ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: See attached Service List.

PLEASE TAKE NOTICE that on March 3, 2016, I filed with the Illinois Pollution Control Board, **Environmental Recycling and Disposal Services, Inc. Post-Hearing Brief,** a copy of which is attached hereto and herewith served upon you.

Dated: March 3, 2016

Respectfully Submitted,

ENVIRONMENTAL RECYCLING AND DISPOSAL SERVICES, INC.

By: _____
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ENVIRONMENTAL RECYCLING AND DISPOSAL SERVICES, INC. POST-HEARING BRIEF

NOW COMES Environmental Recycling and Disposal Services, Inc. (ERDS) by its attorney, George Mueller, and for its response to the briefs of Will County and Waste Management of Illinois, Inc. (WMII) to dismiss, states as follows:

INTRODUCTION

The Respondent (ERDS) is a local family owned company, that has operated a refuse hauling business on Moen Avenue in Rockdale for over fifteen years. Donald Ipema, the President and only shareholder, has forty-five years' experience in the solid waste industry. Donald Ipema and his son, Jay Ipema, vice-president of ERDS, were the only two witnesses at the public hearing conducted by the Board.

ERDS executed a host agreement with the Village, whereby the residents of Rockdale get free garbage pickup and disposal for 20 years. ERDS proposes to construct, permit and operate a solid waste transfer station located on 2.16 acres at 2277 Moen Avenue in Rockdale, Illinois, located directly west of Joliet and south of Interstate 80. The proposed Moen Transfer Station is a solid waste transfer station, as defined in Section 3.330(b)(2) of the Environmental Protection

Act (the 'Act'). The proposed site will contain an 8,000 square foot transfer building, with a 6,300 square foot tipping floor, in which all the transfer activities will occur. The proposed facility is a state of the art, modern solid waste transfer facility, which proposes to receive initially an average of 200 tons per day, but can safely receive 600 tons per day or more, of municipal solid waste and commingled recyclables for transfer to a remote landfill. The Prairie View RDF landfill operated by Waste Management of Illinois is the preferred destination for transfer waste, pursuant to a secondary host agreement previously executed between the Applicant and Will County.

The proposed service area for the transfer station is essentially Will County and nearby portions of adjoining counties.

In support of the proposed facility, ERDS submitted a two volume siting application, consisting of over 1,000 pages of drawings, tables, calculations and detailed text, all of which address the proposal's compliance with each of the nine statutory siting criteria in Section 39.2 of the Act and the facility's compliance with the requirements of the local Rockdale Pollution Control Facility Siting Ordinance.

The Applicant called three witnesses who testified on each of the nine siting criteria. Criteria three, four, six, seven and nine are either inapplicable or uncontested.

The facility will not receive or transfer hazardous waste.

The siting application was filed on December 12, 2014. Public hearings on the application were held on March 23rd and 24th, 2015 and May 20th and 21st, 2015. All parties and individuals who wished to participate or give public comment were allowed to do so. As required by local ordinance and Section 39.2 of the Act, the record remains open through June 22, 2015, for receipt of written public comment. Will County and Waste Management of Illinois, working

in tandem, appeared as objectors. The City of Joliet also participated, was largely supportive, and is not part of this appeal. Will County appeared as an objector, despite the fact that it had previously executed and approved a secondary host agreement with ERDS.

On Sep. 3, 2015, The Village of Rockdale Board of Trustees unanimously adopted ordinance #1026 unanimously approving the siting application with several conditions. The ordinance adopted portions of the hearing officer's report and recommendations, but also made detailed findings of its own, including assessment of the credibility of witnesses. The Trustees unequivocally found that "the Applicant has met its burden of proof as to criterion 1 of Section 39.2." The Trustees also expressly found the expert testimony of John Hock on behalf of the Applicant, on this criterion, to be more credible and persuasive then the opposing testimony of the objectors' witnesses. With respect to criterion 2, the Trustees found "the Applicant has met its burden of proof as to criterion 2 of Section 39.2, the Moen Transfer Station facility is designed, located and proposed to be operated so that the public health, safety and welfare will be protected, provided that the Applicant operates the facility in accordance with the following special conditions..." The Trustees' finding as to criterion 5 was substantially the same.

Extensive public comment was received both at the local level, and during the Board appeal. The public comment was overwhelmingly supportive of the Applicant, indicating that ERDS is a good neighbor and provides a needed and valuable service to the community.

What makes this appeal unique, is that the Petitioners, who should know better based on their extensive experience before this Board, have literally fabricated arguments out of thin air, arguments that attempt to graft novel, unwritten and unsupportable new requirements onto the plain and well understood meaning of Section 39.2 of the Act, and arguments that contradict the

experience of these very same parties before this Board. In the absence of legal support for these arguments, Will County has gone so far as to cite a case and fabricate its holding.

JURISDICTION

Subsequent to the close of evidence at the local hearing, both objectors filed motions to dismiss, alleging lack of jurisdiction. Simply put, the argument of the objectors is that the pre-filing notice in this case specified an incorrect anticipated waste volume, and that this causes the Village Board to lose jurisdiction. This argument fails because it is both legally and factually incorrect.

Without admitting that including either anticipated volume or maximum capacity in the pre-filing notice is even required, Applicant acknowledges that compliance with pre-filing notice requirements, at least as far as timeliness of service and identity of recipients are concerned, is jurisdictional. Whether the content requirements for these notices must be strictly complied with is a matter of first impression. However, the only reported case which deals with something other than timeliness and identity of recipients would suggest that strict compliance with the content requirements is not necessary. In *Daubs Landfill v. Pollution Control Board,* 166 Ill. App 3rd 778 (5th Dist. 1998), the Court held that a defective legal description of the subject property, placing the property in a different township, did not invalidate a pre-filing notice, because the additional narrative description was sufficiently accurate.

Section 39.2(b) of the Act requires the pre-filing notice to state, "the nature and size of the development, the nature of the activity proposed..." In compliance the pre-filing notice in this case states, "The proposed facility encompasses approximately 2.16 acre... The proposed facility would be a nonhazardous transfer station which will accept nonhazardous waste for temporary storage, consolidation and further transfer to a waste disposal/treatment facility." Objectors do

not take issue with the accuracy of the aforesaid statements, rather they take issue with the additional statement in the notice that, "The facility proposes to handle an average of 200 tons per day of solid waste."

WMII claims that this misstates the *nature and size* of the development. That argument makes no sense, because it disregards the word *development* in the requirement. The property will be developed as a nonhazardous waste transfer station. The size of the development is 2.16 acres. Will County claims that the notice misstates the nature of the *activity proposed.* That also makes no sense because the activity proposed is a solid waste transfer station.

The subsequent statement in the notice of 200 tons per day anticipated throughput is surplusage, offered in good faith, but not required in the pre-filing notice. Section 39.2(b) contains no such requirement. Waste transfer stations typically have no volume restrictions, and those that do, have them pursuant to host agreement commitments or siting conditions. To argue that the words *size* or *activity* require a stated estimate of anticipated volume or maximum capacity tortures the language in the statute and attempts to add content requirements, that simply don't appear in the language.

In response, Will County asserts that "The notice requirement including the 'nature and size of the development' and 'nature of the activity proposed' have been thoroughly discussed by Illinois courts and the Pollution Control Board" (WC brief, p. 10). Unfortunately, the anticipated review of that "thorough discussion" does not follow – because it does not exist. Instead, Will County cites an election board case and the Oxford dictionary. The County brief then cites the Supreme Court in *M.I.G. Investments v. DPA, 523 NE 2nd 1(1988),* proposition that strict compliance with the Environmental Protection Act and more specifically, Section 39.2 of the Act is required (WC brief, p. 12). In further citation to *M.I.G. Investments* the County states,

"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 problem here is the Supreme Court said NONE of these things. Will County just fabricated these statements. Pre-filing notices are not mentioned in the Supreme Court's opinion, nor is strict construction. *M.I.G. Investments* simply resolves the issue of whether vertical expansion of a landfill is a change in boundaries, thereby necessitating a new siting hearing.

In an instructive case, in discussing what constitutes authentic tax records for purposes of pre-filing notices, the court in *Bishop v. Pollution Control Board* held that the language in the pre-filing notice requirement is to be given its ordinary meaning and not expanded to require more than what is written. Specifically, the court stated, "Words used in a statute are to be given their plain and commonly understood meaning in the absence of an indication of legislative intent to the contrary. We cannot read Section 39.2(b) as requiring more of the applicant than is statutorily mandated. Generally, as long as notice is in compliance with the statute and places those potentially interested persons on inquiry, it is sufficient to confer jurisdiction on the County Board". *235 Ill. App. 3rd 925, at 933 (5th Dist. 1992).*

The Board's best guidance, however, comes from *Tate v. PCB.* That discussion is worth quoting in its entirety:

> "The final contention of Petitioners concerning jurisdiction is that MCL's request failed to invoke the jurisdiction of the County Board because the request did not include a precise description of the proposed expansion. Specifically, Petitioners complain the request did not accurately describe the flood plain location, height expansion, or the special waste activity. Petitioners' argument is that if the purpose of the 14-day notice provision is to encourage public comment, this court should not allow the purpose to be defeated by the failure to adequately describe the site since the public would be unaware of the nature of the activity and could not therefore comment on it.

Petitioners, however, cite no authority for the proposition that a flood plain description, a description of size of the vertical expansion, or a description of special waste activity be included in the request. *1018 Section 39.2(b) includes the requirement that the notice state the applicant's name and address, the location of the proposed site, the nature and size of the development, the nature and probable life of the proposed activity, the date the request will be submitted to the County Board, and a description of the rights of persons to comment on the request as provided by statute.

