,446 to 3,799 tons per day of MSW requiring disposal. (*Id.*) Mr. Hock predicted those volumes would increase over 30 years based on the area's population growth and would eventually range between 3,922 to 6,103 tons per day. (*Id.*)

Mr. Hock then considered "trends" in the waste disposal system, specifically looking at landfill and transfer station MSW volume and site life for facilities within the service area. (*Id.* at

187-92). The Prairie View RDF has a life expectancy of at least until 2027. (*Id.* at 187). Two transfer stations within the proposed service area provide MSW transfer capacity to the service area: the Rockdale Transfer Station, which is authorized to accept MSW but which currently only accepts approximately 200 tons per day of source-separated recyclables; and the Joliet Transfer Station, which currently accepts between 1,000 to 1,240 tons per day of MSW. (*Id.* at 187-92). Both transfer stations are located within one-and-one-quarter miles of the proposed facility. (*Id.* at 190-91).

Finally, Mr. Hock "looked at the benefits that the Moen Transfer Station would bring." (*Id.* at 197). Mr. Hock testified, first, that the MTS would provide "needed transfer station capacity." (*Id.*) Mr. Hock assumed, without any identified basis in fact, that ten *per cent* (10%) of the 2,400 to 3,700 tons per day of waste generated in the proposed service area is directly hauled to Prairie View RDF. (*Id.*) Mr. Hock then argued that the Joliet Transfer Station is the only transfer station *in the proposed service area* accepting MSW and that its current average throughput of 1,300 tons per day must represent its maximum capacity because, according to Mr. Hock, he has "observed it to be operating at or beyond capacity at certain times." (*Id.*) Accordingly, he subtracted that 1,300 tons per day from the proposed service area's non-direct-hauled waste generation and, as a result, estimated a transfer station capacity shortfall of 850 to 2,000 tons per day. (*Id.* at 197-98).

Mr. Hock testified to other, supposed benefits of the proposed transfer station. The proposed facility would provide competition in the service area that would, he claimed, help keep prices down. (*Id.* at 198). He stated that the proposed facility would provide operational flexibility in the form of longer operating hours. (*Id.* at 199). He further argued that the proposed transfer station would give direct benefits to the Village of Rockdale in the form of free refuse

pick-up and disposal for twenty (20) years. (*Id.*) Mr. Hock claimed that the proposed facility would use its "best efforts" to transport waste to Prairie View RDF, thereby generating additional host fees for Will County, and would further pay Will County $5,000 annually to help fund collection efforts. (*Id.* at 199-200). The proposed transfer station "would reduce environmental impact," he claimed, by increasing the efficiency of collection by reducing fuel consumption, vehicle emissions and road wear. (*Id.* at 200). Finally, Mr. Hock testified that the proposed Moen Transfer Station "will facilitate more waste getting to the Prairie View RDF, which is what the service area needs and wants." (*Id.* at 215-16). Based on the benefits which he claimed the proposed transfer station would provide, Mr. Hock stated his opinion that the MTS meets the requirements of criterion (i), "as it is necessary to accommodate the waste needs of the area it is intended to serve." (*Id.* at 203).

Proper consideration of Mr. Hock's testimony depends more on what he did not say, or was unable to say, than on what he said. Most notably, he did not perform an actual capacity analysis for any transfer stations serving the proposed service area, including the two closest transfer stations, Joliet and Rockdale. (*Id.* at 223-26). Consequently, he did not consider the capacity of Joliet, Rockdale or transfer stations serving the service area but located outside of the service area and, instead, deliberately excluded their capacity from his "shortfall" analysis. (*Id.* at 226-28, 231, 239-41, 321). Mr. Hock further failed to consider that the proposed service area will soon benefit from another new transfer station in Plano and conducted no analysis to determine whether this new facility affected his "shortfall" analysis. (*Id.* at 235-36). Mr. Hock did not testify to any facts or information, other than his anecdotal observations on a single visit, supporting the claim that the Joliet Transfer Station was operating at or beyond its capacity. (*Id.*

at 278-82, 284-85, 288-89, 291-93). Instead, he acknowledged that the Joliet Transfer Station was, in fact, capable of accepting, at a minimum, over 1,800 tons per day. (*Id.* at 323-24).

Nor did Mr. Hock testify to any facts or information supporting his contention that approval of the proposed facility would increase competition and keep prices down or his claim that operation of the proposed facility would more efficiently transport waste to the Prairie View RDF. (*Id.* at 312-14, 344-45). Mr. Hock provided no facts or analysis concerning any supposed volume of MSW from the proposed service area, that is currently being transported for disposal to a facility other than the Prairie View RDF, that the proposed Moen Transfer Station could or would redirect to the Prairie View RDF. Indeed, Mr. Hock acknowledged that ERDS currently sends thirty-five *per cent* (35%) of its waste volume to transfer stations outside the service area, but did not explain why ERDS could not simply redirect this waste to the Prairie View RDF, even absent siting of the proposed Moen Transfer Station. (*Id.* at 224-25).

Ms. Sheryl Smith provided expert testimony regarding criterion (i). Ms. Smith is an environmental consultant and senior project manager with AECOM, and has over 30 years of experience in the solid waste industry. (*Id.* at 357-58). She has performed over 30 need assessments in siting cases, finding both need and no need depending on the facts of each case. (*Id.*)

Ms. Smith explained that the purpose of a MSW transfer station is to provide a more cost-effective means of transporting MSW to disposal facilities. This purpose may be served where service area MSW landfills are at or near capacity and more distant landfills are needed to provide an alternative disposal location. (*Id.* at 359.)

