BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on March 14, 2016, Waste Management of Illinois, Inc. filed with the Illinois Pollution Control Board, **WASTE MANAGEMENT'S REPLY TO RESPONDENTS' POST-HEARING BRIEFS**, in this proceeding, a copy of which is attached and served upon you.

Dated: March 14, 2016

Respectfully Submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
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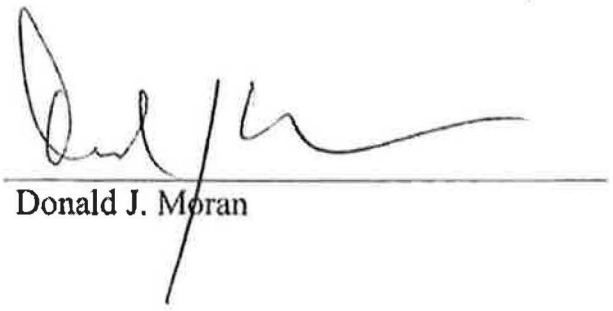
CERTIFICATE OF MAILING

The undersigned, an attorney, states that on March 14, 2016, he caused to be filed by U.S. Mail at or before 5:00 p.m., the foregoing WASTE MANAGEMENT'S REPLY TO RESPONDENTS' POST-HEARING BRIEFS AND this Certificate of Mailing by depositing the same in the U.S. Mail located at 161 N. Clark St., Chicago, Illinois, enclosed in a sealed envelope with First Class postage fully prepaid and addressed to the Illinois Pollution Control Board Clerk:

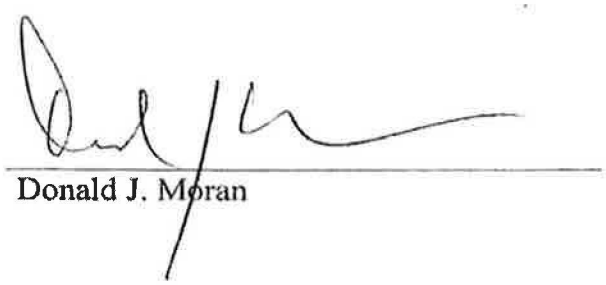
John Therriault
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph Street
Chicago, IL 60601



Donald J. Moran

CERTIFICATE OF SERVICE

I, Donald J. Moran, an attorney, certify that I have served the attached WASTE MANAGEMENT'S REPLY TO RESPONDENTS' POST-HEARING BRIEFS on the named parties by electronic service and by depositing same in the U.S. mail at 161 N. Clark Street, Chicago, Illinois 60601, at 5:00 p.m. on March 14, 2016.



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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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WASTE MANAGEMENT'S REPLY TO RESPONDENTS' POST-HEARING BRIEFS

NOW COMES, Petitioner Waste Management of Illinois, Inc. ("WMII"), by its attorneys Pedersen & Houpt, P.C., and hereby submits its Reply to Respondents' Post-Hearing Briefs in its appeal of the September 3, 2015, decision of the Board of Trustees (the "Village Board") of the Village of Rockdale (the "Village"), granting site location approval for the proposed Moen Transfer Station. For the reasons stated herein, the decision of the Village Board should be reversed.

INTRODUCTION

ERDS does not and cannot deny that its pre-filing notice pursuant to Section 39.2(b) of the Act (the "Notice") did not inform the public of an essential design element of the proposed development: the waste throughput volume. The Notice stated that "[t]he facility proposes to handle an average of 200 tons per day of solid waste." (Ex. 3, p. 2). ERDS's lead design engineer, however, testified to the exact opposite at the public hearing, stating that "we are not requesting to limit the amount that we take in to 200 tons per day. That is not what we are proposing. We are absolutely proposing to accept or demonstrating that we can accept at least 600 and there is not a specific tonnage limit proposed" and that the Moen Transfer Station "could readily manage 600 tons per day so, yes, that is proposed." (VB Tr., pp. 954:22-23, 957:1-6). ERDS cannot and does not deny that the Notice did not inform the public of ERDS's intent to accept 600 or more tons per day, a design element (i.e., throughput volume) fundamental to the nature of the proposed development.

Because it cannot cure the Notice's plain and jurisdictional defects, ERDS instead struggles to read new words into the Notice and to interpret the Act to — somehow — allow for the Notice's blatant misrepresentation. Neither argument is successful. No matter how hard ERDS wishes, the Notice simply does not say that the Moen Transfer Station will accept 200 tons per day "initially;" it says the Station will accept "200 tons per day" — period. Nor can ERDS seriously argue that the Notice genuinely informed the public of the "nature and size" of the development or the activity proposed when it underestimated the scope of that activity by at least a factor of three. ERDS's suggestion that the Notice could contain such a glaring misrepresentation yet somehow comply with Section 39.2(b) has no basis in the statute or in the case law, both of which ERDS misreads. ERDS does not deny, finally, that by omitting the

proposed facility's actual intended throughput volume and capacity, it omitted an essential design element and, thereby, failed to submit detail "sufficient" to demonstrate compliance with Section 39.2(a)'s nine criteria.

ERDS failed to prove compliance with criteria (i), (ii), (v) and (viii) and the Village Board's decision to the contrary was both legally erroneous and against the manifest weight of the evidence. ERDS's need analysis failed to consider available waste disposal capacity, despite endorsement by the case law, and further failed to consider all of the transfer capacity available to the proposed service area in direct contravention of the case law and Section 39.2(a)(i)'s language. Its analysis is, further, riddled with errors, speculation and unsupported assumptions and cannot be considered competent evidence.

No authority supports ERDS's and the Village Board's bold proposal to cure the admitted defects in ERDS's application and presentation with respect to criteria (ii) and (v) by amending the application through the imposition of special conditions. Indeed, ERDS simply ignores the only on-point authority on this topic in favor of a litany of misrepresented and miscited cases, none of which actually support ERDS's position. The testimony showed, and the Village Board confirmed, that ERDS failed to carry its burden of proof. The Village Board's decision to approve local siting despite these failures was against the manifest weight of the evidence and must be reversed.

Finally, both ERDS and the Village Board simply cross their fingers and hope that no-one notices the Village Board's failure to properly consider, much less correctly apply, Will County's Solid Waste Management Plan. The Village Board offers no explanation for its failure to consider that Plan's references to transfer stations, much less an interpretation justifying its departure from the Plan's clear preferences. The proposed Moen Transfer Station is inconsistent

with the Plan. The Village Board's finding to the contrary was against the manifest weight of the evidence and must be denied.

ARGUMENT

A. The Village Board Lacked Jurisdiction

Illinois law does, in fact, require strict compliance with Section 39.2(b)'s content requirements, contrary to ERDS's claim. (Resp., p. 4). "Substantial compliance with notice provisions has been held to be insufficient where the statutory provisions are not merely technical requirements, but are jurisdictional." *Daubs Landfill, Inc. v. Pollution Control Bd.*, 166 Ill. App. 3d 778, 780 (5th Dist. 1988) (citations omitted). Despite this plain language, ERDS misreads *Daubs Landfill* for the exact opposite holding, *i.e.*, that "strict compliance with the content requirements is not necessary," and, in doing so, fails to appreciate the differences between the adequate notice in *Daubs Landfill* and the inadequate Notice here.