Petitioners contend the admission that the legal description of the landfill site was not accurate and that a portion of the site as legally described is within the 100-year flood plain renders the notice inaccurate. Petitioners also argue that since a vertical height expansion is considered a new regional pollution control facility requiring compliance with Section 39.2 *(M.I.G. Investments, Inc. v. Environmental Protection Agency (1988), 122 Ill.2d 392, 119 Ill. Dec. 533, 523 N.E.2d 1)*, the notice should have described the size of the expanded facility in terms of vertical expansion. In addition, the activity of accepting special wastes should have been mentioned in the notice. All of these, according to Petitioners, are jurisdictional defects.

On this point, the County Board's brief merely indicates that at the time of the notices being issued, an Appellate Court had determined that vertical extensions of an existing site was not a new regional pollution control facility under the Act. *(M.I.G. Investments, Inc. v. Environmental Protection Agency (1986), 151 Ill.App.3d 488, 104 Ill. Dec. 382, 502 N.E.2d 1042.)* The decision was reversed by the Supreme Court, as noted earlier, on April 25, 1988, after the issuance of the notices. However, considering that no other proceedings had yet taken place, this does not seem to be a reasonable excuse for not requiring the issuance of a new notice if the existing notices were indeed defective.

MCL suggests the Petitioners failed to raise the question concerning description of vertical expansion and special waste before the County Board and IPCB and, therefore, have waived these arguments for purposes of appeal. However, if Petitioners are correct and the failure to include these items in the notice is a jurisdictional defect, perhaps waiver is avoided. An objection to jurisdiction may be interposed at any time according to *Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc. (1986), 144 Ill.App.3d 334, 98 Ill. Dec. 253, 494 N.E.2d 180.*

In *Daubs Landfill, Inc. v. Pollution Control Board (1988), 166 Ill.App.3d 778, 117 Ill. Dec. 626, 520 N.E.2d 977*, the Court discussed the sufficiency of a legal description contained in the notice. The court found that the narrative description was adequate to apprise the reader of the location of the site, and even though the legal description was so inaccurate *1019 that it placed the site six miles from the site identified in the narrative description, the Court determined this was such an obvious discrepancy that no confusion should result. Furthermore, the notice provision does not specifically require a legal description. **1193 ***418

As for the flood plain, this is a very precise, technical matter. This is very similar to the question concerning the legal description in *Daubs*. In this case, the request refers to the

> site being outside the 100-year flood plain. The legislature required the county to consider whether the facility is within the 100-year flood plain. *(Ill.Rev.Stat.1987, Ch. 111½, par. 1039.2(a)(iv).*). Had the legislature intended to require a precise statement in the notice as to the location of the flood plain, we would reasonably expect the legislature to say so.
>
> 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. The notice itself need not be so technically detailed as to raise unnecessary concerns among local residents and the general public. Clearly, the statute does not require the notice to be so technical that only an engineer would understand it. Therefore, the notice in the case at bar was sufficiently in compliance with the statute to vest the County Board with jurisdiction and was also sufficient to notify potentially interested parties that some new activity was being proposed for the site as to enable inquires to be made...' *Tate v. Illinois Pollution Control Bd., 188 Ill.App.3d 994, 1018-19, 544 N.E.2d 1176, 1192-93, 136 Ill. Dec. 401, 417-18 (Ill. App. 4 Dist.,1989)."*

Based on the foregoing, it is indisputably obvious that an estimate of throughput or volume for a nonhazardous waste transfer station is not required in a pre-filing notice. The fact that the *Tate* court would not even read into a statute requiring a statement of size a requirement to describe the extent of a vertical expansion is telling. Recently, the Board cited *Tate* and *Daubs* with approval in *Roxana v. Caseyville, PCB 15-65 (Dec. 18, 2014).* What is noteworthy about that decision also, is that the Board used as a partial justification for its ruling the fact that missing or incorrect information in the notice was fully available to interested parties in the siting application.

The County half-heartedly makes the additional argument that the pre-hearing notice is also defective because of its inclusion of the intended 200 TPD volume, even though Section 39.2(d) has no content requirements whatsoever and presumably only requires notice of the date, time and place of the public hearing.

Notwithstanding the absence of an estimated or intended volume requirement, the statement in the pre-filing notice that the facility intends to handle an average of 200 tons per day

of solid waste was and is accurate. This representation and intention is found throughout the siting application. Page 1 of the executive summary states, "The site is anticipated to accept approximately 200 tons per day of MSW." Section 1.2 states, "MTS is anticipated to initially accept approximately 200 tons per day of general nonhazardous MSW." Page 2-16 states, "The MTS is initially anticipated to receive approximately 200 tons per day of waste and is designed to efficiently manage this volume... Depending on market conditions, MTS may desire to accept more than 200 TPD of waste. The facility's host agreement with Will County indicates that a fee will be paid to Will County for every ton of waste accepted over 600 TPD. The Transfer Station facility has been designed to allow operational flexibility and incorporates features to allow larger volumes to also be efficiently managed." Page 2-18 states, "Table 2–3 provides an evaluation of the needed tipping floor storage volume for a 200 TPD acceptance rate based on the October 2014 actual ERDS delivery times and relative amounts and percentage of collections vehicles." Page 2-19 states the facility, " .....can easily manage the anticipated initial acceptance rate of 200 TPD under the anticipated incoming waste flow" and "...can readily manage an acceptance rate of 600 TPD under the anticipated incoming waste flow" and "...can manage acceptance volumes greater than 600 TPD under many scenarios." Page 6-1 states, "As proposed, the Transfer Station will typically process, on average, 200 tons of waste per day." This statement is repeated on page 6–11 and on page 6-13.

Based upon the foregoing, the siting application is completely consistent with the language of the pre-filing notice and is clear on the intent of the Applicant, namely to initially accept an average of 200 tons per day of waste in a facility that has the operational flexibility and design features to safely handle a much larger volume. Future volumes are therefore limited not by the facility characteristics, but by market conditions. This is a straightforward point which both the

County and WMII, judging by the arguments in their briefs, seem to have considerable difficulty understanding. Or, as is more likely, they understood the point completely but want to twist it out of context in order to make the false argument that the applicant didn't know what he was proposing or was proposing to accept as much as 2200 TPD.

Significant confusion on this issue has resulted from the unartful use of technical terms in the arguments. Petitioners have either intentionally or unintentionally caused confusion by interchangeably using the terms volume and capacity. At the Board hearing, Jay Ipema explained the difference. Volume is the amount of waste that actually comes through a facility. Capacity is the maximum volume that a facility can safely handle. The Moen Transfer Station, according to all the evidence, has an intended volume of 200 TPD, but a maximum capacity of at least 600 TPD. Mr. Ipema explained that having capacity in excess of volume is a good thing, because it creates operational flexibility. (PCB Tr pp. 52-54)[1].

The intentions of ERDS are as clear in the testimony as in the siting application. Consider the following testimony:

> " It should be noted that 142 is three quarters of our anticipated volume of 200 tons to start." (R Tr. 52)[2]
>
> "So the first evaluation we looked at was 200 tons per day, which is the anticipated volume through the facility." (R Tr. 54)
>
> "We also looked at a 600 ton per day scenario. We picked this volume. It's a volume that's in the host agreement with Will County in terms of host fees, so we thought it was an appropriate number to use." (R Tr. 56)
>
> "So from a throughput standpoint, our summary with this is that the site can easily manage the anticipated initial acceptance rate of 200 tons per day, it can readily manage an acceptance rate of 600 tons per day, and if you extend the hours, depending on the timing of the trucks entering it, it could manage greater than 600 tons per day under many scenarios." (R Tr. 59)

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[1] PCB Hearing Transcript
[2] Rockdale Hearing Transcript

"The facility will process on average 200 tons of waste per day and will typically receive and transfer waste between 5 AM and 5 PM on weekdays and 5 AM to noon on Saturdays." (R Tr. 150)

"On average they are projecting 200 tons per day." (R Tr. 157)

"You can see it takes a relatively modest amount, around 200 tons per day, which is similar to our initially anticipated volume." (R Tr. 191)

"We wouldn't get so much that we needed to change the operations in that manner. We would, if we thought we might need it, then we would have it, but under a 200 day type of a scenario, which is what we are expecting when we start, for instance, no we're not planning on having a grapple loader on site." (R Tr.509)

"We are proposing a throughput that would be defined by the operational standards, meaning that we would meet the conditions of the permit, we do it safely. We just don't believe that we should be arbitrarily confined to a number that is based on certain assumptions and then we should be treated the same as every other transfer station in the area. And as we evaluated it, we looked at the realistic initial volume of something in the range of 200 tons per day and then we wanted to allow for some growth because -- and we wanted to design the facility for a capacity greater than that so we looked at the 600 tons per day which is a -- I would say relatively aggressive growth number and it's also the number that is in the host agreement so it seemed like an appropriate number." (R Tr. 892)

"Well, we evaluated 200 tons and 600 tons per day and there is not a specific maximum allowable amount that's proposed. We propose a maximum capacity based on the same operational standards, as long as we're meeting the permit conditions, as long as we're doing it safely, it would be whatever the practical operational capacity of the facility would be, no different than the other transfer stations in the area." (R Tr. 954)

In its brief, WMII seriously misquotes John Hock, the chief engineer and witness for ERDS. The quote on p. 7 of the WMII brief omits a portion of the actual testimony. What Mr. Hock actually said was, "we are not requesting to limit the amount that we take in to 200 tons per day. That is not what we're proposing. We are absolutely proposing to accept or demonstrating that we can accept at least 600 and there is not a specific tonnage limit proposed. (R Tr. 957). The underlined word is the portion omitted in the WMII brief. Additionally, this entire cross-examination by Mr. Moran was about maximum capacity rather than intended volume. Mr. Hock had previously testified that most transfer stations do not have permitted maximum

capacity, (R Tr. 225). ERDS wanted to be similarly treated, and Jay Ipema explained that despite the intended volume of only 200 TPD, not having a maximum volume restriction would maximize operational flexibility. (PCB Tr. 58). In this case, therefore, requesting the absence of a maximum limit is not equivalent to an intention to increase actual volume. The demonstration of a maximum safe *capacity* is actually linked to the secondary host agreement Will County had with ERDS, which agreement specified that host fee payments to the County would commence if ERDS exceeded actual volume of 600 TPD. (R Tr. 56).