Ms. Smith's method of determining need is to (1) project the amount of MSW produced or generated within the service area over a specified time period, (2) determine the disposal

capacity available to receive that waste and whether the capacity is sufficient to handle the amount of waste generated, and (3) determine if a capacity shortfall for the service area exists. (Ex. 11, p. 3). If the MSW disposal capacity meets or exceeds the amount of waste generated over the specified time period, there is no need for a proposed MSW transfer station. (VB Tr., pp. 360-61, 363-65; Ex. 11, pp.13, 17).

Ms. Smith stated that the Prairie View RDF has the capacity to accept all the MSW generated in the Will County service area. (VB Tr., p. 359.) Prairie View RDF has 25 years of site life remaining. (*Id.* at 363). Therefore, Will County has no need for a MSW transfer station to provide the Will County service area with access to out-of-county or distant landfills. (*Id.* at 360).

In addition, the existing waste collection, transportation and transfer network infrastructure manages the MSW generated in the proposed service area with competition from many haulers. (Ex. 11, p. 13). Waste hauling patterns in Will, Grundy, and Kendall Counties indicate a competitive market of hauling companies, landfills and transfer stations. (*Id.* at 17). No information or data establishes that there is a lack of competition in the proposed Moen Transfer Station service area. (*Id.*)

Ms. Smith concluded that the proposed transfer station is not necessary to accommodate the waste needs of the service area. The bases for her conclusion are: (1) the Prairie View RDF has sufficient disposal capacity to handle the MSW generated in the proposed service area for at least twenty (20) years; (2) there are currently two transfer stations within 1.1 miles of the proposed transfer station that can accept the MSW proposed for that facility; (3) transporting waste out-of-county to distant landfills will be more costly; and (4) the Will County solid waste

plan states that, if needed, transfer stations be developed in the northern or eastern parts of the County, not in the central part. (*Id.* at 360-61, 365-67).

Mr. Kurt Nebel testified regarding the operation and capacity of the Joliet Transfer Station. Mr. Nebel has been employed by WMII for 32 years and is currently a senior district manager. (*Id.* at 412-13). He holds a bachelor of science in civil engineering from Bradley University, and is responsible for ten facilities: a landfill, two compost operations and seven transfer stations, including the Joliet and Rockdale Transfer Stations. (*Id.* at 413).

WMII acquired the Joliet Transfer Station in 1999. (*Id.* at 442). The Joliet Transfer Station is located at 2850 Mound Road, a little over one mile from the proposed Moen Transfer Station. (*Id.* at 414). It includes a scale house with an inbound and an outbound scale and a 20,000 square-foot enclosed structure, within which is a 10,200 square foot tipping floor on the west side. (*Id.* at 415). Mr. Nebel described the operation of the Joliet Transfer Station, specifically, the movement of waste vehicles into, through and out of the facility, unloading and consolidation of waste on the tipping floor, and loading of waste into transfer trailers. (*Id.* at 415-17). The operation is very dynamic: trucks come in, trucks unload their waste, waste is consolidated, the waste pile gets larger, the waste pile gets smaller as transfer trailers are loaded, and trailers and other vehicles leave the facility. (*Id.* at 428). No single photograph or snapshot can depict the dynamic nature of transfer station operation, much less indicate whether a transfer station is operating at or beyond its capacity. (*Id.* at 423-430).

The Joliet Transfer Station holds an IEPA permit, which authorizes the facility to accept MSW, store waste overnight and accept waste after operating hours. (*Id.* at 417-19). The Joliet Transfer Station receives and manages approximately 1240 tons per day of MSW. (*Id.* at 420). It has the capacity to manage an additional 600 tons per day. (*Id.* at 421).

Mr. Devin Moose also testified regarding the lack of need for the proposed transfer station. Mr. Moose is a registered professional engineer in eight states, including Illinois, and is the national director of solid waste consulting for CB&I, an international engineering firm. (*Id.* at 732). He has over 30 years' experience in solid waste consulting, including transfer station design and permitting. (*Id.* at 732).

Mr. Moose testified that the Application does not prove need. (*Id.* at 733, 745-47; Ex. 27, p. 3). Instead, the Application is "a series of statements and disconnected conclusions ... most of which have nothing to do with need." (VB Tr. at 733-34). Mr. Moose testified that the following statements, among others, are not relevant to whether the proposed Moen Transfer Station is necessary to accommodate the waste needs of the service area: (1) the large majority of waste generated in the proposed service area is intended to be disposed of at the Prairie View RDF (*id.* at 737-38); (2) the MTS will facilitate more waste from its service area to be disposed of at the Prairie View RDF (*id.* at 741); (3) the MTS will provide economic benefits and positive environmental impact to the Village of Rockdale and the surrounding area (*id.* at 742-43); and (4) over 90 *per cent* (90%) of the waste received at the Prairie View RDF is through transfer trailers (*id.* at 743-44). Even if true, none of these statements are relevant in establishing need. (*Id.* at 733-34, 737-44).

Mr. Moose further testified that failure to evaluate available transfer station capacity was fatal to ERDS's needs analysis. Without an analysis of transfer station capacity available to the proposed service area, ERDS failed to demonstrate that the proposed Moen Transfer Station is necessary to accommodate the waste needs of the area it is intended to serve. (*Id.* at 745-47, 795, 861-63; Ex. 27, p. 3).