In *Daubs Landfill*, the applicant's Section 39.2(b) notice contained two descriptions of the proposed facility's location: an accurate narrative description and an inaccurate legal description — so inaccurate, in fact, that it described a location six miles away from the actual site. *Daubs Landfill*, 166 Ill. App. 3d at 779-81. The court held that the notice was sufficient despite the inaccurate legal description because, at worst, anyone who took the time to read and understand the legal description would immediately see that it conflicted with the accurate narrative description and would, therefore, have inquired into the actual location of the proposed facility. *Id.* at 782. The *Daubs Landfill* court did not hold that inaccuracies in a Section 39.2(b) notice do not matter, as ERDS claims, but that, *in that case*, the inaccuracy was cured by conflicting, accurate information *in the same notice.* Because the conflict put the public on duty of inquiry, the Section 39.2(b) notice was sufficient, despite the inaccuracy.

The inaccurate Notice in this case did not contain any conflicting, accurate information that would place the public on duty of inquiry, however. The Notice did not, for example, identify the Moen Transfer Station as a 200 ton-per-day facility in one sentence and a facility with no throughput cap in another. (Ex. 3; VB Tr., p. 957). Had it done so, a member of the public reading the Notice would have seen the conflicting throughput capacities, and been able to inquire into which was correct. Without conflicting, accurate information, however, a member of the public reading the Notice would assume, wrongly, that the Notice was accurate and that ERDS proposed a 200 ton-per-day facility. In reality, the Notice gives the reader no inkling that ERDS in fact proposes to accept 600 or more tons per day and no reason to inquire further. The Notice's inaccuracy renders it inadequate, even under the holding of *Daubs Landfill*, and this Board, therefore, lacks jurisdiction.

ERDS excuses its failure by claiming that Section 39.2(b) permits it to misrepresent the facility's throughput volume, but this argument strains both common sense and the language of Section 39.2(b). That Section requires the public notice to state, among other things, "the nature and size of the development [and] the nature of the activity proposed." 415 ILCS 5/39.2(b). ERDS contends, without citation to authority, that these words only require the Notice to identify the facility as a non-hazardous waste transfer station and to state the size of the parcel of land on which the facility will sit. (Resp., p. 5). Notably, ERDS claims that both the "nature of the development" and the "nature of the activity" requirements can be satisfied with the same information: "solid waste transfer station." (*Id.*)

The word "nature" is defined as "the essential character of a thing" and the "quality or qualities that make something what it is; essence." WEBSTER'S NEW WORLD DICTIONARY 904 (3d ed. 1991). Hence the "nature" of the development includes essential design elements such as

waste throughput or processing capacity and volume. Failure to accurately describe the designed capacity and intended volume is failure to describe the nature of the development.

ERDS's incredible interpretation of Section 39.2(b) asks this Board to believe, without a scrap of supporting authority or evidence, that a transfer station accepting 200 tons-per-day (approximately 30 trucks/day) is of the same "nature" and "size" as a transfer station accepting three, or even ten, times as much (*i.e.*, between 90 and 300 trucks/day). It further asks the Board to believe that neither the "nature of the development" nor the "nature of the activity" provisions require any indication of the facility's proposed throughput volume or capacity — despite Hock's admission that throughput capacity is a design element for a solid waste transfer station — and, instead, merely require the facility to be identified as a waste transfer station — an interpretation which would render one or the other provision mere surplusage in direct contravention of basic rules of statutory construction. *Hirschfield v. Barrett*, 40 Ill. 2d 224, 230 (1968) ("presence of surplusage … is not to be presumed in statutory or constitutional construction …."). (VB Tr., pp. 954, 958-59). Indeed, it seems beyond question that the public is entitled to at least *some* notice of the facility's fundamental design elements and the scope of its activities — how much waste will it process, how many trucks per day will visit and the like — yet ERDS would have the Board believe that the only thing the public needs to know is how much space the facility will take up. This simply defies common sense. Public notice of the "size and nature" of the development and its activities requires notice of the nature (*i.e.,* designed capacity) of the development and the scope of its activities (intended volume).

At a minimum, ERDS cannot *misrepresent* the designed capacity or the scope of the facility's activities (intended volume) in its public notice. *Bishop v. Pollution Control Board*, 235 Ill. App. 3d 925 (5th Dist. 1992), does not suggest otherwise. That case did not interpret Section

39.2(b)'s content requirements at all; instead, it merely applied the dictionary definition of "authentic" in order to determine what constituted "authentic tax records" for the purpose of determine the addresses to which notices must be sent. *Bishop*, 235 Ill. App. 3d at 933. Nothing in *Bishop* suggests that a local siting applicant can misrepresent the facts in its public notice and then escape the consequences.

To the extent *Tate v. Illinois Pollution Control Board*, 188 Ill. App. 3d 994 (4th Dist. 1989), excuses the failure to describe the size of a vertical landfill expansion in a Section 39.2(b) notice of an application for local siting *of a vertical landfill expansion* — a holding the *Tate* court never expressly makes — it appears wrongly decided. Indeed, ERDS cites *Tate* for the proposition that Section 39.2(b) notices do not require "a statement of size," despite the statute's clear requirement that the notice state "the nature and size" of the proposed facility. (Resp., p. 8). The *Tate* court, notably, did not consider the statutory "nature and size" language and, instead, focused entirely on the technical nature of flood plain descriptions. *Tate*, 188 Ill. App. 3d at 1019. The *Tate* court never explained its holding regarding the notice's failure to describe the vertical expansion and has never before been cited for the proposition advanced by ERDS. *Tate* is not persuasive authority.

