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 May 26, 2016, Waste Management of Illinois, Inc. filed with the Illinois Pollution Control Board, **WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION FOR RECONSIDERATION**, in this proceeding, a copy of which is attached and served upon you.

Dated: May 26, 2016

Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC

By: _____
Donald J. Moran

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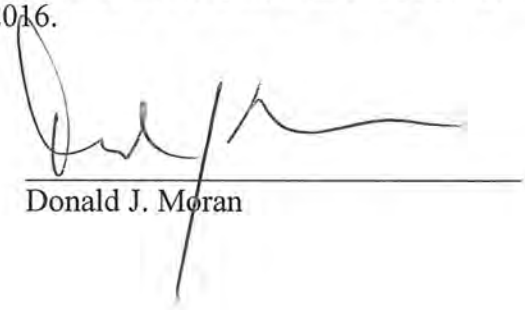
CERTIFICATE OF SERVICE

I, Donald J. Moran, an attorney, certify that I have served the attached **WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION FOR RECONSIDERATION** 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 May 26, 2016.

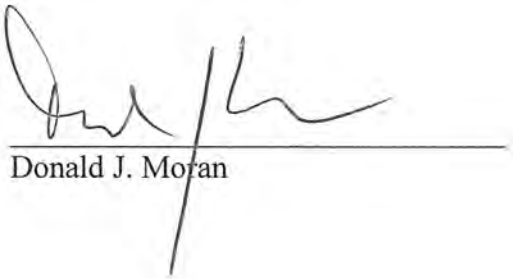


Donald J. Moran

CERTIFICATE OF MAILING

The undersigned, an attorney, states that on May 26, 2016, he caused to be filed by U.S. Mail at or before 5:00 p.m., the foregoing **WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION FOR RECONSIDERATION** 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



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WASTE MANAGEMENT OF ILLINOIS, INC.'S
MOTION FOR RECONSIDERATION

NOW COMES Petitioner Waste Management of Illinois, Inc. ("WMII"), by its attorneys Pedersen & Houpt, P.C., pursuant to Section 101.520 and 101.902 of the Pollution Control Board Procedural Rules, and moves this Board to reconsider its April 21, 2016, Opinion and Order ("Opinion") because the Board misapplied the manifest weight of the evidence standard of review. In support of this Motion, WMII states as follows:

INTRODUCTION

This Board should reconsider its Opinion as it is based on an erroneous interpretation and application of the manifest weight of the evidence standard of review.[1] Though that standard is deferential, it still requires a substantive analysis of the evidence presented to the local siting authority and mandates reversal where the local authority's decision is not supported by substantial proof. This Board may not affirm merely because both sides presented evidence on a disputed issue of fact.

ARGUMENT

This Board misapplied the "manifest weight of the evidence" standard and abdicated its obligation to conduct a substantive review of the evidence and testimony below. Under established precedent, this Board reviews a local siting authority's findings of fact on Section 39.2(a)'s nine statutory criteria to determine whether those findings were against the manifest weight of the evidence. *Fairview Area Citizens Taskforce v. Pollution Control Bd.*, 198 Ill. App. 3d 541, 550 (3d Dist. 1990); 415 ILCS 5/40.1. The "manifest weight of the evidence" standard does not require the Board to affirm simply because the applicant presented evidence or testimony on a disputed issue of fact — especially when that evidence is not competent to prove the matter in dispute and when that testimony consists of nothing more than unsupported opinions, assumptions and speculation. The Board's overly deferential interpretation of the "manifest weight" standard has led to mechanical, insubstantial and erroneous holdings such as the Board's analysis regarding criterion (v): "Mr. Hock testified that the design of the facility

[1] WMII expressly reserves its right to appeal this Board's holdings with respect to other issues raised in WMII's and Will County's post-hearing briefing and does not intend, and should not be deemed, to have waived any such issues or arguments by bringing this motion.

met criterion (v) and Mr. Moose disagreed. The Board does not reweigh the evidence ... The Board finds that the Village's decision has support in the record and therefore, the Board finds the Village's decision was not against the manifest weight of the evidence." *Will County v. Village of Rockdale*, PCB Nos. 16-54 & 16-56 (cons.), slip op. at 38 (Apr. 21, 2016).