**b. The Village Board's finding on criterion (i) was against the manifest weight of the evidence.**

Because ERDS did not actually conduct an analysis to determine the disposal and/or transfer capacity available to the service area, it failed to demonstrate a need for the proposed transfer station. On the contrary, ERDS's needs analysis is riddled with errors, speculation and unfounded assumptions. There is no evidence to support its assumption, for example, that only ten *per cent* (10%) of the proposed service area's waste is direct hauled to Prairie View RDF. No analysis, furthermore, supports the assumption that the Joliet Transfer Station has reached its maximum capacity; ERDS even admits that the Joliet Station is capable of processing nearly 600 tons per day more than it currently does. Most egregiously, however, ERDS simply omitted any analysis of the various transfer stations that, while physically located outside the proposed service area, receive waste from within the service area and are, therefore "accommodating the waste needs of the area [the proposed facility] is intended to serve." 415 ILCS 5/39.2(a)(i).

This is not simply an issue of having failed to perform the "traditional" analysis, therefore, or of one or another expert's "credibility," as the Village Board would have it. (9/3/15 Ord., § 3). The case law requires a capacity analysis because, absent such an analysis, any claim of need is, essentially, speculative. ERDS failed, as a matter of law, to present competent evidence of need and therefore failed, as a matter of law, to prove compliance with criterion (i). The Hearing Officer's report identified this fundamental failure, but the Village Board ignored it. (8/14/15 Rpt., pp. 10-11). The Village Board's decision to approve the Application despite this serious and glaring flaw was against the manifest weight of the evidence and must be reversed.

The Village cannot justify its decision to approve the Application by reference to the various irrelevancies raised in Mr. Hock's testimony. No authority, to WMII's knowledge, suggests that the financial benefit to the Village or Will County is a relevant consideration in

determining whether the proposed facility is "necessary to accommodate the waste needs of the area it is intended to serve." Indeed, as Mr. Moose pointed out, the proposed service area includes portions of DuPage, Kane and Grundy Counties, and none of them will benefit from the Village of Rockdale's free garbage pickup or Will County's host agreement with Prairie View RDF. (VB Tr., pp. 738-39). Finally, no actual evidence or analysis supports ERDS's claims regarding competitive or environmental benefits which are, Mr. Hock admits, merely his "intuitive and ... common sense" assumptions. (*Id.* at 325-26, 344-45, 743). If mere assumptions were sufficient to satisfy criterion (i), the criteria would be, essentially, meaningless. The Village Board's reliance on Mr. Hock was erroneous as a matter of law and led the Village Board to approve the Application despite the manifest weight of the evidence. The Village Board should be reversed.

**3. Criterion (ii) – Public Health, Safety and Welfare. The Village Board's special conditions cannot cure ERDS's failure to prove compliance with criterion (ii).**

The Village Board's decision to approve the Application was against the manifest weight of the evidence because, by the Village Board's own admission, ERDS failed to demonstrate compliance with criterion (ii). The Village Board cannot cure ERDS's failure by imposing special conditions that might have rendered that Application sufficient if they had been incorporated into the Application in the first place. No authority, to WMII's knowledge, authorizes a local siting decisionmaker to, essentially, amend an application for local siting approval in order to approve that application as amended. The Village Board's decision is against the manifest weight of the evidence and must be reversed.

**a. The proposed transfer station is not so designed, located and proposed to be operated as to protect the public health, safety and welfare.**

Section 39.2(a)(ii) of the Act requires that an applicant for local siting approval demonstrate that the proposed facility "is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii). This criterion requires a demonstration that the proposed facility is not flawed from a public safety standpoint and that its proposed operations are neither substandard nor unacceptably risky. *Indus. Fuels*, 227 Ill. App. 3d at 546. The determination of whether a proposed facility satisfies criterion (ii) is purely a matter of assessing the credibility of expert witnesses. *Fairview Area Citizens Task Force v. Ill. Pollution Control Bd.*, 198 Ill. App. 3d 541, 552 (3d Dist. 1990); *File v. D & L Landfill, Inc.*, 219 Ill. App. 3d 897, 907 (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 (Oct. 1, 2009).

Mr. Hock testified for ERDS on criterion (ii). The proposed Moen Transfer Station will be located on a 2.16-acre property that has an upper and lower level, with a 15-20 foot grade change between the two levels. (VB Tr., p. 32). The facility will include an 8,000 square foot transfer station building, with a tipping floor of 6,300 square feet, two bay opening doors and a 18-feet-tall by 14-feet-wide drive-through loading pit. (*Id.* at 36-37). The tipping floor will be on the upper level, eight feet above the bottom of the loading pit. (*Id.* at 37). The tipping floor will be curved and sloped to a collection pump that will collect wastewater, which will then flow to a second drain and a sanitary sewer connection. (*Id.* at 38).

Interior traffic circulation will occur as follows: collection vehicles would enter the site from Moen Avenue and proceed to a scale house, where they would be weighed and provide billing information. (*Id.* at 39). They would proceed in a counterclockwise direction and either exit the site or proceed back over the scale "to have a tare weight measure." (*Id.* at 40). Transfer trailers would enter the site, bypass the scale house on the left, travel in a counterclockwise direction around the transfer station building and enter the loading pit from the south. (*Id.* at 42). After loading was completed, the trailer would again travel around the transfer station building before exiting the site. (*Id.* at 42-44).