Nor can ERDS cure the Notice's deficiencies by pretending the Notice said something it did not. ERDS's Response devotes pages to the proposition that the Notice "was and is accurate" because, according to the actual application and ERDS's witnesses, the Moen Transfer Station proposes to accept 200 tons per day "initially." (Resp., pp. 8-11). Of course, the word "initially" appears nowhere in the Notice and there is nothing in the Notice to suggest that ERDS contemplated receiving more than 200 tons-per-day or could ever grow from a 200 ton-per-day facility to something more. (Ex. 3; VB Tr., p. 957). Thus, ERDS's references to its Application

and its witnesses' testimony, as well as its arguments regarding its intent and its speculation regarding WMII's, are irrelevant. If the Notice, standing alone, is defective, ERDS has failed to satisfy Section 39.2(b) and this Board lacks jurisdiction.[1]

ERDS's newly advanced claim that it does *not*, in fact, propose to accept more than 200 tons per day and that its references to a 600 ton-per-day facility merely describe the facility's theoretical *capacity* is also knowingly false.[2] (Resp., p. 10). The Notice states that "[t]he facility proposes to handle an average of 200 tons per day of solid waste," *i.e.*, to process a "volume" of 200 tons per day. (Ex. 3) ERDS's Application, however, claims that the proposed facility "may desire to *accept more than* 200 TPD of waste" and repeatedly states that it will "receive" or "accept" 200 tons per day only "initially." (Ex. 1, pp. 2-16) (emphasis added). At the hearing before the Village Board, ERDS's witness confirmed that the proposed facility would accept a "volume of 200 tons" "to start" or "initially." (VB Tr., pp. 52, 191, 509, 892). Mr. Hock furthermore, clearly stated that ERDS is "absolutely proposing to accept … at least 600" tons per day. (*Id.* at 957).[3] Indeed, ERDS repeatedly asserts, in its Brief to this Board, that it only intends

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[1] Whether waste transfer stations "typically have volume restrictions" is also, therefore, irrelevant. (Resp., p. 5). WMII does not contend that the Notice necessarily constitutes a restriction on a proposed facility's throughput. The Notice could have stated, for example, that ERDS proposed to accept "at least" or "more than" 200 tons per day, but it did not. Instead, it stated that the facility would accept 200 tons per day when, in fact, ERDS proposed and intends to accept much more. This knowing falsehood rendered the Notice deficient.

[2] ERDS's arguments are also inconsistent. Does ERDS intend to accept 200 tons per day "initially," or is 200 tons per day its actual, intended throughput volume? ERDS would have it both ways, which simply underscores the deficiency of the Notice. If even ERDS cannot consistently explain its facility's proposed nature and size, how could the Notice recipients be expected to understand the scope of ERDS's proposed activities?

[3] WMII did not misquote Mr. Hock at all. (Resp., p. 11). Immediately before the quoted statement, Mr. Hock stated that "we are not requesting to limit the amount *that we take in* [*i.e.*, the facility's actual throughput volume] to 200 tons per day." (VB Tr., p. 957) (emphasis added). Mr. Hock contrasted that hypothetical limit on what ERDS could "take in" with ERDS's proposal to "accept" 600 tons per day. While Mr. Hock did claim the facility had a capacity of

to accept 200 tons per day "initially." (Resp., pp. 9, 12). The Notice's failure to describe the actually-intended "nature and size" of the proposed facility rendered it deficient and deprived the Village Board of jurisdiction.

It is not clear, furthermore, that distinguishing "capacity" from actual, intended "volume" actually makes a difference for purposes of Section 39.2(b)'s notice. Because ERDS's Notice claims the proposed facility will accept 200 tons per day, it leads readers to believe that the proposed facility has a 200 ton-per-day capacity. It stands to reason that a facility capable of accepting three times as much waste as another is, if nothing else, of greater "size" than the other. Because the Notice fails to explain that the proposed facility in fact is capable of processing 600 — or, indeed, as many as 2,200 — it fails to advise the recipients of the true "size" of the facility. (VB Tr., pp. 954, 957). Recipients of the Notice have no reason to expect the Moen Transfer Station to be the "size" of a 600 ton-per-day facility, whatever its actual daily throughput volume, and ERDS's Notice is, therefore, deficient.

The fact that "neighbors and nearby businesses" declined to attend the local siting hearing and, instead, submitted supposedly "unanimously supportive public comments" completely misses the point. Of course the neighbors were supportive; they have no idea what ERDS actually intends to build! Had ERDS's Notice been truthful, the public response may well have been different.

The Village Board has not "mooted" the issue of public notice by loosely imposing what ERDS as a 300 ton-per-day "maximum volume" cap on the proposed facility's operations. (Resp., p. 13). In granting siting, the Village Board found that ERDS had failed to prove

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600 tons per day, he also specifically proposed to "accept" 600 tons per day rather than limit the amount ERDS "takes in." Mr. Hock's statement reflected ERDS's actual intent, not merely the facility's theoretical capacity.

compliance with Section 39.2(a)'s criteria (ii) and (v), but stated that the application would comply "provided that" ERDS complied with certain additional, special conditions. (9/13/15 Ord., § 4). Among other things, the Village Board stated that:

> The Moen Transfer Station Facility shall have a limitation on throughput to 300 tons per day. However, the Village of Rockdale will designate a contact person who can authorize temporary operation in excess of the daily maximum tonnage as circumstances dictate. In addition, the Applicant can request authorization to increase these daily limits to a maximum of 600 tons per day, and the Village of Rockdale may increase these limits by Resolution or Ordinance.

(*Id.*) In essence, the Village of Rockdale gave itself the power to authorize the expansion of an existing pollution control facility — without public notice or a siting hearing as required by Section 39.2 — to triple the functional throughput. Leaving aside the questionable legality of this condition and its apparent attempt to skirt Section 39.2(a)'s requirements, the condition seems designed to prevent public notice or objection to the creation of a 600 ton-per-day facility Should ERDS avail itself of the condition's option, as it surely will, it will successfully have built a 600 ton-per-day transfer station without ever informing the public of its intentions. Far from "mooting" the issue, the Village Board's special condition simply preserves the issue until fewer people are paying attention.

By misstating the nature and size of the proposed facility, ERDS failed to comply with Section 39.2(b)'s notice requirements. Because those requirements are jurisdictional, the Village Board lacked the power or authority to hear ERDS's Application for local siting of the proposed Moen Transfer Station. The Village Board erred, as a matter of law, in not dismissing that Application. The Village Board should be reversed.

B. The Application is Legally Insufficient

By failing to specify the proposed transfer station's true proposed throughput, ERDS failed to provide the "sufficient detail" needed to prove compliance with Section 39.2(a)'s

criteria. ERDS offers no real argument otherwise; indeed, it admits that the proposed facility's "intended volume" is, at least, relevant to "need" and "a safety determination." (Resp., p. 13). Instead, ERDS miscites *Timber Creek Homes, Inc. v. Village of Round Lake Park*, for the proposition that throughput capacity or volume are not, generally, considered relevant to criterion (ii). Unfortunately, ERDS cites to an April 7, 2014 procedural order in that case, instead of this Board's actual, August 21, 2014, decision.

Had ERDS cited the correct document, it would have seen that this Board considered the proposed transfer station's throughput capacity and volume in its consideration of criteria (iii) (compatibility with surrounding character), (vi) (traffic patterns) and (viii) (consistency with county solid waste management plan). *Timber Creek Homes, Inc. v. Village of Round Lake Park*, PCB No. 14-99, slip op. at 17, 21, 23 (Aug. 21, 2014) (criteria iii, vi, viii). Indeed, had it dug a bit deeper, ERDS would have found that this Board has considered a proposed transfer station's throughput capacity and volume in connection with criterion (ii) (public health, safety and welfare) in two other cases: *Roxana Landfill, Inc. v. Village Board*, PCB Nos. 15-65, 15-69 (cons.), slip op. at 28, 33 (Dec. 18, 2014) (criteria ii and vi); *and Continental Waste Industries v. City of Mt. Vernon*, PCB No. 94-138, slip op. at 9 (Oct. 27, 1994) (criterion ii).