The testimony is, therefore, consistent and clear. The Applicant proposes initial volume acceptance of 200 tons per day based on market conditions. Even Mr. Moose understood this, when he acknowledged that the Applicant currently controls approximately 200 tons of waste per day (R Tr. 769). The Applicant hopes for growth and noted that nearby competitors are not volume restricted by permit or contract. The Applicant, therefore, demonstrated that the facility as designed is capable of safely handling much larger volumes. For Will County to now argue that the ERDS pre-filing notice was intended to mislead people into believing that the facility would handle 200 TPD and only 200 TPD for 20 years, is particularly disingenuous given the fact that the County was a party to the host agreement which initially introduced the 600 TPD figure. The only participants at the local public hearing were a competitor, an adjacent municipality, and the County, all of whom knew the Applicant's intentions perfectly. The unanimously supportive public comments from neighbors and nearby businesses would suggest that the public had no concern about volume or capacity.

Both Petitioners added unique little twists to their arguments. WMII argues that the application is legally incomplete because it proposes a "transfer station of unspecified waste throughput." It's not even clear what WMII is arguing here because they seem to be mixing up

the concepts of volume and capacity. Secondly, the argument is just plain wrong based upon the citations to the application and the testimony recited above. Thirdly, there is no support or authority for the proposition that anything related to volume or capacity is an essential design element. In the *Timber Creek v. Round Lake* case neither volume nor capacity are even mentioned in the Board's extensive discussion of Criterion 2. *(PCB 14-99, April 7, 2014).*

Certainly, the intended volume is relevant to need, and there was ample demonstration in this record for a need of at least 200 tons per day, and probably a lot more, of additional transfer capacity in the service area. Capacity is relevant to a safety determination, specifically whether there is sufficient capacity to safely handle the intended volume. In this case, the Applicant demonstrated a comfortable capacity of at least 600 TPD, more than adequate to handle the intended value of 200 TPD. Lastly, the Village rendered this entire argument moot by conditioning approval on a maximum volume of 300 TPD, a condition not being appealed by ERDS. So, the issue now should not be whether there is a missing design element, but whether the finding that this Transfer Station has a safe maximum capacity of 300 TPD is against the manifest weight of the evidence.

Will County's extra argument stemming from the notices is equally strange. Without quoting any facts or any law, the County argues that the application was amended a second time when ERDS altered the proposed size of the facility at the public hearing. Besides the fact that it is not true, since all the required information about both intended volume and maximum capacity is in the siting application itself, Mr. Hock's direct testimony on this subject occurred before the hearing officer declared an amendment related to the storm water errata sheet. (R Tr. 56-59).

CONDITIONAL APPROVAL

Both Petitioners offer a novel, completely unsupported argument that once again asks the Board to graft a heretofore unheard of meaning onto the plain meaning of Section 39.2(e) of the Act. The relevant language is:

> In granting approval for a site the County Board or governing body of the municipality may impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section and as are not inconsistent with regulations promulgated by the Board. *415 ILCS 5/39.2(e)*

Petitioners argue ERDS did not prove its case, because conditions were required in order to achieve compliance with the statutory siting criteria. They argue, without any legal support, that section 39.2 requires proof of compliance with all siting criteria, without any conditions. This is nonsensical on its face, since one of the main purposes of Section 39.2 is obviously to guarantee that pollution control facilities are compliant with the nine statutory citing criteria. The County brief goes so far as to suggest that conditions may only be imposed "to improve" an application which already meets all the siting criteria. (WC brief at 6). Petitioners extend the argument by emphasizing that the imposition of conditions to achieve compliance with the statutory criteria is an improper delegation of the burden of proof to the local decision maker.

Notwithstanding the minor technicality that the Village Trustees did not expressly find an absence of proof on criteria 2 and 5, but rather found the Applicant met its burden of proof with the addition of conditions (Rockdale ordinance #1026, Section 4A, 4B), the argument of Petitioners is and always has been wrong. In *Lake County v. IPCB,* the Applicant, BFI, sought expansion of a landfill. BFI received approval with conditions and appealed those conditions. The PCB struck most of the conditions, and the County Board appealed directly to the Appellate Court. In discussing the conditions, the Court noted: "Following the hearings, the Committee

presented its findings to the County Board in a written report. The Committee found that four of the six criteria of section 39.2 were satisfied by B.F.I. They were those found in subparagraphs (i), (iii), (iv), and (vi). However, *in order to meet the criteria of subparagraphs (ii) and (v), certain conditions were imposed* on B.F.I." *Lake County v. Illinois Pollution Control Bd., 120 Ill.App.3d 89, 92, 457 N.E.2d 1309, 1311-12, 75 Ill.Dec. 750, 752-53 (Ill.App. 2 Dist.,1983)*(emphasis added). *Lake County* has been often cited as authority for the proposition that establishing the siting criteria is a reasonable and necessary purpose of imposing conditions of approval. ERDS is frankly surprised that neither WMII or Will County were aware of this 30-year-old, but still controlling, precedent.

Subsequent cases have established that using conditions to create compliance with the statutory criteria is routine practice. Recently the Board noted, "In its recommendation, Patrick Engineering, the City Council's consultant, agreed that 'the design, operation and location of the expansion is designed and proposed to be operated to be protective of the public health safety and welfare' with special conditions." *Rochelle Waste Disposal, L.L.C., Petitioner v. The City of Rochelle, an Illinois Municipal Corporation, and the Rochelle City Council, Respondents 2008 WL 256801 (Ill. Pol. Control. Bd.), 49.* More recently the Board observed, "Ancel Glink concluded that with the addition of the 26 conditions, the siting should be approved. C5-0021. More specifically, with the imposition of 22 conditions, including Special Condition 2.2, the public health safety and welfare will be protected and criterion 2 will be met. Id." *Veolia Es Zion Landfill, Inc., Petitioner v. City Council of the City of Zion, Respondent 2011 WL 1549344 (Ill. Pol. Control. Bd.), 8.*

Will County and WMII are frequent litigants before this Board, as are their respective attorneys, Mr. Helsten and Mr. Moran. It is therefore, totally surprising that these very parties

and attorneys were participants in the clearest case of all, demonstrating unequivocally that conditions can be and are used to fashion compliance with statutory siting criteria. After Will County granted conditional siting approval to WMII for Prairie View RDF, WMII appealed certain conditions to the Board, claiming they were not necessary to create compliance with the related siting criteria. One of the conditions was that WMII close its Wheatland Landfill, which Will County said was required in order for Prairie View to be necessary to accommodate the waste needs of the area to be served. On review the Board agreed with WMII, holding, "The Board therefore finds that Condition Six, i.e., closing Wheatland, is not needed to make Prairie View necessary to meet the waste needs of the intended service area. The Will County Board's decision to impose Condition Six is against the manifest weight of the evidence." *Waste Management of Illinois, Inc., Petitioner v. Will County Board, Respondent, 1999 WL 744116 (Ill. Pol. Control .Bd.), 4.* The dissenting opinion is also interesting:

> "I respectfully dissent from today's decision. I believe that the record shows that Condition Six is indeed needed to make WMII's proposal for Prairie View Landfill consistent with landfill siting Criteria One and Eight. For that reason, I believe the Board should have affirmed the Will County Board's decision to conditionally approve WMII's proposal for the Prairie View Landfill. A local siting authority is authorized and required by Section 39.2 of the Act to grant approval of a landfill siting proposal only if the proposed landfill complies with all of the statutory siting criteria. If the local siting authority finds that one or more of the criteria is not met, it must either deny approval outright, or grant a conditional approval in which the attached conditions cause the criteria to be met."
> *Waste Management of Illinois, Inc., Petitioner v. Will County Board, Respondent, 1999 WL 744115 (Ill. Pol. Control. Bd.), 1. PCB 99-141 9-9-99.*

The Appellate Court affirmed, and that decision makes it clear that Will County continued to argue that Condition Six was needed in order to create compliance with criterion 1:

> "The Board (Will County Board) first argues that condition six is needed to satisfy criterion i of the Act, which requires a showing that the new facility "is necessary to accommodate the waste needs of the area it is intended to serve." *415 ILCS 5/39.2(a)(i) (West 1998).* The Board contends that if Wheatland is permitted to remain open after

> Prairie View is operational, the new facility was not necessary to accommodate the County's disposal needs since Wheatland remained available. The board relies on *Will County Bd. v. Illinois Pollution Control Bd., 319 Ill.App.3d 545, 548, 747 N.E.2d 5, 6, 254 Ill. Dec. 248, 249 (Ill. App. 3 Dist.,2001)*

There can be no doubt that conditions can be and are imposed by the local siting authority to achieve compliance by the Applicant with the statutory siting criteria. For WMII and Will County, who both have direct experience in this area, to make an argument to the contrary smacks of the worst kind of bad faith.