Mr. Hock stated that the proposed facility's design manages all of the stormwater on the site and asserted that there is no run-on that would come onto the site. (*Id.* at 45-46). Stormwater would be directed from north to south, with all stormwater flowing through a detention basin along the far south perimeter of the site. (*Id.* at 46-47). Another basin, directly south of the building, would collect run-off from the building itself. (*Id.* at 47).

The area just east of the building would contain underground stormwater detention that would receive flow from (a) a trench drain west of the building, (b) the northeast portion of the site and (c) an inlet along the north perimeter ditch. (*Id.*) An outflow structure along the southwest portion of Detention Pond 2 would allow stormwater to flow into a ditch on the north side of Moen Avenue and then to a culvert underneath Moen Avenue and property to the south. (*Id.* at 48).

Mr. Andrew Nickodem, a civil engineer licensed in Illinois and four other states, testified regarding criterion (ii). (*Id.* at 652-73). He specializes in the design of solid waste facilities, which includes landfills and transfer stations. (*Id.* at 652-56.) Mr. Nickodem testified that MTS did not meet criterion (ii) because the 2.16-acre site is too small to allow (1) safe and efficient

movement of waste vehicles within the site, (2) adequate stormwater management structures to prevent flooding on Moen Avenue and property to the south, and (3) compliance with the Will County Stormwater Ordinance. (*Id.* at 665-71).

Mr. Nickodem described the traffic movements within the proposed transfer station. Upon entering the station, transfer trailers would use the entire 65-foot entrance on Moen Avenue to make the turn, which must be perfectly executed to avoid hitting the entrance gate. (*Id.* at 659-60; Ex. 23, p. 4). The trailers would then proceed north and must make two 180-degree turns on a sloped surface. (VB Tr., pp. 659-60, 665; Ex. 23, p. 4). These turns, also, must be perfectly executed to avoid striking the wall of the transfer station building. (VB Tr., pp. 660, 665; Ex. 23, p 4). In exiting the site, the transfer trailers must cross the inbound truck lane to make the turn, which can result in backups to inbound vehicles and safety issues with crossing traffic. (VB Tr., pp. 660-61; Ex. 23, p. 4). In addition, the transfer trailers require more than the 65-foot wide entrance to make the turn onto Moen Avenue. (Ex. 23, p. 4). The AutoTrack program was used to show the movement of vehicles entering, traveling through and exiting the site. (VB Tr., pp. 658-64; Ex. 23, p. 4, App. A).

It is not good design practice to fail to provide a margin of error in an engineered system. (VB Tr., p. 664). Specifically, it is unreasonable, in designing internal facility traffic patterns, to require error-free driving or maneuvers in order to ensure safe movement and avoid accidents. (*Id.* at 664). The perfect driving and vehicle maneuvering required within the site by ERDS's design is unreasonable and an insufficient basis on which to prove compliance with criterion (ii), *i.e.,* that the proposed Moen Transfer Station is designed and proposed to be operated to protect the public health, safety and welfare. (*Id.* at 659-65; Ex. 23, pp. 4, 9).

Roll-off trucks are expected at the proposed facility. Roll-off boxes might, therefore, be used for separating unacceptable waste and other materials but there are no designated areas in which to locate those roll-off boxes. (VB Tr., p. 662-63). The Application shows the roll-off boxes on the west side of the site, but they cannot be accessed at that location without crossing the property line and the perimeter ditch. (*Id.* at 663).

The stormwater management system for the site consists of a series of catch basins, trench drains and swales or ditches that collect water and direct it to one of three detention ponds. (*Id.* at 665-67; Ex. 23, p. 5). The orifices or inlets from Detention Ponds 1 and 3 are very small—0.5 inch from Detention Pond 1 and 1.0 inch from Detention Pond 3. (VB Tr., p. 667; Ex. 23, p. 5). Detention Ponds 1 and 3 drain to Detention Pond 2, which outlets through two orifices with diameters of 1.3 and 2.67 inches, respectively. (*Id.* at 5, 7). These orifices are very small and can easily be clogged with any one of a number of small items, such as paper, silt, rocks and debris. (VB Tr., p. 667; Ex. 23, p.7.) The orifices in Detention Pond 2 drain to a 12-inch PVC pipe to an offsite drainage swale. (*Id.* at 5). If the orifices are clogged, flow from the ponds will back up and the ponds may overtop and flow out onto Moen Avenue or the south perimeter ditch, flooding Moen Avenue. (VB Tr., p. 667).

The Will County Stormwater Management Ordinance (the "Stormwater Ordinance"), Section 203.6, Part F, provides that storage facilities shall be designed so that the pre-development peak runoff rate from the 100-year critical duration rainfall will not be exceeded if the primary restrictor is blocked. (Ex. 23, p. 5). The primary restrictors are the small orifices for the three detention ponds. If the orifices are blocked or clogged, stormwater flow will potentially back up, overtop the pond and flow out onto Moen Avenue or into the ditch, flooding Moen Avenue. (VB Tr., p. 667).