ERDS essentially concedes that it failed to submit a legally sufficient application. Because ERDS failed to provide "sufficient detail" in its application to allow consideration of Section 39.2(a)'s nine criteria, its application must be denied. The Village Board's failure to do so constituted legal error and should be reversed.

C. The Village Board Cannot Cure ERDS's Failure to Prove Compliance with Criteria (ii) and (v) by Imposing Special Conditions.

ERDS does not deny the core of WMII's argument, namely, that the Village Board expressly found that ERDS had failed to prove compliance with criteria (ii) and (v), but then

sought to "cure" that failure by imposing special conditions that, if followed, would bring the application into compliance with Section 39.2(a).[4] Nor does ERDS deny that this procedure essentially grants approval to something *other* than the "proposed facility" in violation of Section 39.2(a). Finally, ERDS simply ignores *Peoria Disposal Co. v. Peoria County Board*, PCB No. 06-184, slip op. at 36-38 (June 21, 2007), which expressly treated the County Board's finding that the applicant "met siting criterion v only if certain special conditions were imposed" as a finding that the applicant "did not meet its burden on criterion v."

Instead of responding to WMII's argument, ERDS misrepresents the record and miscites various authorities for the false proposition that special conditions can be used to cure an applicant's failure to carry its burden of proof. First, ERDS misrepresents the Village's finding. The Village did not find that the Applicant met its burden of proof "with" the addition of conditions, as ERDS claims. (Resp., p. 14). Instead, it found compliance "provided that" ERDS adhered to certain additional conditions — a very different matter. (9/3/5 Ord., § 4). ERDS's unwillingness to correctly quote the Ordinance and choice to, instead, misrepresent the Village's finding of noncompliance as a "minor technicality" speaks volumes regarding the merits of its argument.

None of ERDS's cited cases, furthermore, support ERDS's conclusion. *County of Lake v. Illinois Pollution Control Board*, 120 Ill. App. 3d 89, 97, 102-03 (2d Dist. 1983), for example, expressly declined to reach the issue of whether a local siting authority could cure an applicant's failure of proof by imposing special conditions. ERDS cites no authority supporting its claim that *County of Lake* "has been often cited as authority for the proposition that establishing the siting

[4] WMII's argument in no way requires the Board to treat the local Hearing Officer's report as evidence, as ERDS claims. (Resp., pp. 19-20). The Village Board itself, in its own words, found that the Application only complied with criteria (ii) and (v) if it conformed to the Village Board's additional conditions.

criteria is a reasonable and necessary purpose of imposing conditions of approval," and WMII can locate no such authority.

Rochelle Waste Disposal, LLC v. City of Rochelle, PCB No. 07-113, slip op. at 49 (Jan. 24, 2008), involved an appeal from the imposition of special conditions; whether the applicant had met its burden of proof under Section 39.2(a) was not at issue. The conditions in that case were imposed "with" the approval; the approval was not, as here, subject to the conditions. *Id.*

The language ERDS cites from *Veolia Es Zion Landfill, Inc. v. City Council*, PCB No. 11-10, slip op. at 8-9 (Apr. 21, 2011), comes from this Board's description of the City's law firm's recommendations to the City, not the City's findings or this Board's holding. The applicant in that case appealed from the imposition of a single special condition; this Board found that the condition usurped the permitting authority of the IEPA. *Id.* at 18. Nothing in that case suggested that the applicant had failed to meet its burden of proof absent the condition; on the contrary, this Board found that "[t]he record contains no evidence that the proposed plans for the design and operations of the landfill is insufficient to control odors," which was the subject of the challenged condition.

Nor did this Board hold, in *Waste Management of Illinois, Inc. v. Will County Board*, PCB No. 99-141, slip op. at 4-5 (Sept. 9, 1999) that special conditions could be used to bring an otherwise deficient application into compliance with Section 39.2(a). On the contrary, the Board held that the applicant had met its burden of proof under Section 39.2(a) criteria (specifically, criteria (i) and (viii)); the imposition of a special condition requiring the closing of a separate landfill in order to artificially "create" a lack of disposal capacity did nothing to advance the purposes of Section 39.2 and was, therefore, invalid. Nowhere did the Board suggest that the applicant would have failed to meet is burden absent the condition; on the contrary, this Board

treated the underlying grant of siting approval as valid even after striking the challenged condition. ERDS's reliance on the dissenting opinion in that case is insufficient for obvious reasons, though it should be noted that the dissent cited no authority for the proposition that special conditions could be imposed to "cause the criteria to be met." *Waste Mgmt. of Ill., Inc. v. Will County Board*, PCB No. 99-141, slip op. at 1 (Sept. 9, 1999) (R.C. Flemal, dissenting).

The appellate court adopted this Board's holdings regarding the special condition, namely, that the applicant had met its burden of proof with or without it. *Will County Bd. v. Ill. Pollution Control Bd.*, 319 Ill. App. 3d 545, 548-50 (3d Dist. 2001). The language ERDS quotes describes the local siting authority's characterization of its own position, not the appellate court's holding. Nothing in *Waste Management* supports ERDS's position.

In short, no authority supports ERDS's claim that special conditions can be used to cure an applicant's failure to carry its burden of proof. The applicable statutory language and on-point authority (*Peoria Disposal*) indicate exactly the opposite, and ERDS offers no response. The cases ERDS cites do not support its position and ERDS makes no other argument. Because the Village Board found that special conditions were required to bring the Application into compliance with Section 39.2(a)(ii) and (v), ERDS *per se* failed to meet its burden of proof. Because the proposed facility does not comply with Section 39.2(a)'s nine criteria, the Village Board should have denied the Application. Its failure to do so was legal error and must be reversed.

D. Criterion (i). The Village Board's Finding of Need Was Against the Manifest Weight of the Evidence.

ERDS does not deny the fundamental flaws in Mr. Hock's "analysis" under criterion (i) (need), namely, that (a) it contained no disposal capacity analysis; (b) it wrongly excluded from its transfer capacity analysis those transfer stations physically located outside the service area but

providing transfer capacity to the service area; and (c) it relied on speculative assumptions that various economic and environmental benefits will result from the proposed facility's construction. Instead, ERDS misrepresents the law and the facts in a meritless attempt to rehabilitate Mr. Hock's fatally flawed need analysis. That effort must fail here, as it should have failed before the Village Board. The Village Board's decision to rely on Hock's fundamentally deficient analysis was against the manifest weight of the evidence and should be reversed.