Such extreme deference misapplies the manifest weight of the evidence standard. The deference afforded under this standard "is not boundless." *Kousoukas v. Ret. Bd. of the Policeman's Annuity*, 234 Ill. 2d 446, 465 (2009). The "manifest weight of the evidence" standard does not permit "a rubber stamp of the proceedings below merely because a board heard witnesses, reviewed records, and made the requisite findings." *Bowlin v. Murphysboro Firefighters Pension Bd. of Trs.*, 368 Ill. App. 3d 205, 211-12 (5th Dist. 2006) (citing *Brown Shoe Co. v. Gordon*, 405 Ill. 384, 392 (1950)).

On the contrary, "while it is primarily within the province of the [local decisionmaker] to determine issues of fact, it is nevertheless the duty of the [reviewing body] to weigh and consider the evidence in the record, and if it is found that the decision of the [local decisionmaker] is without substantial foundation in the evidence it must be set aside." *Corn Prods. Refining Co. v. Industrial Comm'n*, 6 Ill. 2d 439, 443 (1955). The local decisionmaker's findings "must rest upon competent evidence and be supported by substantial proof;" if they are not, they are against the manifest weight of the evidence. *Walker v. Dart*, 2105 IL App (1st) 140087, ¶ 37. Neither the local decisionmaker — nor this Board — may simply ignore uncontradicted testimony. *Carroll v. Chicago Housing Auth.*, 2015 IL App (1st) 133544, ¶ 26. Thus, even when a decision is supported by some competent evidence, which if undisputed would sustain the local finding, that evidence is not sufficient if upon consideration of all the competent evidence the decision is against the manifest weight. *Bowlin*, 368 Ill. App. 3d at 212.

Even the local decisionmaker's "credibility determinations ... are not immune from review," though they are afforded considerable weight. *Kousoukas*, 234 Ill. 2d at 465. For example, this Board cannot affirm a local decisionmaker's finding of lack of credibility unless that finding is supported by competent evidence. *Carroll*, 2015 IL App (1st) 133544, ¶ 26. Unsupported findings of lack of credibility should be reversed.

This Board's obligation to review the local authority's assertions regarding credibility — including the credibly of alleged "experts" — is doubly important where, as here, this Board has a statutory obligation to apply its "technical expertise in examining the record to determine whether the record supported the local authority's conclusions." *Town & Country Utils., Inc. v. Ill. Pollution Control Bd.*, 225 Ill. 2d 103, 123 (2007). "An expert's opinion is only as valid as the basis and reasons for the opinion." *Wilson v. Bell Fuels, Inc.*, 214 Ill. App. 3d 868, 875 (1st Dist. 1991). "When there is no factual support for an expert's conclusions, the conclusions alone do not create a question of fact." *Gyllin v. College Craft Enters., Ltd.*, 260 Ill. App. 3d 707, 715 (2d Dist. 1994).

The Board here did not properly interpret and apply the manifest weight of the evidence standard. It did not apply its technical expertise in examining the record to determine whether there is competent evidence sufficient to support applicant's *prima facie* case. Instead, the Board simply recited the record evidence without examination. The Board merely assumed, and did not evaluate and determine, the competence of the applicant's evidence on the statutory criteria, and so concluded that since the applicant had made some submission or presentation in support of its application, the local authority's decision was not against the manifest weight of the evidence.

The Board should reconsider and reexamine the record. Had the Board applied its expertise in examining the record evidence, it would have found that the applicant failed to

present competent evidence sufficient to satisfy criteria (i),(ii),(v) and (viii). The Board should reconsider its opinion, properly examine the record under the manifest weight standard, and reverse its Opinion and Order. The Village of Rockdale's decision on the criteria is against the manifest weight of the evidence.

A. Criterion (i) - Need.

The applicant's ERDS's lead design engineer, Mr. John Hock, failed to perform the disposal capacity analysis required by prevailing case law on criterion (i) and his opinion should have been rejected for that reason alone.[2] Even if one were to accept that need for a transfer station can be established through a "transfer capacity" analysis such as Mr. Hock's, however, Mr. Hock's conclusions regarding available transfer capacity would still be fundamentally speculative and, therefore, incapable of constituting competent evidence of compliance with criterion (i).

Mr. Hock's analysis is simple enough: estimate the proposed service area's rate of waste generation and then compare that figure to the area's so-called "transfer capacity." Mr. Hock claimed that the area produced between 2,446 and 3,799 tons of municipal solid waste per day. (VB TR., p. 186). He them claimed (a) that ten *per cent* of that waste was direct hauled to the Prairie View RDF and (b) the only other transfer station available to the service area (according to Mr. Hock), the Joliet Transfer Station, operated at a maximum capacity of 1,300 tons per day. (*Id.* at 197). Accordingly, Mr. Hock opined that the proposed service area suffered from a "transfer capacity" shortfall of 850 to 2,000 tons per day. (*Id.* at 197-98).