The Stormwater Ordinance provides that peak stages in detention systems "shall be below finished floor elevation." (Ex. 23, p. 6). The lowest finished floor elevation is 571.00 feet mean sea level ("msl"). (*Id.*) Detention Pond 1 has a bottom elevation of 571.00 feet msl and a peak water elevation of 577.91 feet msl, which does not satisfy the design criteria. (*Id.*) The Stormwater Ordinance also provides that the "site runoff storage facility shall provide 1 (one) foot of freeboard above the design high water elevation." (*Id.*) Top of pond elevations for Detention Ponds 1 and 2 do not provide the required one foot of freeboard above the design high water elevation. (Ex. 1, § 2.3, Table 2.2; *Id.* at App. 2-G, Table 2; Ex. 23, p. 7; VB Tr., p. 671).

ERDS has not identified an area for handling prohibited or unacceptable waste. (*Id.* at 670; Ex. 23, p. 9). It has also not designated any area for tarping or untarping trucks. (VB Tr., p. 670; Ex. 23, p. 9).

Mr. Devin Moose also testified regarding criterion (ii). Mr. Moose identified a threshold problem with the Application: ERDS's failure to specify a throughput capacity. (VB Tr., pp. 746, 753, 758-59). This failure makes it "pretty hard" to perform an analysis because ERDS is "moving all over on the numbers." (*Id.* at 753). As a result, Mr. Moose's analysis assumed one of the numbers that ERDS mentioned as possible throughput for the Moen Transfer Station: 600 tons per day. (*Id.* at 754). His analysis revealed that at 600 tons per day, the facility is "just too small." (*Id.* at 758, 796).

Mr. Moose's conclusion was based on the intensity of activity on a 2.16-acre site. (*Id.* at 758, 796-98). There is not enough room in the proposed facility to allow safe traffic movement, adequate vehicle storage and queueing, safe and efficient vehicle movement and waste storage on the tipping floor, safe and efficient transfer processing in the transfer station building, adequate recyclables storage, litter control, or effective and compliant stormwater management.

(*Id.* at 755-77, 783-92). In fact, the proposed design reveals dangerous on-site traffic and equipment movements that would pose unreasonable risks to persons and property. (*Id.* at 772-74, 776-78, 798, 865).

The proposed Moen Transfer Station is not safely designed. (*Id.* at 755-78). The design provides narrow and inadequate space for vehicle movement and for waste unloading and loading. (*Id.* at 756-70). The risks of traffic conflicts and accidents are evidence of the unsafe design. (*Id.* at 776-78). In addition, the design of the stormwater management system calls for a one-half inch diameter orifice and assumes proper functioning even if clogged. (*Id.* at 785-86). The design provides an underground detention basin, which will allow standing water in the parking lot and possible flow to and flooding of Moen Avenue. (*Id.* at 788, 791). The design is "completely inappropriate" and a "mistake," and does not comply with the Will County Stormwater Ordinance. (*Id.* at 788, 791, 797). In fact, the design of the proposed facility presents an unreasonable risk and danger to the public health, safety and welfare. (*Id.* at 865-66).

**b. ERDS failed to carry its burden of proof.**

Both the Hearing Officer and, implicitly, the Village Board found that ERDS failed to prove that the proposed Moen Transfer Station is "so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii).

First, the Hearing Officer's Report found that the proposed facility could not safely handle the 600 tons per day that ERDS was "absolutely proposing to accept …." (VB Tr., p. 957; 8/14/15 Rpt., pp. 14-15). ERDS's modeling did not support its assumption that the loading of the transfer trailers and unloading of the hauler trucks could take place simultaneously. (*Id.* at 14). On the contrary, at 600 tons per day, "there is no place for the wheel loader to operate while the

hauler trucks were unloading." (*Id.*) Moreover, "neither the Application nor Mr. Hock satisfactorily explained how sorting, storing and the other operations could go on simultaneously at 600 tons per day." (*Id.* at 15). These details were particularly important where, as here, the design and modeling indicates that a barrier wall may, due to volumes, be used as a *de facto* push wall. (*Id.*) The Hearing Officer found that such use violates the minimum requirements of criterion (ii). (*Id.*)

The Hearing Officer's report also identified deficiencies in the storm water management plan for the proposed facility. (*Id.* at 15-16). Indeed, even ERDS acknowledges that "many final design details are missing from the Application." (*Id.* at 16). As the Application stood in its present state, it could not demonstrate that the design of the facility and the stormwater management plan is sufficient to safeguard the public from leachate leaving the premises. (*Id.*) On the contrary, "the risk of unmanaged leachate [from the proposed facility] is quite high." (*Id.*)

Despite identifying these deficiencies, the Hearing Officer did not recommend denying the Application outright as having failed to satisfy criterion (ii). Instead, he found that the facility's design and proposed plan of operations would satisfy criterion (ii) if certain special conditions were imposed: (1) a limitation on throughput to 300 tons per day; and (2) the Village Engineer's later review of a presumably-amended design and storm water management plan and satisfaction that this amended design would reasonably protect the public from untreated leachate and comply with the Stormwater Ordinance. (*Id.*) Indeed, the Hearing Officer recommended "more underground vaulting, clog prevention, and other design improvements ... in [the] final design." (*Id.*)