1. Hock failed to consider available disposal capacity.

ERDS admits that *Waste Management of Illinois, Inc. v. Pollution Control Board*, 234 Ill. App. 3d 65, 69-70 (1st Dist. 1992), is the most persuasive and on-point authority, yet seeks to avoid the core of that case's holding on criterion (i), namely, that the evidence presented by the applicant in that case "was insufficient to show that the waste transfer station was reasonably required by the waste needs of the area" when it "did not adequately address the waste production and disposal capabilities in the service area." (Resp., pp. 27-28). There can be no question that Mr. Hock failed to conduct a disposal capacity analysis and, therefore, like the applicant in *Waste Management*, failed to produce evidence "sufficient" to prove need.[5] The Village Board's decision to the contrary was against the manifest weight of the evidence and must be reversed.

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[5] ERDS makes much of the fact that *Waste Management* and other cited cases upheld a local siting authority's denial of siting but does not explain why the evidence that was "insufficient" to show need in those cases should be sufficient in this case. (Resp., pp. 26, 29-30). *Waste Management* remains the most factually on-point and persuasive authority, despite its procedural posture. *Turlek v. Village of Summit*, PCB No. 94-22, slip op. at 17 (May 5, 1994), certainly does not forbid its consideration, as ERDS seems to suggest; instead, it merely pointed out that cases affirming a denial are not controlling authority in considering cases seeking reversal. The decision in *Roxana Landfill, Inc. v. Village Board*, PCB Nos. 15-65 & 15-69 (cons.), slip op. at 23-25 (Dec. 18, 2014), is on appeal to the Appellate Court of Illinois for the Fifth Judicial District and, pending that appeal, should not be considered persuasive authority.

ERDS's failure to conduct a disposal capacity analysis lies at the root of its vehement, but ultimately supported and irrelevant, disagreement with Ms. Smith. Ms. Smith testified that the principal purpose of transfer stations is to consolidate waste for transport outside the service area due to a lack of disposal capacity within the service area — hence the need for a disposal capacity analysis. (VB Tr., p. 359-61, 363-65; Ex. 11, pp. 13, 17). ERDS, on the other hand, contends that a transfer station is needed if it can transport waste to a landfill within the service area more "efficiently" — by consolidating waste prior to deliver to the Prairie View RDF and, thereby, taking collection trucks off the road. (Resp., p. 26; VB Tr., p. 200).

ERDS's claim is refuted, again, by *Waste Management*: "improvement in the efficiency of [the applicant's] operations by elimination of some collection trucks is inadequate to meet the statutory requirement of necessity." *Waste Mgmt.*, 234 Ill. App. 3d at 69. Ultimately, however, the distinction makes no difference because, as noted below, ERDS failed to present any evidence that the proposed facility would, in fact, result in any actual improvement in efficiency — only Mr. Hock's "intuitive and … common sense" assumptions. (VB Tr., pp. 325-26, 344-45, 743). ERDS provides no argument justifying departure from the most widely-used and accepted analysis.

ERDS's remaining quibbles with Ms. Smith's testimony are equally meaningless. Ms. Smith understood the difference between transfer and disposal capacity; she simply considered a transfer capacity analysis to be unnecessary given the ample disposal capacity with the service area. (*Id.* at 372). She was unaware of the expected composition of the municipal solid waste to be accepted at the Moen Transfer Station because ERDS had not identified that composition in its Application; in any case, ERDS fails to explain why the expected composition is relevant. (*Id.* at 373). Ms. Smith testified that the Citiwaste facility could accept approximately ten *per cent*

(10%) of the waste ERDS proposes to accept at the Moen Transfer Station. (*Id.* at 373-74). ERDS has not established any generally accepted concept of "working capacity," much less its supposed relevance here. Ms. Smith, in any case, seemed to have no problem with the concept of "functional capacity." (*Id.* at 376-77).

The fact that Ms. Smith did not have an opinion as to the functional capacity of the Joliet Transfer Station, the centroid of Will County or the available locations for a transfer station was hardly surprising; she was not offered to provide testimony on these topics. Ms. Smith did, in fact, explain that the Moen Transfer Station's location was likely to result in greater truck traffic, as trucks were likely to pass the Prairie View RDF to go to the Station, only to have the waste transferred for delivery back to Prairie View. (*Id.* at 391-92). She specifically rejected Mr. Hock's conclusions regarding competition, noting that those conclusions depended on Hock's artificial exclusion of several transfer stations providing capacity to the service area. (*Id.* 394-95). The mere fact that Ms. Smith's methodology for determining need is not the only valid methodology does not mean Mr. Hock's "methodology" is valid. Finally, ERDS does nothing to establish that its truly picayune objections to Ms. Smith's mathematical assumptions have any actual bearing on her conclusions.

ERDS failed to conduct a waste disposal capacity analysis and therefore failed, under the most persuasive authority available, to provide evidence "sufficient" to prove need. The Village Board's finding to the contrary was against the manifest weight of the evidence and should be reversed.

2. Hock incorrectly excluded various transfer stations serving the proposed service area from his analysis.

Mr. Hock's failure, also, to consider transfer stations physically located outside the proposed service area but accepting waste from within that area rendered his analysis fatally

defective. Section 39.2(a)(i) requires an analysis of the "waste needs of the area [the proposed facility] is intended to serve." Even if one were to assume, as ERDS does, that in the case of transfer stations the applicant need only demonstrate a "transfer capacity" — rather than a disposal capacity — shortfall, the analysis would still require consideration and inclusion of those transfer stations physically located outside the proposed service area but accepting waste from within that area, *i.e.*, serving the "waste needs" of the proposed service area. Because he artificially excluded those transfer stations from his "transfer capacity" analysis, Mr. Hock cannot accurately state the "transfer capacity" available to the area the proposed facility "is intended to serve." As a result, Mr. Hock failed to accurately assess the "waste needs" of the proposed service area. His analysis cannot support a finding of need.

ERDS does not address this argument, raised in WMII's Post-Hearing Brief on page twenty-two. Instead, it quibbles with the local hearing officer's citation to *A.R.F. Landfill v. Pollution Control Board*, 174, Ill. App. 3d 82, 92 (2d Dist. 1988), for the proposition that a capacity analysis must consider facilities located outside, but still serving, the proposed service area. (Resp., p. 26; 8/14/15 Rpt., p. 8). ERDS dismisses *A.R.F.* as a "landfill" case but never explains why this makes a difference: why must landfill siting analyses consider all facilities serving the proposed service area while transfer station siting analyses may disregard certain transfer stations serving the proposed service area based solely on their location outside the proposed service area's boundaries — boundaries arbitrarily drawn by the applicant? Mr. Hock failed to conduct the analysis required by Section 39.2(a)(i) and the applicable case law and ERDS, therefore, failed to prove need.