THE SITING CRITERIA

Standard of Review

A local decision finding that an Applicant has proven the siting criteria, conditionally or otherwise, will not be disturbed on review unless it is against the manifest weight of the evidence. The Board is to review the siting authority's decision under the manifest-weight-of-the-evidence standard and is not to reweigh the evidence. *Fox Moraine, LLC v. United City of Yorkville, 960 N.E.2d 1144, 1173, 356 Ill. Dec. 21, 50 (Ill. App. 2 Dist.,2011).* A determination on the second criterion is purely a matter of assessing the credibility of the expert witnesses. *File v. D & L Landfill, Inc., 219 Ill.App.3d 897, 907, 162 Ill. Dec. 414, 579 N.E.2d 1228 (1991).* The question before the PCB was whether the Village Board's decision was contrary to the manifest weight of the evidence. *Waste Management of Illinois, Inc. v. Pollution Control Board, 122 Ill.App.3d 639, 644 (1984)* (PCB decides whether the decision of the local siting authority was against the manifest weight of the evidence). The manifest-weight standard of review also governs this court's review of the PCB's decision. *Waste Management, 122 Ill.App.3d at 644.* We do not reweigh the evidence. *Tate v. Pollution Control Board, 188 Ill.App.3d 994, 1022 (1989). Timber Creek Homes, Inc. v. Illinois Pollution Control Bd., 2015 WL 5313496 (Ill. App. 2 Dist.), 11 (Ill. App. 2 Dist.,2015)*

In *Timber Creek*, the Board has a very good summary of the meaning of the manifest weight standard as applied to pollution control facility siting appeals:

> "In reviewing the decision of a local government on siting a landfill or transfer station, the Board must apply the "manifest weight of the evidence" standard of review. *Town & Country Utilities v. PCB, 225 Ill.2d 103, 866 N.E.2d 227 (2007); Land and Lakes Co. v. PCB, 319 Ill. App. 3d at 48, 743 N.E. 2d at 197; Waste Management of Illinois, Inc. v. PCB, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2nd Dist. 1987); City of Rockford v. PCB, 125 Ill. App. 3d 384, 465 N.E.2d 996 (2nd Dist. 1984).* A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. *Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Harris v. Day, 115 Ill. App. 3d 762, 451 N.E.2d 262 (4th Dist. 1983).* The province of the hearing body is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses. Merely because the Board could reach a different conclusion is not sufficient to warrant reversal. *City of Rockford, 125 Ill. App. 3d 384, 465 N.E.2d 996; Waste Management of Illinois, Inc. v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d 542 (3rd Dist. 1984); Steinberg v. Petta, 139 Ill. App. 3d 503, 487 N.E.2d 1064 (1st Dist. 1985); Willowbrook Motel Partnership v. PCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985).* *12 The Board will not disturb a local siting authority's decision regarding the Applicant's compliance with the statutory siting criteria unless the decision is contrary to the manifest weight of the evidence. See *Concerned Adjoining Owners, 288 Ill. App. 3d at 576; 680 N.E.2d at 818; see also Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197.* "That a different conclusion may be reasonable is insufficient; the opposite conclusion must be clearly evident, plain or indisputable." *Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818, quoting Turlek v. PCB, 274 Ill. App. 3rd 244, 249, 653 N.E.2d 1288, 1292 (1st Dist. 1995).* The Board may not reweigh the evidence on the siting criteria to substitute its judgment for that of the local siting authority. See *Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3rd Dist. 1990); Waste Management of Illinois, Inc. v. PCB, 187 Ill. App. 3d 79, 81-82, 543 N.E.2d 505, 507 (2nd Dist. 1989); Tate v. PCB, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989).* "[T]he manifest weight of the evidence standard is to be applied to each and every criteria on review." See *Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818.*The local siting authority weighs the evidence, assesses witness credibility, and resolves conflicts in the evidence. See *Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818*; see also *Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Fairview, 198 Ill. App. 3d* at *550, 555 N.E.2d at 1184; Tate, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195.* Where there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits one group of witnesses and does not credit the other. *See Waste Management, 187 Ill. App. 3d at 82, 543 N.E.2d at 507.* "[M]erely because the [local siting authority] could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the [local siting authority's] finding." *File v. D & L Landfill, Inc., 219 Ill. App. 3d 897, 905-906, 579 N.E.2d 1228, 1235 (5th Dist. 1991).*"

Timber Creek Homes, Inc., Petitioner v. Village of Round Lake Park, Round Lake Park Village Board and Groot Industries, Inc., Respondent 2014 WL 4249954 (Ill. Pol. Control. Bd.), 11-12

WMII readily acknowledged the appropriate standard of review, but Will County did not, arguing instead without reference to a standard that ERDS had not proven their case. What the Will County argument misses is that at this point the Village has found the case to be proven, so their argument is moot.

The Hearing Officer's Report

Derke Price, the hearing officer for the local hearing issued a report in which he found that criterion 1 had not been proven, that criteria 2 and 5 required conditions, and that all other criteria has been proven. Petitioners make much out of the fact that Price found that criteria 2 and 5 were not proven unless subject to conditions, and they base almost their entire argument with respect to criterion 1 on his report.

Expert and staff reports are not evidence. *Fairview Area Citizens Taskforce v. Illinois Pollution Control Bd., 198 Ill.App.3d 541, 548, 555 N.E.2d 1178, 1182, 144 Ill. Dec. 659, 663 (Ill. App. 3 Dist.,1990).* It is undisputed that a hearing officer in proceedings before the County Board is not a decision maker. *Citizens Against Regional Landfill v. Pollution Control Bd., 255 Ill.App.3d 903, 907, 627 N.E.2d 682, 685, 194 Ill. Dec. 345, 348 (Ill. App. 3 Dist.,1994).* A Village Board is free to select from multiple reports and recommendations it may receive from different parties and sources in making its own findings. *Timber Creek Homes, Inc., Petitioner v. Village of Round Lake Park, Round Lake Park Village Board and Groot Industries, Inc., Respondent 2014 WL 4249954 (Ill. Pol. Control. Bd.), 69.*

If it considers it proper, a local siting authority may adopt a set of findings proffered by an Applicant or a siting approval opponent without depriving any party of fundamental fairness. *Land & Lakes, 319 Ill. App. 3d at 49-50.*

Accordingly, Mr. Price's report has no evidentiary value, and in the absence of allegations to the contrary, the Village Trustees are presumed to have given it the weight it deserves.

CRITERION i
THE FACILITY IS NECESSARY TO ACCOMMODATE THE WASTE NEEDS OF THE AREA IT IS INTENDED TO SERVE

John Hock from Civil and Environmental Consultants, Inc. testified for ERDS on this criterion. Mr. Hock has over twenty-seven years of experience in the solid waste industry, during which time he has been involved with the development of a variety of solid waste management facilities, including the design and permitting of numerous transfer stations. He is a professional engineer in six states, including of course, Illinois, and is currently vice-president for CEC, which has been in operation for over twenty-five years and has 700 employees and 18 offices. Mr. Hock manages CEC's Lombard office.

He identified the proposed service area for the Moen Transfer Station as consisting of Will County, several adjoining townships to the North and Northeast of Will County, the Eastern portion of Kendall County and the Northeast portion of Grundy County adjacent to Will County. He evaluated waste generation and disposal trends in the service area and considered the benefits of the proposed transfer station. He noted that Prairie View RDF landfill, operated by WMII, is, pursuant to the Will County Solid Waste Management Plan, intended to meet the waste disposal needs of the County and townships, municipalities, and villages which are partially within the County. He noted that waste acceptance volumes have generally been decreasing at Prairie View

RDF and explained this by noting that a significant amount of waste generated within the service area is being transferred to remote landfills outside the service area even though Prairie View RDF is the closest landfill to the point of generation, as it is in the service area.

Mr. Hock evaluated the three other transfer stations in the service area. The first is the Rockdale Transfer Station owned by WMII, which accepts only source separated recyclables. The Citiwaste facility is located in Joliet, but only accepts C&D debris, landscape waste and recyclables. The Joliet Transfer Station (JTS), also owned by WMII, is the only transfer station in the service area that accepts general municipal solid waste, and it is located about 1.25 miles west of the proposed facility.

Mr. Hock pointed out that the service area currently generates between 2,392 and 3,718 tons per day of solid waste, of which perhaps 10% can be efficiently direct hauled to the Prairie View RDF. The average daily volume of the JTS is approximately 1,300 tons, leaving a transfer capacity shortfall in the service area of 853-2,046 tons per day. Additionally, population trends indicate that the amount of waste generated within the service area will continue to increase.

The application and Mr. Hock demonstrated that the JTS is dangerously over extended, receiving much more waste than it can safely and efficiently handle. He demonstrated there are frequently long lines of waste trucks waiting to discharge at the JTS, waste is often discharged outside the building, and during 2014, JTS frequently left waste on its tipping floor overnight far in excess of its permit condition, which allows up to nine loads of waste to be left on the floor, up to three times per month. WMII's pre hearing submittal admitted these violations.

Mr. Hock pointed out that the development of the Moen Transfer Station would provide another option to haulers in the area, and generally have the benefit of increasing competition. In addition, there would be increased operational flexibility through longer working hours, there

would be a direct benefit to the County in that the development of the Moen Transfer Station will, pursuant to both the intent of the operator and its secondary host agreement with Will County, increase disposal at Prairie View RDF, from which the County receives substantial host fees. The direct benefit to Rockdale would be continuation of the terms of ERDS' host agreement with Rockdale, by which free pick up and disposal is provided to Rockdale residents for a twenty-year period. Mr. Hock also pointed out that locating the Moen Transfer Station centrally in the service area will increase the efficiency of the waste collection and disposal system in the service area, reducing vehicle emissions and reducing wear on roads. Redirecting waste presently being direct hauled to transfer stations outside the service area for transfer to remote landfills back to Prairie View RDF will also significantly add to those benefits. He concluded that in his expert opinion, the Moen Transfer Station is necessary to accommodate the waste needs of the area it is intended to service.