The Village Board adopted the core of the Hearing Officer's recommendations, holding that ERDS "has met its burden of proof as to Criterion 2 ... *provided* that the Applicant operates

the Facility in accordance with [certain] special conditions[.]" (9/3/15 Ord., § 4) (emphasis added). First, the Village Board purported to limit the facility's daily throughput to 300 tons, but indicated that it might increase that limit to 600 tons per day upon request. (*Id.*) Second, it purported to limit the types of waste the proposed transfer station could accept and required load check and random inspection procedures to screen out unauthorized wastes. (*Id.*) Third, it purported to require future operations to conform to "the statements and representations contained in its Application and in the testimony of its witnesses at hearing" and to include unspecified "procedures and control measures" for vector, dust, odor, litter, noise and fire control, as well as site security. (*Id.*) Finally, it purported to require the future review of the facility's stormwater management plan recommended by the Hearing Officer. (*Id.*) The Village Board did not, ultimately, adopt the Hearing Officer's findings of fact on criterion (ii) and made no findings of its own, except to say, without elaboration, that, in its opinion, "Mr. Hock's testimony was the more thorough and credible testimony on this issue." (9/3/15 Ord., §§ 2, 4).

Thus, both the Hearing Officer and the Village Board found, essentially, that ERDS's Application and evidence — standing on their own — failed to establish compliance with criterion (ii). On the contrary, both found that ERDS could only "meet its burden of proof" *if* (*i.e.*, "provided that") it operated the proposed facility in accordance with certain special conditions — conditions not present in the Application itself. The necessary corollary to this finding is that, without the conditions, the proposed transfer station would not satisfy criterion (ii). ERDS failed to carry its burden of proof.

### c. The Village Board cannot amend ERDS's deficient Application by imposing special conditions.

Because ERDS failed to prove compliance with criterion (ii), the Village Board's decision to approve the Application was against the manifest weight of the evidence. *Town & Country*, 225 Ill. 2d at 117 (siting approval requires proof that proposed facility meets all nine statutory criteria). The Village Board lacked authority to, essentially, "amend" the Application through the imposition of special conditions so that it could approve the Application "as amended." Upon finding that ERDS only met its burden of proof *if* certain additional conditions were imposed, the Village Board had no choice but to deny the Application. Its decision to approve was against the manifest weight of the evidence and must be reversed.

The Village Board was required to determine whether ERDS's Application and evidence demonstrate that "the proposed facility" — not some hypothetical facility that ERDS may decide to build — meets Section 39.2(a)'s nine criteria. Section 39.2 plainly states that "[a]n applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if *the proposed facility* meets the following criteria[.]" 415 ILCS 5/39.2(a) (emphasis added). Under the unambiguous language of the statute, therefore, the Village Board was required to decide whether the "proposed facility," *i.e.*, the facility described in ERDS's Application and evidence, met Section 39.2(a)'s criteria.

Nothing in the statute authorized the Village Board to determine whether another, hypothetical facility that ERDS *had not* proposed, *i.e.*, a facility incorporating the Village Board's "special conditions," satisfied the nine statutory criteria.[1] "A fundamental rule of

[1] By definition, ERDS's proposed facility did not include the special conditions proposed by the Village. For example, ERDS did not propose a facility with the 300 ton-per-day throughput cap imposed by the Village. (9/3/15

statutory construction is that where the language of a statute is clear and unambiguous, the court must enforce it as written. It may not annex new provisions or substitute different ones, or read into the statute exceptions, limitations, or conditions which the legislature did not express." *Harshman v. DePhillips*, 218 Ill. 2d 482, 510 (2006). In this case, the statute authorizes the Village Board to rule on the compliance of the "proposed facility." If this Board affirms the Village Board's decision to approve a facility *other than* the one ERDS proposed, it would, in effect, expand the Act's grant of local siting authority.[2] No legal authority or rule of statutory construction supports such a course of action. *Cf. Peoria Disposal Co. v. Peoria County Bd.*, PCB No. 06-184, slip op. at 36-38 (June 21, 2007) (declining to review decision that applicant "met siting criterion v only if certain special conditions were imposed" and, instead, treating decision as finding that applicant "did not meet its burden on criterion v").

The Village Board's finding that ERDS met its burden on criterion (ii) *if* (*i.e.*, "provided that") it complies with certain special conditions is, essentially, a finding that, absent those conditions, ERDS failed to meet its burden. Upon reaching that finding, the Village Board had no choice but to deny the Application. Its decision not to do so was against the manifest weight of the evidence, as a matter of law, and must be reversed.

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Ord., § 4). On the contrary, ERDS specifically asked "the Village to approve the application without a tonnage cap." (*Id.* at 958).

[2] Of course, under Section 39.2(e) of the Act, the Village Board was free, "[i]n granting approval for a site," to "impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section [39.2] and as are not inconsistent with regulations promulgated by the Board." 415 ILCS 5/39.2(e). No authority, however, permits a local decisionmaker to use Section 39.2(e) conditions to relieve an applicant of its burden of proof under Section 39.2(a).

### 3. Criterion (v) - Danger to Surrounding Area. The Village Board's decision was against the manifest weight of the evidence.

The Village Board's finding that ERDS met its burden of proof as to criterion (v) is against the manifest weight of the evidence because it is unreasonable and not based on the evidence. *Maple,* 151 Ill. 2d at 454. Section 39.2(a)(v) of the Act requires that an applicant for local siting approval demonstrate that "the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents" 415 ILCS 5/39.2(a)(v). The Hearing Officer below found that ERDS's plan of operations had not been designed to minimize the danger from operational accidents arising out of on-site traffic movements and, therefore, that ERDS failed to demonstrate compliance with criterion (v). (8/14/15 Rpt., pp. 18-20). The Village Board, on the other hand, cited nothing in support of its finding that ERDS met its burden of proof on criterion (v) and WMII is aware of no evidence sufficient to rebut the Hearing Officer's findings. (9/3/15 Ord., § 4). To the extent the Village Board sought to cure ERDS's failure to prove compliance with criterion (v) through the imposition of special conditions, its decision suffers from the same defects as its decision on criterion (ii). In either case, the Village Board's decision was against the manifest weight of the evidence and must be reversed.