ERDS further fails to address Mr. Moose's testimony or refute his argument on this point. Instead, it laughably cites *County of Kankakee v. City of Kankakee*, PCB No. 03-31, slip op. at 7,

25-30 (Jan 9. 2003), for the proposition that Devin Moose has a "controversial history," but this Board adopted Mr. Moose's conclusions on criteria (v) and (viii) in that case and, though it disagreed with his conclusions on criterion (ii), did not indicate they were "controversial" in any way. (Resp., p. 25). Interestingly, Mr. Moose's testimony in that case was presented by ERDS's current counsel, George Mueller, who agreed that Moose was "the best expert" the applicant could find. *County of Kankakee*, PCB No. 03-31, slip op. at 7. At best, ERDS claims, without citation, that Mr. Moose believes the transfer capacity of the stations physically located within the proposed service area is unlimited, but WMII can locate no such testimony. On the contrary, Mr. Moose specifically noted that Mr. Hock had failed to adequately perform such an analysis. (VB Tr., p. 813).

Contrary to ERDS's claim, *Hediger v. D & L Landfill, Inc.*, PCB 90-163, slip op. at 9-10 (Dec. 20, 1990), does not hold that failure to consider capacity outside the proposed service area is permissible. (Resp., p. 31). The applicant's expert in that case did, in fact, consider capacity outside the proposed service area; he merely concluded that said capacity was insufficient and that the proposed landfill was needed despite that capacity. The applicant in *Sierra Club v. City of Wood River*, PCB No. 95-174, slip op. at 13-16 (Oct. 5, 1995), did, in fact, consider the available landfill capacity in establishing need for an incinerator. Contrary to ERDS's claim, nothing in that case suggests the applicant failed to include any relevant landfills in its analysis.

Nor did this Board hold, in *Gallatin National Co. v. Fulton County Board*, PCB No. 91-256, slip op. at 22-23 (June 15, 1992), that "competition" is an appropriate consideration in a criterion (i) needs analysis, as ERDS seems to suggest. Instead, it merely noted that requiring a showing of absolute necessity would have the undesirable effect of creating monopolies. The language ERDS quotes is, furthermore, *dicta*, as the applicant's expert did, in fact, include the

Gallatin landfill in his needs analysis; he simply gave it little weight due to questions regarding its operational status. ERDS is, in any case, tilting at windmills, as WMII does not contend that ERDS must show absolute necessity, only that it has failed to provide the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve.

By excluding transfer stations serving the proposed service area, ERDS failed accurately assessed the transfer capacity available to the proposed service area. ERDS failed, therefore, to prove that the proposed transfer station is necessary to service the waste needs of the proposed service area. The Village Board's finding to the contrary was against the manifest weight of the evidence and must be reversed.

3. Hock's analysis is riddled with speculation and incorrect assumptions.

Even if Mr. Hock's methodology were not fatally flawed — which it is — it would still be insufficient to prove need because it is riddled with speculation and incorrect assumptions. ERDS's entire argument regarding criterion (i) (need) is presented without record citation, no doubt to discourage efforts to check ERDS's claims. ERDS cannot and does not deny, however, that many of its alleged statements of "fact" are, in reality, simply the unsupported assumptions of Mr. Hock. ERDS identifies no evidence supporting Mr. Hock's assumption, for example, that only ten *per cent* (10%) of the proposed service area's waste can be "efficiently" direct hauled to Prairie View RDF. (Resp., p. 21). Repeating Mr. Hock's assumptions as if they were fact does not, however, make them true.

Nor does ERDS deny that Mr. Hock's conclusions regarding the supposed competitive and environmental benefits of the proposed facility are based on no analysis whatsoever and are, instead, merely Mr. Hock's "intuitive and … common sense" assumptions. (VB Tr., pp. 325-26, 344-45, 743). ERDS repeatedly asserts that Mr. Hock performed an "economic analysis," but

cites nothing in the record to support that claim. (Resp., p. 28). WMII, certainly, can locate no such analysis, just Mr. Hock's speculation and assumptions. ERDS presents no authority or argument, finally, suggesting that free residential pick-up for one village or unsubstantiated promises of increased tipping fees for one county — each representing only a portion of the proposed service area — validly demonstrates that the proposed facility is necessary to serve the overall area's "waste needs." ERDS has neither made a valid economic case for need or demonstrated that such an economic case is relevant to criterion (i).

Absolutely no competent evidence, furthermore, supports ERDS's claim that the Joliet Transfer Station is overextended. (Resp., p. 21). Mr. Hock admitted that he did not actually know the transfer capacity of the Joliet Transfer Station. (VB Tr., p. 225). He simply ignored the testimony of Kurt Nebel, the senior district manager for the Joliet Transfer Station, that the Joliet station has the capacity to manage an additional 600 tons per day of municipal solid waste. (*Id.* at 421). Mr. Hock's claim that the station is overextended was entirely predicated on (a) two snapshots showing a line of trucks, immediately before closing time, on two occasions (not "frequently," as ERDS now claims); (b) and a few photographs showing small amounts of waste just outside the facility's doors, while simultaneously showing ample capacity inside the facility. (Ex 1, Apps. 1-A & 1-B). ERDS cites no evidence supporting its claim that the Joliet Transfer Station has violated its permit by leaving waste on the tipping floor overnight; indeed, it does not respond to Mr. Nebel's testimony explaining that the Station's permit does, in fact, allow for waste to be left on the floor overnight provided the Station is operating the next day.[6] (VB Tr., p. 417-18).

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[6] WMII denies having "admitted" any permit violations and notes that ERDS cites nothing in the record supporting its accusation. (Resp., p. 21).

ERDS does not contest Mr. Nebel's report of the Joliet Transfer Station's capacity or his testimony that it could, functionally, accept an additional 600 tons per day. Mr. Nebel did not "opine" that the Joliet Transfer Station could load a transfer trailer in seven to fifteen minutes, as ERDS claims; he testified that this was, in fact, the case based upon actual experience. (Resp., p. 24; VB Tr., pp. 431-32). While he noted that waste might fall partially outside the building as a truck pulled away, that waste was typically bulldozed into the building shortly thereafter. (*Id.* at 424-25, 435-36).

This Board did not hold, in any case, that "poor operations" at nearby facilities was relevant to a consideration of need, as ERDS claims. *Wabash and Lawrence Counties Taxpayers and Water Drinkers Association v. County of Wabash*, PCB No. 88-110, slip op. at 10 (May 25, 1989). (Resp., p. 32). Instead, it merely noted, in its description of the evidence, that one of the applicant's witnesses testified as such. This Board did not rely on that testimony in any way, however, much less elevate it to a recognized factor in a criterion (i) needs analysis.

ERDS failed to provide competent evidence of need for the propose facility, much less evidence sufficient to provide compliance with Section 39.2(a)(i). The Village Board's finding to the contrary was against the manifest weight of the evidence and should be reversed.

E. Criteria (ii) and (v). The Village Board's Findings Were Against the Manifest Weight of the Evidence.

For the most part, ERDS simply does not respond to the criticisms of the proposed facility's design outlined in WMII's Post-Hearing Brief and the local hearing officer's report. The testimony described in ERDS's brief generally consists of Mr. Hock's statements of opinion and reaffirmations of his own methods, without any real explanation of their appropriateness or response to the criticisms made — reaffirmations with which WMII disagrees for the reasons set

forth in its opening brief. Accordingly, WMII primarily relies on its opening brief as a response to ERDS's descriptions of Mr. Hock's testimony.