In opposition, Sheryl Smith testified on behalf of WMII. Her claimed expertise is as a senior project manager, but she is not an engineer, nor licensed in any other profession. Ms. Smith's analysis was really more geared to the question of whether a new landfill is needed in the service area, because she concluded that there is adequate disposal capacity for the next twenty-five years in the service area. She did not look at transfer capacity, and seemingly did not understand the distinction between waste transfer and waste disposal. She opined that the methodology for determining the need for a landfill is exactly the same as the methodology for determining the need for a transfer station and drew the dubious conclusion that if there is no need for a landfill in a service area, there would generally be no need for a new transfer station.

Ms. Smith did not know many of the facts relevant to a need analysis. She was unaware of the expected composition of solid municipal waste to be received at the Moen

Transfer Station. She felt that the Citiwaste facility could significantly provide transfer capability even though it does not take general refuse, which will be the bulk of the waste received by the Moen Transfer Station. She did point out that there were no legal restrictions on how much waste the JTS could take, and she was unaware of the concept of working or functional maximum capacity. Therefore, she did not have an opinion on whether the Joliet Transfer Station could safely accept 100,000 tons of waste per day, even though she claimed to have been there. Even though Ms. Smith opined that a transfer station was not necessary at the proposed specific location, she did not know where the population centroid of either Will County or the service area was nor did she know whether there were available locations for transfer stations further North in the service area.

There were other flaws in Ms. Smith's testimony, especially in the mathematical assumptions used to support her ill-conceived waste generation versus disposal capacity conclusions, such as the erroneous assumption that a packer truck can hold 9 tons of waste, when Kurt Nebel, on behalf of WMII, testified that 7.5 tons is more appropriate. She also did not know the prescribed truck routes to the Prairie View RDF, and she used 20-24 tons of capacity in a loaded transfer trailer rather than 25 tons as suggested by Mr. Nebel. These factors all impact her mathematics in terms of cost/benefit, with all her assumptions being decidedly un-conservative. Her conclusion that it is more expensive to use transfer trailers to haul waste to landfills was really based upon transferring waste out of the service area to distant landfills, and not a comparison of the cost of direct haul versus transfer to a specific landfill, such as Prairie View RDF. She could not explain how the Moen Transfer Station would increase truck traffic nor the potential impact of that traffic, even though she predicted this in her report.

It is noteworthy that Ms. Smith did not refute the claimed benefits of the Moen Transfer

Station described by Mr. Hock. Also, when pressed on cross examination, Ms. Smith did admit that her mathematical waste generation versus disposal capacity analysis is not necessarily the only valid way of demonstrating need. It is not surprising that the Village Trustees found Mr. Hock to be more credible than Ms. Smith.

Kurt Nebel, an operations/management employee of WMII, also testified, and the substance of his testimony basically was that the JTS is not beyond functional capacity. He did admit that JTS has only one load out bay, and unlike the proposed Moen Transfer Station, it is a back-in rather than a drive through bay. Despite that, he opined that transfer trailers could be loaded out in 7-15 minutes. He believed that the JTS operating permit allowed after-hours waste storage on the tipping floor of 5-6 loads, but admitted that at times, up to 30 loads were left on the floor. He also said that sometimes it just can't be helped that discharged loads of waste end up partially outside the building. He testified that JTS' maximum daily throughput in 2014 was 1,800 tons. He acknowledged that Waste Management has recently acquired the Naperville hauling contract, and that this would add about 150 tons per day to the volume to be received at the JTS. He also admitted that the JTS had a large hole in its tipping floor which went unrepaired for over a year.

Devin Moose, an engineer with a controversial history as a witness in pollution control facility siting cases (see *County of Kankakee v. City of Kankakee and Town & Country, PCB 03-31, Jan. 9, 2003, slip opinion at 25-28)* opined on behalf of Will County that ERDS had not proven need, because their analysis failed to consider all transfer capacity *outside* the service area that might be available. His testimony squarely missed the point that a main benefit of the Moen transfer station is avoiding the environmental and other costs of direct hauling waste from within the service area to remote transfer stations outside. While Moose was very clear about

what the Applicant did not prove, he had no real opinions about what ERDS did prove. When asked if he agreed that the waste generated in the service area exceeded the transfer capacity in the service area, he refused, noting that the transfer capacity of the existing facilities in the service area is unlimited, presumably because JTS has no permit based upper capacity limit. Unrebutted evidence that the JTS consistently violated its permit conditions in 2014 by keeping loads of waste on their tipping floor overnight did not cause him to conclude that JTS was operating above its functional capacity. The fact that Will County, an EPA delegated agency has not issued violations notices to WMII in connection with the repeated permit violations, seemingly all connected to overuse at JTS supports an inference that the County recognizes that JTS's capacity is so over extended that if they didn't violate their permit consistently, garbage simply wouldn't be picked up from homes and businesses. The Village Trustees found Mr. Hock to be more credible than Mr. Moose.

Moose's and Smith's testimony suffer from the same fundamental flaw, a belief that the only way to do a needs analysis is the way they have done it in the past. Their confusion is understandable since most of their work and the case law deals with need analysis for *landfills.* The accepted methodology there is the conventional waste generation exceeds or shortly will exceed disposal capacity mathematical computation. That computation requires consideration of landfill capacity outside a service area, if that capacity is reasonably available to the service area via *transfer* trailers. If this conventional computation results in a disposal capacity shortfall, you literally have a scenario where if you don't build or expand the subject landfill, there will be garbage in the streets.

Garbage in the streets really is a worst case scenario, since municipal solid waste in Illinois always has been and continues to be managed in one way or another. More importantly, transfer stations are not like landfills, and the determination of whether they are needed is fundamentally different. As long as there is disposal capacity in the form of landfills, garbage can be direct hauled to those landfills even if there are no transfer stations at all. So the real purpose of transfer stations is to get the garbage to the landfills more efficiently. In this context more efficiently means with less road wear, less carbon emissions, less vehicle wear and tear, less man hours and of course less money spent. So the analysis for whether transfer stations are necessary should be fundamentally different than landfill necessity analysis and should focus on the efficiency related benefits. Moose's and Smith's opinions to the contrary notwithstanding, the garbage in the streets scenario is not the way to prove need for a transfer station.

While his findings are obviously not evidence, the hearing officer, Derke Price bought into the Smith/Moose landfill based analytical approach of having to look at out of service area capacity in determining a shortfall. That is the sole reason why he believed criterion 1 had not been proven. Mr. Price unfortunately misinterpreted the case law to require a shortfall/capacity analysis including facilities outside the service area. All of the cases that support this standard are *landfill* cases and all of them result from an appeal of a local *denial* on Criterion 1. Just like the Petitioners here, Mr. Price erroneously relied on A.*R.F Landfill* to conclude that an applicant for transfer station siting must consider disposal capacity outside the service area. He believed *A.R.F* required such a calculation to establish need, but the ruling in *A.R.F.* is actually very limited: that failure to consider disposal capacity outside a service area in that case meant that a local *denial* of a *landfill* expansion was not against the manifest weight of the evidence. What the Court held in *A.R.F.* is actually as follows:

> "Based on this evidence, the PCB concluded that the county board's determination that ARF failed to meet criterion (i) was not against the manifest weight of the evidence. Thorsen did not establish a current need for additional landfill space in Lake County. According to him, additional space would not be needed until 1993. Moreover, of the two plans relied on by Thorsen, the SWAC plan failed to consider refuse disposal capacity in surrounding areas outside of Lake County and the NIPC plan was not current. Additionally, this estimate of disposal capacity was contradicted by M. Robert Luedtke, president of the Lake County Joint Action Solid Waste Agency, who testified that depending on compaction rates the capacity would last until 1994 to 1997. Furthermore, Thorsen did not consider the current disposal capacity of other landfills operating within the surrounding area. In light of the evidence presented on this criterion, it cannot be said that the county board's decision as to criterion (i) was against the manifest weight of the evidence."
> *A.R.F. Landfill, Inc. v. Pollution Control Bd., 174 Ill.App.3d 82, 91-92, 528 N.E.2d 390, 396, 123 Ill. Dec. 845, 851 (Ill. App. 2 Dist.,1988).*

More importantly transfer stations do not dispose of waste, they only transfer it, so disposal capacity is not relevant to siting of transfer stations, but only to landfills. Mr. Price's statement that disposal capacity is equivalent to transfer capacity for analytic purposes is unsupported by any case law. Ms. Smith, the witness for WMI, made the same mistake when she concluded that no new landfills were needed in the service area and therefore the applicant had failed to demonstrate need. Under Mr. Price's misunderstanding of the case law and Ms. Smith's misunderstanding of the siting request, no transfer station could ever be approved in a service area that had a landfill providing available *disposal* capacity.