The Hearing Officer found that ERDS's plan of operations had not been designed to minimize the danger from operational accidents arising out of on-site traffic movements. (8/14/15 Rpt., p. 18). The Report cited the traffic-related issues testified to by Mr. Nickodem and Mr. Moose and discussed in Part III.C.3.a, *supra*, but also went on to identify several other defects in the proposed plan. (*Id.* at 18-20) First, it noted that ERDS's modeling failed to address "active operations conflicts such as movements at peak hours while trucks are waiting, trucks without tare weights need to go back over the scale after unloading, and transfer trailers are

being moved or tarped." (*Id.* at 19). Second, it noted that ERDS never explained the storage of various pieces of equipment listed in its Plan of Operations and, therefore, failed to eliminate a concern for even more traffic conflicts when handling the proposed 600 tons-per-day volume. (*Id.* at 19-20). Third, it found that ERDS "never satisfactorily explained queuing operations and on site traffic direction during peak times at the 600 tons per day volume" and expressed concern "that the operator of the wheel loader or the scale house operator or both would be directing the truck traffic while simultaneously operating the loader and the scale house." (*Id.* at 20). These concerns, collectively, led the Hearing Office to conclude that ERDS had failed to prove compliance with criterion (v). (*Id.* at Proposed Finding No. 17).

The Hearing Officer unequivocally found that "[t]he Applicant has not demonstrated that the proposed Facility meets Criterion 5[.]" (*Id.*). Again, however, the Hearing Officer stated that the proposed facility would satisfy criterion (v) "with the imposition of and compliance with the following special conditions:" (1) the inclusion of additional personnel to direct traffic during peak hours; (2) the Village Engineer's later review and approval of a presumably-amended "final site plan, traffic circulation design, signage and plan of operations;" and (3) a limitation on throughput to 300 tons per day. (*Id.*)

The Village Board, without explanation, rejected the Hearing Officer's findings of fact on criterion (v) and, instead, and again without explanation, found that ERDS had "met its burden of proof as to Criterion 5 of Section 39.2, subject to [certain] special conditions[.]" (9/3/15 Ord., §§ 2, 4). Specifically, the Village Board purported to limit the facility's daily throughput to 300 tons, but indicated that it might increase that limit to 600 tons per day upon request and, further, purported to impose the Hearing Officer's recommended personnel and review conditions. (*Id.* at § 4).

The Village Board referred to no evidence in support of its finding and WMII is aware of no evidence sufficient to address the Hearing Officer's concerns regarding the danger from operational accidents arising out of on-site traffic movements. The Village Board's decision is unreasonable and not based in the evidence and the opposite conclusion — that ERDS failed to demonstrate compliance with criterion (v) — is plainly evident; indeed, it is the conclusion reached and supported by the Hearing Officer. The Village Board's decision is, therefore, against the manifest weight of the evidence and should be reversed.

To the extent the Village Board's statement that ERDS met its burden of proof on criterion (v) "subject to [certain] special conditions" is interpreted to mean that ERDS failed to meet it burden absent those conditions, the Village Board's decision on criterion (v) suffers from the same defects as its decision on criterion (ii). (*Id.* at § 4). The Village Board cannot approve a facility other than the "proposed facility" and cannot use conditions to relieve ERDS from meeting its burden of proof. If ERDS failed to carry its burden on criterion (v), the Village Board had no choice but to deny the Application. Its failure to do so was against the manifest weight of the evidence and should be reversed.

**4. Criterion (viii) - Consistency with the County's Solid Waste Management Plan. The Village Board ignored key Plan provisions.**

The Village Board's finding that the proposed transfer station is "consistent" with Will County's Solid Waste Management Plan is against the manifest weight of the evidence because it ignored key Plan provisions. (9/3/15 Ord., § 2; 8/14/15 Rpt., pp. 22-23). Those provisions indicate Will County's intent (1) to site any new transfer stations in the northern or eastern parts of the County — not the central portion where ERDS proposed to site the Moen Transfer Station; and (2) that any new transfer stations be sited and developed by WMII, in particular. The Village Board was not free to simply ignore these provisions and the intent reflected therein; nor can it

reasonably argue that the proposed Moen Transfer Station is consistent with that intent. The Village Board's finding with respect to criterion (viii) was against the manifest weight of the evidence and should be reversed.