Rather than respond to WMII's arguments, ERDS offers only misrepresentations and quibbles that, even if true, would not justify disregarding the objectors' experts' testimony or giving Mr. Hock's more weight. Regarding traffic, for example, Mr. Nickodem understood that the proposed load-out bay was fourteen feet wide, but that did not alleviate his concern regarding traffic accidents, however, as the drivers would need to perform a 160- to 180-degree turn, on a slope, in order to enter the load-bay doors, which they would do at an angle. (Resp., p. 36; VB Tr., pp. 699-700). ERDS presented no evidence regarding the overall size of Waste Management's Matteson transfer station, its entranceway or the slope at which drivers would enter (or lack thereof), rendering comparison to the proposed Moen Transfer Station impossible. (Resp., p. 42).

Mr. Nickodem considered the Shawano facility because it is of roughly the same size as the proposed Moen Transfer Station, but has difficulty loading even 120 tons per day. (*Id.* at 671-73). Though Shawano uses a baler, which adds some time to each load, ERDS does nothing to establish that this fact renders a comparison with Moen impossible. (Resp., p. 37).

ERDS did not actually submit evidence showing the width of the Rockdale or Joliet Transfer Station's driveway entrance, and it is unsurprising that Mr. Nickodem had not calculated a safe driveway entrance for ERDS, as Mr. Nickodem did not bear the burden of proof. (Resp., p. 38). Mr. Nickodem did not concede that the sharp S-turns required in the proposed facility were closer to 160 than 180 degrees, only that they were "slightly" less than 180 and that 160 "could be" "more accurate" than 180, which means only that Mr. Nickodem could not tell, from the map he was shown during cross-examination, whether the turns were a little more or less than 170

degrees. (VB Tr., pp. 692-94). Nickodem further testified that, whatever the precise angle, the turns still constituted "essentially two S turns or complete turnarounds of the transfer trailers which are difficult movements to make … especially through a small facility like this." (*Id.* at 694).

ERDS presented no evidence to challenge Mr. Nickodem's qualifications or the fact that he had designed approximately ten transfer stations in the past. (Resp., p. 38). For his part, Mr. Nickodem testified that he only has about half of all his past projects on his résumé. (VB Tr., p. 684).

Mr. Nickodem used the transfer trailer and cab lengths specified by ERDS is in its application as inputs in the Auto Track model; he simply could not recall them from memory, on the stand. (*Id.* at 688-89). He further testified that whether trucks exited to the west or east made no difference to his traffic simulation, and ERDS presented no evidence to the contrary. (*Id.* at 692). Nor has ERDS presented any evidence or argument to suggest that Mr. Nickodem's momentary slip of the tongue regarding tarping in fact affected his analysis in any way. Rather than actually address the substance of Mr. Nickodem's analysis, ERDS offers only quibbles.

Mr. Moose in fact disagreed that Hock's traffic throughput analysis assumptions were conservative. (Resp., p. 36; VB Tr., p. 841). Nowhere, furthermore, did Mr. Moose concede that Mr. Hock's traffic analysis was correct or that it "works," as ERDS implies, and any alleged agreement with certain of Mr. Hock's assumptions is, ultimately, irrelevant. Mr. Moose of course could not provide accident data for a facility not yet built. Mr. Moose, finally, disagreed with Mr. Hock's assumption that the proposed facility's second loading bay would only be used for about twenty-five minutes out of each day, as that bay would likely be required for segregation, and

disagreed that a grapple load could increase throughput capacity. (*Id.* at 765-66, 840; Resp., p. 42).

It is true that Mr. Moose testified that other, larger, better designed transfer stations operated more intensely than the proposed facility, but that fact does not render the proposed facility safe. (*Id.* at 38; VB Tr., pp. 655-57). ERDS does not explain why Moose's use of building size, rather than tipping floor size, supposedly affects the accuracy of that analysis or Moose's conclusions.

Mr. Moose's calculation of the intensity of usage ratio did not form any portion of his opinion regarding the proposed Moen Transfer Station's safety. (*Id.* at 833). Nothing about those calculations support the direct comparisons regarding need that ERDS now seeks to draw; Mr. Moose testified that he did not study the Joliet Transfer Station, had not addressed differences between the stations and intended his calculation to provide a loose comparison only. (*Id.* at 833-45). ERDS did nothing, moreover, to demonstrate that Mr. Moose's calculations of the intensity of usage ratios for other facilities, which Mr. Moose also used to test his conclusions, were incorrect or inapplicable in any way. ERDS disingenuously omits, finally, the testimony in which Mr. Moose solves the mathematical calculation with which he had a temporary difficulty. (*Id.* at 869-70).

Mr. Moose rejected Mr. Hock's last-minute, rebuttal intensity usage analysis. First, ERDS used thirteen facilities, while Mr. Moose used 35. (*Id.* at 964). Second, that analysis could not be directly compared to Mr. Moose's prior calculations because ERDS calculated facility size differently and, in Mr. Moose's view, sometimes inaccurately. (*Id.* at 964-65). As a result, the analysis provided little benefit to the local siting authority.

No authority, to WMII's knowledge, prohibits the consideration of compliance with local environmental and safety ordinances, such as the Will County Stormwater Ordinance, in determining compliance with Section 39.2(a)'s criteria; ERDS, certainly, cites none. Nor does ERDS cite any authority establishing that such regulations constitute "local land use regulations" as that term is used in Section 39.2(g).

Mr. Hock's principal response to the objectors' criticisms regarding the proposed facility's storm water management design was to baldly assert that someone, someday, will address problems that arise through "standard means" that Mr. Hock asserts will be adequate. (*Id.* at 930-32). For the party bearing the burden of proof, however, such vague assertions are insufficient; ERDS should not be permitted to claim that the proposed facility will, someday, somehow become compliant with criteria (ii) and (v). Safety and the public health must be addressed now.

Mr. Hock's other tactic was to describe bugs as features. Mr. Moose testified that only a bad design would deliberately cause storm water to back up into the facility's parking lot to stand for a day or more. (*Id.* at 788). ERDS presented no evidence supporting its claim that this flaw in its design is, in fact, "a fairly standard design feature," as it now claims, or that such flooding will "not interfere with site operations." (Resp., p. 40). Again, public health and safety are matters, ERDS claims, for another day.

Mr. Nickodem disagreed that the detention ponds have the required freeboard, even after receiving ERDS's "errata" sheet amending its application. (VB Tr., p. 723-24). Mr. Moose testified that ERDS cannot simply ignore the Ordinance's freeboard requirement with respect to the below ground vault, whatever ERDS believes are the reasons for that requirement, because the Ordinance does not provide for any such exception. (*Id.* at 787). That ERDS could conclude

from the parties' prior briefing and the testimony cited above, that "no one questioned the design of the storm water management system or opined that it would not work" is simply baffling. (Resp., p. 43).