Although it involves appeal of a local denial, one of the cases referenced by Mr. Price does at least deal with a transfer station, and the court's comments regarding need there are closer to establishing a standard for determining transfer station need:

> "Although a petitioner need not show absolute necessity, it must demonstrate that the new facility would be expedient as well as reasonably convenient. *(Clutts v. Beasley (1989), 185 Ill.App.3d 543, 546, 133 Ill.Dec. 633, 634, 541 N.E.2d 844, 845; A.R.F. Landfill v. Pollution Control Board (1988), 174 Ill.App.3d 82, 91, 123 Ill.Dec. 845, 851, 528 N.E.2d 390, 396; Waste Management of Illinois, Inc., 123 Ill.App.3d at 1084, 79 Ill.Dec. 415, 463 N.E.2d 969.)* The petition must show that the landfill is reasonably required by the waste needs of the area, including consideration of its waste production

> and disposal capabilities. *Waste Management of Illinois, Inc., 175 Ill.App.3d at 1031, 125 Ill.Dec. 524, 530 N.E.2d 682; A.R.F. Landfill, 174 Ill.App.3d at 91, 123 Ill.Dec. 845, 528 N.E.2d 390; Waste Management of Illinois, Inc., 123 Ill.App.3d at 1084, 79 Ill.Dec. 415, 463 N.E.2d 969.3.* The evidence offered by Waste Management to establish the necessity of the waste transfer station consisted of the testimony of Edward Evenhouse, the general manager of Garden City. Although Evenhouse concluded that the waste transfer station was necessary, he acknowledged that Garden City did not service all of the waste needs in the area and that he was unable to testify as to the percentage of waste Garden City did handle within the service area. He also stated that the application for site location approval did not include an economic analysis of the proposal. In addition, Evenhouse stated that Lake landfill had received a three-year extension of its operations, but could not testify as to the projected life of the Congress Development landfill. Evenhouse was also unable to state the maximum number of loads Congress Development would accept from Garden City. He further admitted that his information regarding the projected closing of the Mallard Lake landfill in 1993 was derived from newspaper articles and that the Mallard Lake landfill had never refused to accept waste from Garden City. Evenhouse testified that although Mallard Lake and Congress Development landfills were located within reasonable distances from Garden City, he hoped the construction of the proposed transfer station would improve the efficiency of Garden City's operations by allowing for the elimination of some of its collection trucks. Evenhouse stressed the importance of recycling, but acknowledged that Garden City did not require approval from the Village for recycling operations. We find that improvement in the efficiency of Garden City's operations by elimination of some collection trucks is inadequate to meet the statutory requirement of necessity. Thus, the evidence presented by Waste Management was insufficient to show that the waste transfer station was reasonably required by the waste needs of the area and did not adequately address the waste production and disposal capabilities in the service area. Based upon the record before us, we hold that the Village's decision, affirmed by the PCB, as to the necessity of the waste transfer station was not against the manifest weight of the evidence."
> *Waste Management of Illinois, Inc. v. Pollution Control Bd., 234 Ill.App.3d 65, 69-70, 600 N.E.2d 55, 57-58, 175 Ill. Dec. 432, 434-35 (Ill. App. 1 Dist.,1992).*

If the afore cited case provides a standard, ERDS did meet this standard, because it considered available transfer capacity and waste generation in the service area and because it did perform an economic analysis demonstrating tangible benefit to the service area. Petitioners misrepresent the evidence regarding benefit, acknowledging the benefit to Rockdale, but ignoring the benefit to the entire service area and beyond in the form of reduced wear on roads and vehicles, reduced carbon emissions and of course the benefit to Will County and its citizens, who comprise most of the service area population, by increased utilization of Prairie View RDF.

The distinction between cases appealing a denial and cases appealing an approval is significant. The manifest weight standard of review creates a substantial presumption in favor of the validity of the underlying decision. Since there is almost always some competent evidence on both sides of an issue, manifest weight arguments are seldom successful. The reviewing tribunal is primarily looking for an evidentiary basis to affirm. The fact that the local denials based on failure to prove need are not reversed should not be any indication of whether a local approval based on the same evidence would be affirmed. In other words, we have a situation where the reviewing tribunal says "the fact that applicant *didn't* do A" supports affirming a denial even though the same tribunal might say "the fact that applicant *did* do B" supports affirming an approval. Petitioners incorrectly want to exploit this dichotomy by extrapolating from the denial cases that A is required in order to prove the issue.

The Board has acknowledged the validity of this dichotomy. See *Turlek v. Village of Summit*, where the Board noted: "Petitioners' reliance on *A.R.F. Landfill v. Pollution Control Board (Ill.App.2d Dist.1988), 528 N.E.2d 390*, for the proposition that reliance on outdated information is grounds for finding that the applicant did not establish need is misplaced. In A.R.F., the local government found that the applicant *did not meet* the need criterion, and the Board and Appellate Court held that this determination was not against the manifest weight of the evidence. Here, the Village has determined that WSREC *did meet* the need criterion, and it is the Board's duty to determine whether this determination in favor of the applicant is against the manifest weight of the evidence." *Turlek v. Village of Summit, 1994 WL 185708 (Ill. Pol. Control .Bd.), 13* (emphasis added).

Based on the distinction between appeals of local denials and appeals of approvals, there is every reason to believe that the Board would affirm an approval in the Garden City transfer

station case discussed above despite what appear to be somewhat Spartan, and certainly not expert, proofs on need. Such reasoning is consistent with the Board's recent decision in *Roxana Landfill v. Caseyville, PCB 15-65 (Dec. 18, 2014)*, affirming a local finding of need for a transfer station based on non-expert vague conclusions of economic benefit, generic reports and the like. Noteworthy is the fact that Sheryl Smith testified that there was at least 20 years of remaining disposal capacity in the service area, a fact acknowledged by the Board.

The myriad of Pollution Control Board decision and Appellate Court opinions on the subject, which have described the standard of need as anywhere from reasonably convenient to urgently needed are not really instructive, because those terms are defined on a case by case basis. However, it is interesting that the urgently needed language is generally found in cases where the Board or Court affirms a local finding that need was not established and the reasonably convenient and expedient language appears in opinions holding that an affirmative local finding of need was not against the manifest weight of the evidence. *Turlek v. Pollution Control Board, 274 Ill App 3rd 244, 653 N.E. 2nd 1288 (1st District, 1995).*

A closer look at the facts of other PCB and Appellate cases relating to the need criterion finding, not cited by the Petitioners, reveals a much different and more complex picture than what they and Mr. Price have painted. First of all, there are no reported cases where a local finding of need has been reversed as against the manifest weight of the evidence, even though those local findings routinely failed to consider all available disposal capacity and considered economic factors in the need equation. In other words, the PCB and the Courts have affirmed local decision making processes of need consistent with application of the manifest weight of the evidence standard of review discussed above.

Failure to consider the impact of proposed additional pollution control facilities *in* the service area on disposal capacity is not improper. *Turlek v. Village of Summit, 1994 WL 185708 (Ill. Pol. Control. Bd.), 14.* Failure to consider readily available disposal capacity outside the service area, while still finding the existence of need, is not improper. *Hediger v. D. and L. Landfill Inc., (December 20, 1990) PCB 90-163.* Failure to consider existing landfill capacity, even in the service area, in finding need for an incinerator, is not improper. *Sierra Club, Madison County v. City Wood River, 1995 WL 599852 (Ill. Pol. Control. Bd.), 11.*

The foregoing cases demonstrate that the simple formulistic approach of comparing disposal capacity to waste generation in determining need, as advocated by Petitioners, is not the actual practice of local decision-makers. The concept of urgently necessary as argued by the Petitioners in this case really approaches the definition of absolute necessity, which has been condemned by the courts. In previously rejecting the mathematical approach urged by the objectors, the PCB had an interesting observation about the negative effects of this approach.

> "The Board notes that Gallatin's claim that Fulton County did not consider the Gallatin facility seems to imply that simply because a large landfill has been sited and permitted, and intends to serve the same area, no need for another facility can ever be demonstrated. For this Board to find that no need can exist if another landfill, with much capacity, is serving or will serve the proposed service area, would result in the creation of landfill monopolies, at least within specific service areas. We do not believe that the legislature, in requiring local decision makers to consider the waste needs of the intended service area, meant to establish de facto monopolies. In this case, Fulton County presented an analysis of need, and the County Board found that the facility is necessary. The proper inquiry before the Board is whether the County Board's decision is against the manifest weight of the evidence, not whether there is another landfill which could serve the intended service area. We do not find the County Board decision to be against the manifest weight of the evidence." *Gallatin National Company, Petitioner v. The Fulton County Board and The County of Fulton, Respondents, 1992 WL 142713 (Ill. Pol. Control. Bd.), 16.*

In light of this comment by the PCB almost 25 years ago, Mr. Hock's testimony that increased competition from siting the Moen Transfer Station supports his conclusion that there is a need turns out to be right on the money.

The economic benefits of a new pollution control facility are properly considered as part of the need determination. While not controlling, the economics of greater hauling distances can be germane to Criterion 1, *Waste Management of Illinois*, v. *PCB, 123 Ill. App. 3d at 1087-88, 463 N.E.2d at 978-79.* Increased costs, distance and travel time do constitute evidence of need. *Waste Management of Illinois, Inc. v. Pollution Control Board (1984), 122 Ill.App.3d 639, 77 Ill. Dec. 919, 461 N.E.2d 542.*

Lastly, poor operations at nearby facilities are also a legitimate reason for local decision-makers to find need for a new or additional facility. *Wabash and Lawrence Counties Taxpayers and Water Drinkers Association, Petitioner, v. The County of Wabash and K/C Reclamation, Inc., an Illinois Corporation, Respondents, 1989 WL 97283 (Ill. Pol. Control. Bd.), 7.* Petitioners criticize Applicant's testimony and evidence about how overextended and poorly operated the JTS is, but that evidence is, in light of previous decisions by the PCB, a perfectly legitimate reason to conclude that need exists for the Moen Transfer Station.

The Rockdale Village Trustees did an extraordinary job reviewing and weighing the evidence on this criterion. Section 3 of the ordinance approving the application contains the analysis and goes for four, single spaced pages. This analysis confirmed a significant transfer capacity shortfall in the service area. It found "ample" evidence that the JTS is seriously overextended. It confirmed the many direct and indirect benefits that the service area will derive from the Moen Transfer Station. It expressly rejected the suggestion that proof of need required the traditional waste generation versus disposal capacity analysis advocated by petitioners.

The benefits of landfills are that they provide disposal capacity. The benefits of transfer stations are that they provide efficiency and economic advantages in utilizing that capacity. The Village Trustees made such a finding.