Criterion (viii) requires the proposed transfer station to be "consistent" with the solid waste management plan adopted by Will County pursuant to the Solid Waste Planning and Recycling Act (the "Plan"). 415 ILCS 5/39.2(a)(viii). Any analysis under criterion (viii) consists of two parts. First, one must determine the intent of the relevant county, as expressed in the solid waste management plan. This determination presents a legal question of statutory construction, and is reviewed *de novo*. *County of Kankakee v. Ill. Pollution Control Bd.*, 396 Ill. App. 3d 1000, 1020 (3d Dist. 2009). Only after determining the county's intent may one turn to the factual question of whether the proposed pollution control facility is "consistent" with that intent. *Id.*

When interpreting a solid waste management plan, the "cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature (here, the County Board). The best indicator of legislative intent is the language of the statute itself, which must be given its plain and ordinary meaning." *Id.* (citations omitted). When the plan is susceptible to more than one interpretation, however, such as when the plan's language is silent or ambiguous, said ambiguity "does not create interpretive license to simply choose one or the other of possible meanings; rather it simply widens the range of evidence that may be used to discover what the drafter intended. … If the language of a statute is susceptible to two constructions, one of which will carry out its purpose and another which will defeat it, the statute will receive the former construction." *Id.* at 1022 (interpreting Kankakee County's solid waste management plan as part of criterion (viii) analysis).

Mr. Hock testified regarding criterion (viii). This was the first time Mr. Hock prepared a report and testified regarding criterion (viii). (VB Tr., p. 255). He reviewed the Will County Solid Waste Management Plan (the "Plan") and the host agreements in place. (*Id.* at 180-82, 256-57). Based on only three of the seven plan recommendations, he concluded that the proposed Moen Transfer Station would be consistent with the Plan. (*Id.* at 181-83). Mr. Hock identified these three recommendations as (1) an intent to rely on transfer stations operated by the private sector; (2) a statement of "potential need" for additional transfer stations to serve the County; and (3) a requirement that any proposed transfer station operation negotiate a host agreement with Will County. (*Id.* at 181-82). According to Mr. Hock, because the proposed facility is consistent with these three recommendations, it meets criterion (viii). (*Id.* at 181-83). Mr. Hock acknowledged that Will County, despite entering into a host agreement with ERDS, has not determined that the proposed facility is consistent with the Plan. (*Id.* at 258-59).

Mr. Hock, however, ignored two Plan provisions referring to transfer stations, despite agreeing that all Plan provisions relating to transfer stations are relevant in determining whether the proposed transfer station is consistent with the Plan. (*Id.* at 181-83, 261-62). First, Mr. Hock ignored the Plan's statement that a transfer station, if needed, should be located in the northern or eastern parts of the County and that WMII, in particular, "may site" transfer stations in those locations. (*Id.* at 263-64). Second, Mr. Hock ignored the Plan's statement that the County will allow development of transfer stations "pursuant to the terms of the Host and Operating Agreement for the Prairie View RDF." (VB Tr., p. 266). That Agreement provides that WMII, in particular, will be responsible for ensuring the development of a network of transfer stations to serve Will County's needs. (*Id.* at 266-67).

Though Mr. Hock admitted he made no effort to interpret the Plan in a legal sense, he nevertheless opined that the Plan did not, and that Will County does not, have the right to, "preclude" entities other than WMII from siting a transfer station in the County. (*Id.* at 264-65, 268). He provided no factual or other basis for this understanding. Nor did he provide an explanation or justification for locating the Moen Transfer in the central part of the County, when the Plan clearly states that a new transfer station, if shown to be needed, should be located in the northern or eastern parts of the County. (*Id.* at 263-65, 268; Ex. 7, p. 33).

As a result, ERDS did not explain how locating a transfer station in the central part of the County is consistent with Plan language indicating that any new transfer station should be located in the northern or eastern parts of the County. Nor did ERDS establish that the development of the Moen Transfer Station by ERDS would be consistent with the Plan or the Prairie View RDF Host and Operating Agreement, both of which provide that WMII, in particular, is responsible for developing transfer stations within the service area. (*Id.* at 266-68). The Village Board, too, ignored these issues and, instead, relied on ERDS's three cherry-picked recommendations, with which it readily found compliance.

The intent of the Plan, as reflected by its plain language, in its common and ordinary meaning, is that any new transfer stations, if needed, should be developed by the select private sector contractor, WMII, in the northern or eastern parts of the County. The Village Board was not free to simply ignore that intent. The Village Board's finding that the proposed transfer station is consistent with the Plan, despite the Plan's clear language and intent to the contrary, is erroneous as a matter of law and should be reversed.

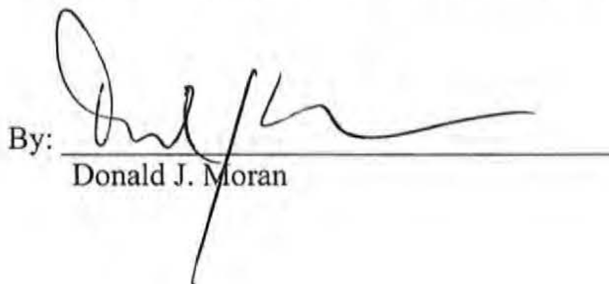
## IV. CONCLUSION

This Board should reverse the Village Board's site location approval because (1) ERDS failed to comply with Section 39.2(b)'s mandatory pre-filing notice procedures and the Village Board, therefore, lacked jurisdiction to hear ERDS's Application; (2) ERDS failed to demonstrate compliance with criteria (i), (ii), (v) and (viii) of Section 39.2(a) of the Act; (3) the Village Board's findings regarding criteria (i), (ii), (v) and (viii) are against the manifest weight of the evidence; and (4) the Village Board lacked authority to cure ERDS' failures by imposing special conditions. The Village Board's decision to approve ERDS's application was erroneous as a matter of law and must be reversed.

Dated: February 11, 2016

Respectfully Submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.



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