As noted above, the Village cannot cure defects in the Application by finding that the proposed facility *would* satisfy Section 39.2(a)'s criteria *if* ERDS complies with certain conditions. (*Id.*) Indeed, the sheer number of conditions imposed by the Village Board — additional traffic personal; a redesigned site plan, traffic circulation design and plan of operations; compliance with local Ordinances; additional review by the Village Engineer; *etc.* — simply underscores the dramatic insufficiency of the facility as proposed. The "proposed facility" did not satisfy criterion (ii) and the Village Board should have, therefore, denied siting. Its failure to do so went against the manifest weight of the evidence and must be reversed.

The Village Board has not "resolved all concerns about safe operating levels" by loosely imposing what ERDS as a 300 ton-per-day "maximum volume" cap on the proposed facility's operations. (*Id.* at 13, 43). In granting siting, the Village Board found that ERDS had failed to prove compliance with Section 39.2(a)'s criteria (ii) and (v), but stated that the application would comply "provided that" ERDS complied with certain additional, special conditions. (9/13/15 Ord., § 4). Among other things, the Village Board stated that:

> The Moen Transfer Station Facility shall have a limitation on throughput to 300 tons per day. However, the Village of Rockdale will designate a contact person who can authorize temporary operation in excess of the daily maximum tonnage as circumstances dictate. In addition, the Applicant can request authorization to increase these daily limits to a maximum of 600 tons per day, and the Village of Rockdale may increase these limits by Resolution or Ordinance.

(*Id.*) In essence, the Village of Rockdale gave itself the power to authorize the expansion of an existing pollution control facility — without public notice or a siting hearing as required by Section 39.2 — to triple the functional volume. Leaving aside the questionable legality of this

condition and its apparent attempt to skirt Section 39.2(a)'s requirements, the condition seems designed to avoid any close scrutiny of the public health and safety concerns accompanying the creation of a 600 ton-per-day facility Should ERDS avail itself of the condition's option, as it surely will, it will successfully have built a 600 ton-per-day transfer station without ever proving that such a facility would comply with Section 39.2(a)(ii) and (v). Far from "mooting" the issue, the Village Board's special condition simply preserves the issue until fewer people are paying attention.

Indeed, no-one, including ERDS of the Village, has conducted any analysis whatsoever to establish that the proposed facility is designed and can be operated in compliance with criteria (ii) and (v) while accepting 300 tons per day. Even now, the best ERDS can muster is a vague assertion that the Village's "cap" would "seem to" alleviate safety concerns. (Resp., p. 43). To affirm local siting on this record, which contains literally no evidence supporting a finding of compliance at 300 tons per day, would be legal error. The Village Board erred in approving siting, and its error must be reversed.

F. Criterion (viii). The Village Board Ignored the Will County Solid Waste Management Plan.

ERDS failed to demonstrate the proposed facility is consistent with Will County's Solid Waste Management Plan. More importantly, the Village failed to interpret the Plan prior to finding in favor of local siting and it, therefore, committed legal error. (8/14/15 Rpt., pp. 22-23; 9/13/15 Ord., § 2). The Village Board's disregard of the Plan's actual language was legal error; its finding that the proposed facility was consistent with that Plan was against the manifest weight of the evidence. Both require reversal.

Will County's Solid Waste Management Plan states that "the selected contractor," *i.e.*, WMII, may seek to site transfer stations in the "northern and eastern parts of the County."

Whether or not that language is "permissive," as ERDS now argues, is irrelevant: it expresses a clear preference for transfer stations in the northern and eastern areas of Will County. Establishing a transfer station in the central area of county, within one mile of the existing Joliet Transfer Station, is simply not consistent with that preference. (VB Tr., pp. 360-61, 365-67). Neither the Village Board nor this Board are free to simply disregard the Plan's language; instead, they must read that Plan to determine the drafters' intent. *County of Kankakee v. Ill. Pollution Control Bd.*, 396 Ill. App. 3d 1000, 1020, 1022 (3d Dist. 2009). Here, irrespective of whether Will County intended for WMII, exclusively, to develop future transfer stations, it cannot be read to have intended to site a second transfer station within a mile of WMII's facility. To hold otherwise would be legal error. *Id.* (Plan construction reviewed *de novo*).

The Plan also states that the "selected contractor" — in context, a clear reference to WMII — may site a transfer station. (VB Tr., pp. 263-64). WMII maintains that this language indicates a plain intent to entrust WMII with future transfer station development. ERDS offers no argument to the contrary other than to say that the Plan "certainly doesn't say" what it very much appears to say. (Resp., p. 45). Nor does ERDS contest that the Plan requires all transfer stations to be developed "pursuant to the terms of the Host and Operating Agreement for the Prairie View RDF," which provides that WMII, in particular, shall be responsible for developing a network of transfer stations to serve Will County's needs. (VB Tr., pp. 266-67). The mere fact that the 2007 Plan update refers to "private sector" development is, furthermore, consistent with a preference for WMII, a private sector entity.

Will County cannot change the language of the Plan by entering into a host agreement with ERDS, nor can it make the Plan mean something other than it says by taking, in that host agreement, a position directly contradicted by the language of the Plan. Solid Waste Management

Plans are creatures of statute and must, by the terms of that statute, be "officially adopted" by the County's governing body. 415 ILCS 15/4(a). Will County may amend its Plan, but it must do so in accordance with the law, not by entering into a private agreement with ERDS.

WMII raised its argument with respect to criterion (viii) in its Memorandum of Law and Proposed Findings of Fact and Conclusions of Law submitted to the Village Board. (C2117-C2151). That argument is not, therefore, waived, as ERDS claims without support or citation. (Resp., p. 45).

The proposed facility is inconsistent with Will County's Solid Waste Management Plan. The Village Board's failure to interpret the Plan and consider its provisions regarding transfer stations before finding that the proposed facility is consistent with the Plan was legal error, requiring reversal under a *de novo* standard. Its decision to find that ERDS's proposed facility, to be located in the center of the County within a mile of the existing Joliet Transfer Station, is consistent with the Plan, is against the manifest weight of the evidence. Both of these errors require reversal.

CONCLUSION

ERDS failed to satisfy the jurisdictional notice requirements of Section 39.2(b) when it misrepresented the actual intended throughput volume of the proposed Moen Transfer Station. It also failed to submit a legally sufficient application in that it omitted necessary information regarding the facility's proposed throughput volume and capacity. ERDS failed to prove compliance with criteria (i), (ii), (v) and (viii) and the Village Board could not cure that failure through the imposition of special conditions. The proceedings before the Village Board were riddled with error and the Village Board's decision to grant local siting approval must, therefore, be reversed.

Respectfully Submitted,

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