In summary, demonstration of need is therefore not an absolute but a relative requirement. The question then becomes, relative to what? This becomes a cost/benefit analysis where the impact of a proposed facility has to be weighed against the benefits. Because transfer stations have minimal impact compared to landfills, the need demonstration does not have to be as rigorous. The need determination for transfer stations is therefore mainly an economic determination. This makes sense, because all waste in a service area could conceivably be direct hauled to a landfill, so that the only need for transfer stations is economic and environmental benefit.

ERDS proved:

1. The waste generated within the service area greatly exceeds the transfer capacity within the service area, resulting in significant amounts of waste within the service area being direct hauled to transfer stations outside the service area for ultimate disposal in remote landfills which are much further away than the landfill within the service area. This creates significant economic and environmental costs in terms of fuel used, road wear, carbon emissions and lost time both inside and outside the service area. The evidence supports the inference that at least some of these costs are passed on to residents and businesses within the service area.

2. Approving the ERDS application is likely to increase use of Prairie View RDF, the closest and most conveniently located landfill to the service area, resulting in savings in fuel costs, road wear, carbon emissions and time, as well as increased host fees to the County. The

evidence supports the inference that at least some of the savings will be passed on to local residents and businesses within the service area.

3. The Joliet Transfer Station is being utilized very intensively, often in violation of its permit, and we conclude beyond its functional capacity. This situation will only get worse with WMII's acquisition of the Naperville hauling contract. Construction of the MTS would reduce some of this load, thereby improving permit compliance at the JTS and, based on Mr. Moose's testimony that intensive use of a transfer station constitutes a potential safety problem, safety at the JTS.

4. The benefit of economic savings to residents and businesses in the service area from increased competition has not been rebutted.

CRITERIA ii and v
THE FACILITY IS SO DESIGNED, LOCATED AND PROPOSED TO BE OPERATED THAT THE PUBLIC HEALTH, SAFETY AND WELFARE WILL BE PROTECTED. THE PLAN OF OPERATIONS FOR THE FACILITY IS DESIGNED TO MINIMIZE THE DANGER TO THE SURROUNDING AREA FROM FIRE, SPILLS AND OPERATIONAL ACCIDENTS.

John Hock, a professional engineer testified on behalf of the Applicant on these criteria. Criteria 2 and 5 are obviously connected, so they are presented here in a single discussion. Mr. Hock first described the two step regulatory approval process for pollution control facilities, a rigorous IEPA permitting process following local siting approval.

Mr. Hock next described the applicable location standards and indicated that the proposed facility was compliant with all of them: wetlands, archeological sites, threatened species, wild and scenic rivers and residential setback.

Mr. Hock described the proposed site plan. The site is sloped generally from North to South and fronts Moen Avenue on the South. The site entrance will be at the Southeast corner of the site. The transfer building with a 6,300 square foot tipping floor will have two discharge bays and a drive-thru recessed load out bay fourteen feet wide. Loading will be done by front end loader, but a grapple will also be available.

Mr. Hock detailed the interior traffic circulation on the site to demonstrate that vehicles could safely make all the required movements and to show that there is adequate queuing for discharge trucks both before and after they have passed the scale and for transfer trailers before they load. Tarping will be done outside, as it is at the JTS. Proposed operating hours for the facility are 5am-5pm Monday-Friday and 5am-12pm on Saturday, but twenty-four-hour operation is available to increase operational flexibility and better serve customers.

Although the facility only proposes to initially receive an average of 200 tons per day of waste, Mr. Hock performed a detailed throughput evaluation to conclusively demonstrate that the facility can easily and safely manage 600 tons per day. The methodology for this evaluation included estimating incoming vehicle distribution at peak hours and computing available storage capacity on the tipping floor at the same time. For a 200 ton per day throughput, the second operating bay is never used and only one loader will be used. This scenario requires that only one transfer trailer per hour be loaded out, even though the facility, using a conservative load out time of twenty minutes, can load three tractor trailers per hour. With a 600 ton per day scenario discharge bay one will be occupied 50% of the time during a peak hour and discharge bay two would be occupied 17% of the time. A grapple loader would be added for this volume. Mr. Hock again conservatively assumed a load out time of twenty minutes per transfer trailer, and he

assumed that 60% of the incoming trucks would arrive within four hours during the twelve hour operating day.

With regard to this throughput analysis, Mr. Moose opined that the facility could not safely handle 600 tons per day, but said he did not have an opinion about any other, lower volume. He described traffic movements at the 600 TPD volume as dangerous, but interestingly, he could not take issue with any of the mathematical assumptions in Mr. Hock's throughput evaluation. So if the throughput analysis works, and it does, Moose's conclusions are not supported. Regardless, Mr. Moose continued to refer to the facility at this volume as dangerous, even though he was on cross examination unable to provide any accident data.

Mr. Hock also described the storm water management plan for the proposed facility. The site generally drains from North to South. There will be two above ground detention basins, one immediately South of the transfer building and another along the Southern boundary of the site. Additionally, there will be an underground detention vault, generally to the East of the transfer building. Capacity for these features was calculated by modeling the maximum precipitation event, deemed to be the one hundred year, twenty-four-hour storm. Final storm water discharge will be to an existing ditch on the North side of Moen Avenue. Mr. Hock concluded that the amount of storm water to be received post development in the ditch will be much less than what it currently receives, so that the existing drainage ditch on the North side of Moen Avenue will function much better after development than in the current condition.

Mr. Hock next detailed the operational plan and plans to minimize the danger to the surrounding area from fire, spills or other operational accidents. The plan focuses on accident prevention. The facility manager or designated equipment operator will serve as safety officer and will be on site at all times. Responsibilities of the safety officer include implementing

procedures to prevent fire, spills or other operational accidents and coordinating responses to incidents or emergencies. There will be regular training of employees and safety procedures. The facility will accept no liquid waste. There will be procedures to contain and collect spilled liquids. All liquids on the tipping floor and load out bay will be treated as leachate. All employees will wear personal protective equipment, designated by the operator. A fire prevention plan has been prepared and approved by the Chief of the Rockdale Fire Protection District. A fire lane has been designated.

Mr. Hock concluded in his expert opinion that the facility is so located, designed and proposed to be operated that the public health, safety and welfare will be protected and that the plan of operations for the facility is designed to minimize the danger to the surrounding area from fires, spills or other operational accidents.

Andy Nickodem, an engineer who usually works for WMII, testified in opposition to Mr. Hock's conclusions. Nickodem concluded that the facility could not safely handle even 200 tons of waste per day, basing his testimony almost exclusively on a software program called "Auto Track," which models the turning movements of trucks.

Mr. Nickodem's testimony is so flawed, unsupported, and contradictory that it should be given no weight at all. First of all, he described the required truck turns on site as tight but not impossible, and his real complaint was that the required turns did not provide sufficient margin of error for drivers. However, he simply did not understand the application. For example, he testified that a 10-foot-wide load out bay would be sufficiently safe, not understanding that the proposed transfer station has a 14-foot-wide load out bay. He used his experience at a Wisconsin Transfer Station, Shawano, to support his conclusions, but admitted Shawano is a baler facility, not a conventional solid waste transfer station, so the comparisons are not valid.

Nickodem opined that the 65-foot entryway proposed for the Moen transfer station was not wide enough to allow trucks to enter, but he did not know what width would be sufficient nor did he know that the entryway at the nearby JTS was narrower. Significantly, Nickodem kept referring to the required 180 degree turns, but on cross examination admitted that they were not 180 degree turns and was forced to concede that they were closer to 160 degrees because of the building being offset from an east-west orientation.

Frankly, Mr. Nickodem did not have the knowledge base to support his conclusions. Even though he said he had designed transfer stations in the past, there is no transfer station experience listed on his lengthy resume. Moreover, he did not know the length of transfer trailers and cabs, he did not know what length of trucks was modeled in his Auto Track program, and he could not produce the input data to verify that he had modeled the correct truck lengths. He also had exiting transfer trailers going to the west when, in fact, the application clearly specified they all go to the east. Worst of all, Mr. Nickodem complained there was no place on site for packer trucks to tarp and un-tarp, when, in fact, collection vehicles do not use tarps.

Mr. Nickodem's testimony should be disregarded in its entirety.

Mr. Moose's testimony that the proposed site is too small to safely handle 600 ton per day volumes is undermined by how evasive his responses on cross examination became. Mr. Moose readily admitted that other transfer stations, including some designed by him, operated far more intensively than the proposed Moen transfer station at 600 tons per day, including DuKane, Calumet and Batavia. His intensity analysis is fatally flawed at the outset in that he based the calculation on throughput versus overall building size rather than throughput versus tipping floor size. One thing about Moose's usage intensity calculations is especially disturbing, that he depicts JTS as having less usage intensity than the proposed facility even though it is undisputed

that the tipping floor at JTS is about one-third larger than the tipping floor at the proposed facility, even though JTS handles on average over 1,200 tons of waste per day, with a maximum in 2014 of 1,800 tons, all with a single back-in load out bay. So, by ignoring the facts and depicting JTS's usage intensity as lower than the proposed site, Moose was attempting to mislead the trier of fact. Alternatively, if Moose's conclusion that the Moen Transfer Station cannot handle 600 tons per day is going to be even considered, then the applicant's assertion that the JTS is utilized beyond its functional capacity is conclusively established, putting the need issue to bed.

All the cross examination questions to Mr. Moose regarding the JTS were deflected with statements that he didn't study it. Moose's answers about usage intensity only got worse when cross examined by Mr. Shanahan, on behalf of the city of Joliet, because then it turned out that Moose didn't quite understand how his own numbers were calculated. When asked several times to use his own formula to back figure building sizes for facilities mentioned in his slide #5, Moose finally admitted, "I just calculated the Moen and it comes up to an incorrect number, so I'm unable to solve it apparently." Then, in a quick attempt to blunt the impact of his lack of knowledge, he added, "I can say that the numbers did not go into any of my opinions as I testified." (R Tr. 869).

Moose was also critical of Mr. Hock's storm water management design, opining specifically, that the plan lacked "sufficient detail" that the discharge orifice from the detention basins were too small and subject to clogging, and that the Southernmost detention basin would overflow onto the property during a maximum precipitation event.

John Hock both on cross-examination and in rebuttal testimony addressed all of Mr. Moose's concerns. First of all, it should be noted that because Section 39.2 siting supersedes

zoning and local land use regulations, the storm water management design is not required to be compliant with the Will County or Village of Rockdale Storm Water Management Ordinance. Nonetheless, ERDS intends to design and build the system in compliance with all local ordinances.

However, such compliance is certainly not required to be proven at the local siting hearing. Mr. Hock pointed out that the conveyance pipes, swales and trench drains depicted on the site plans have been analyzed and will be adequately sized. Pipe clogging will be prevented by standard means and clean out access will be provided. Mr. Hock demonstrated three standard techniques to address clogging. According to him, these techniques are in the nature of Storm water 101 and did not need to be depicted in the application. A further observation by Mr. Hock and an example of Mr. Moose attempting to make something out of nothing, is Moose's criticism that the adequacy of the 18" diameter conveyance pipes between detention basins was not modeled. Mr. Hock pointed out that an 18" diameter pipe is over sized by at least an order of magnitude and anyone could clearly see without doing detailed modeling, that this diameter is more than sufficient for storm water on site.

Mr. Hock also pointed out that overflow scenarios had been accounted for in the design, so that there would be normal above-ground sheet flow from a higher basin to a lower basin in the event that a conveyance or an orifice failed. This feature of the design utilizes site topography. Mr. Hock also indicated that storm water may backup into about 7,000 square feet of the paved area of the parking lot for a period of perhaps one day during a hundred year storm event, a fairly standard design feature that would not interfere with site operations. In no event will any of the transfer operations ever occur under water.

Lastly, Mr. Hock responded to Moose's criticism that the storm water management system did not comply with the local ordinance because the detention basins lack the required 12" of freeboard. Mr. Hock pointed out that the two above ground basins did in fact have the required freeboard, and that the freeboard requirement did not apply to the below ground vault, because the purpose of freeboard is to guard against wind driven wave action.

In conclusion on this point, Mr. Hock once again pointed out that many of Moose's and Nickodem's criticisms really boil down to the absence of construction details which are not required at this stage of the proceedings. It is a fairly common technique for opponents who cannot criticize the material that is presented to argue and nitpick about the material that is not presented.

John Hock presented significant rebuttal testimony to demonstrate that Mr. Moose's conclusions regarding usage intensity, throughput capacity and traffic patterns were simply incorrect. Mr. Hock reviewed aerial photographs of the thirteen transfer stations in and closest to the proposed service area, he reviewed EPA capacity reports from 2009, the most recent year available, he visited selected facilities, he reviewed multiple Google street views of each of these facilities and he calculated usage intensity based on actual acreage used for transfer facility activities. While Mr. Moose had asserted that the average facility size in Northeastern Illinois is 5.7 acres compared to the proposed facility size of 2.2 acres, Mr. Hock's detailed research indicated that the average area used for MSW transfer in the thirteen facilities within or closest to the service area is only 2.62 acres. In support of that conclusion, Mr. Hock actually depicted the facilities studied.

With regard to the JTS, Mr. Hock pointed out that the actual ratio of throughput to transfer station building size is 103.3 tons per day per 1,000 square feet, whereas at

600 tons per day, this ratio for the proposed facility is about 75, 30% less than at JTS.

With regard to Moose's claim of lack of maneuvering room in the transfer station for loading equipment at the maximum waste storage capacity and inability to load transfer trailers while both bays are being used for discharge, Mr. Hock pointed out, once again, the conservative assumptions in his throughput analysis. Even at 600 tons per day, the second loading bay would be utilized only for 25 minutes out of a twelve hour working day and that even this time period is inflated by assuming a 20-minute loading time rather than the industry accepted standard of 15 minutes. Hock also pointed out that Moose's critiques did not take into account the use of a grapple loader during busy times.

Mr. Hock did admit that while the onsite traffic patterns involve some cross overs, the amount of trucks in the facility at any given time is so small that this is not a problem. He also emphasized that tight turns are routine in transfer stations, citing the Waste Management Matteson Transfer Station as an example.

In summary, the design and operational criticisms of both Mr. Nickodem and Mr. Moose are largely smoke and mirrors, bold conclusions unsupported by underlying evidence or, even worse, supported by faulty and incorrect assumptions.

Will County's argument being devoid of any reference to a standard of review, is moot and does not equine a response other than an observation that it is mostly a brief bit of nitpicking about minor variances between the hearing officer's findings and the special conditions imposed by the Village.

WMII's argument is more substantial, but the very fact that counsel spends many pages reviewing the testimony on both sides, makes the point that the local decision is not against the manifest weight of the evidence. There was contested evidence on both sides of the health, safety

and welfare issues, the Village weighed that evidence, and the Board is not now free to adopt a different interpretation.

There are really only two points of disagreement on public health, safety and welfare. The first is the dispute about maximum daily capacity. Devin Moose took strong issue with a proposed 600 tons per day maximum, but had no opinion about a lesser amount. Andy Nickodem disputed that even 200 tons could be handled safely, but his testimony was so incredible, inconsistent and weak that it is barely mentioned in the hearing officer's report. The Village's imposition of a 300 TPD maximum would seem to resolve all concerns about safe operating levels. It resolved the hearing officer's concerns.

The second point of contention deals with detail in the Storm water management design. Mr. Hock felt that there was sufficient detail, certain things were obvious, Mr. Moose was nitpicking and a siting application does not require a construction drawing level of detail. What is critically important, is that no one questioned the design of the storm water management system or opined that it would not work. Conditioning approval on compliance with the County Storm water management ordinance, which demands significantly more detail, solves the problem in its entirety.

The criterion 5 issue deals with potential on site traffic conflicts. While ERDS disputes the existence of these conflicts, reducing daily maximum volume to 300 tons would seem to remove any doubt about safety. In addition, both the Hearing Officer and the Trustees suggested additional conditions of adding more personnel for the specific purpose of directing on-site traffic and requiring final site design approval by the Village engineer. These are the kinds of conditions one typically sees in many siting cases.

In conclusion, it is noteworthy that the Village, which was very proactive in reviewing the Application and evidence as evidenced by their detailed findings, actually imposed more conditions then were recommended by the Hearing Officer. It goes without saying that the decision of a municipality, which is obviously interested and knowledgeable, as was the case here, should be given more deference by the Board.

ERDS did not support or request any of the conditions imposed by the Village. ERDS fully believes that the evidence conclusively supported an unconditional approval. While issues relating to waste handling capability and on-site traffic flow were hotly contested between the expert engineers at a 600 ton per day volume, ERDS believes that Mr. Hock was more credible than Mr. Moose. However, ERDS has elected not to appeal the Village's conditions, and in so doing, now argues, without waiver of its position that the application and evidence supported unconditional approval, that the 300 ton per day volume limit and other conditions imposed by the Village provide an incredible, frankly unnecessary, margin of safety.

CRITERION 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.

John Hock testified as to this criterion. He detailed the history of the Will County Solid Waste Management Plan from its adoption to its most recent update in 2007. He reviewed the Pollution Control Facility recommendations in that plan. Those recommendations include reliance on a network of transfer stations operated by the public sector, recognition of the potential need for additional transfer stations to serve the needs of the County and a requirement that any new pollution control facility seeking local siting approval must negotiate a host agreement with the County.

Mr. Hock pointed out that the secondary host agreement executed between ERDS and Will County acknowledges Prairie View RDF as the preferred disposal location for waste transported from the transfer station and the proposed facility is consistent with the relevant recommendations of the Solid Waste management plan regarding the siting of new pollution control facilities.

This criterion was not contested at the public hearing, and Will County does not argue it on appeal. WMII now argues that the County solid waste management plan, as updated, requires new transfer stations to be located in the northern or eastern part of the County and to be developed only by themselves.

First of all, the argument is waived, as the evidence of plan consistency presented by ERDS was unrebutted. The trier of fact and the Board are not free to disregard unrebutted evidence. *Industrial Fuels v. PCB, 227 Ill.App. 3rd 533 (1st Dist. 1992).* The closest WMII came to preserving the argument, is brief testimony on the need criterion by Sheryl Smith, that because the County solid waste management plan called for additional transfer stations in the northern or eastern part of the County, a new transfer station in the central part of the County was not needed.

WMII's argument is also clearly wrong. The testimony they rely on is a reference to chapter 4, page 4 of the County Plan. There, the 2001 plan update recommendation is "selected contractor may desire to site transfer stations in northern and eastern parts of the County." That language looks permissive rather than mandatory, and it certainly doesn't say that only WMII can site transfer stations. Contrast the foregoing with the language from the 2007 (most recent) update: "The County will not pursue the development of a County owned transfer station, rather the County will allow the private-sector to develop a transfer station network as it deems

appropriate and pursuant to the terms of the host and Operating agreement for Prairie View RDF." Mr. Hock testified that he interpreted this requirement to mean that Prairie View had to be the preferred disposal destination for waste from a new transfer station. Apparently, the County agreed, because that was a key component of the secondary host agreement they executed with ERDS.

Lastly, the fact that Will County, who should understand its solid waste plan better than anyone, executed and approved a secondary host agreement with ERDS, should conclusively put any questions about plan consistency to rest.

CONCLUSION

For the foregoing reasons, ERDS respectfully prays that the conditional siting approval of the Village of Rockdale be affirmed.

Respectfully submitted,
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