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[2] To the extent Mr. Hock considered local disposal capacity, he found it more than adequate to meet the needs of the proposed service area, thereby undercutting the need for a transfer station. (C61-63). *Will County*, PCB Nos. 16-54 & 16-56, slip op. at 34.

This analysis is fundamentally meaningless, however, because it is not based on competent evidence. First, there is no evidence whatsoever to support Mr. Hock's assumption that ten *per cent* of the service area's municipal solid waste is direct hauled to Prairie View; on the contrary, Mr. Hock's own observations suggest the actual figure may be twenty *per cent* or higher.[3] Second, Mr. Hock ignored the capacity of transfer stations outside the service area that accept waste from the service area. Contrary to the Board's implication, Mr. Hock's only consideration of transfer stations outside the service was to determine whether they took waste to Prairie View — not whether they had transfer capacity available to the service area as a whole. *Will County*, PCB Nos. 16-54 & 16-56, slip op. at 10, 34. (C2612-13, 3384-86). Third, no competent evidence supports Mr. Hock's contention — which this Board appears to have uncritically accepted — that the Joliet Transfer Station has reached a "maximum capacity" of 1,300 tons per day. *Will County*, PCB Nos. 16-54 & 16-56, slip op. at 10. The senior district manager for that Station testified that it could accept approximately 1,900 tons per day;[4] Mr. Hock cannot overcome this objective factual testimony with anecdotes regarding two visits to the Joliet Transfer Station and speculative conclusions.[5] (VB Tr., pp. 421).

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[3] In one day of observations, Mr. Hock observed seventy-seven packer or roll-off trucks deliver their loads directly to Prairie View RDF. (C61). Assuming seven tons per truck, these deliveries represent fifteen to twenty-two *per cent* of the service area's total estimated daily generation.

[4] WMII can locate no evidence supporting this Board's statement that the Joliet Transfer Station is currently accepting 2,400 to 3,700 tons per day. *Will County*, PCB Nos. 16-54 & 16-56, slip op. at 9.

[5] Furthermore, there is no evidence that the Joliet Transfer Station violated its permit by leaving waste on the tipping floor overnight, yet the Board uncritically repeats ERDS's baseless claim as if it were fact. *Will County*, PCB Nos. 16-54 & 16-56, slip op. at 32. In fact, Mr. Hock acknowledged he knew of no such violation and Mr. Nebel testified that no such violation had occurred. (VB Tr., pp. 417-19, 536).

These are not minor points, because if one or more of Mr. Hock's assumptions or errors are corrected, the supposed "transfer capacity" shortfall evaporates. If, for example, one agrees with Mr. Hock's low-end estimate of 2,446 tons per day in total generation, but finds, in accordance with the competent evidence, that twenty *per cent* of the service area's municipal solid waste is direct hauled to Prairie View and the Joliet Transfer Station is, in fact, capable of accepting 1,900 tons per day, there is no capacity shortfall at all. Actual consideration of transfer stations outside the proposed service area, furthermore, could only further weaken Mr. Hock's case. One cannot simply wave away these flaws as matters of "credibility." The local authority's adoption of Mr. Hock's speculative and unsupported opinion was against the manifest weight of the evidence. *Will County*, PCB Nos. 16-54 & 16-56, slip op. at 33.

B. Criteria (ii) & (v) - Public health, safety and welfare; Danger to surrounding area.

In affirming the local decisionmaker, this Board has mistakenly treated unfounded and speculative expert testimony as the equal of testimony grounded in the facts and, thereby, incorrectly reduced the conflict between those experts to a question of "credibility." *Will County*, PCB Nos. 16-54 & 16-56, slip op. at 37-38. Before a decisionmaker can be presented with a credibility question, however, it must first be presented with competent expert opinions based in fact — not mere assertions or conclusions. Where, as here, one expert's testimony consists of *ipse dixit* pronouncements and gross omissions, the local decisionmaker is not presented with a credibility question and must instead base its decision on the unrebutted, competent testimony. To decide otherwise is against the manifest weight of the evidence.

For example, expert testimony showed that trucks entering the proposed transfer station would need to execute multiple hairpin turns, on a slope, perfectly in order to avoid hitting the entrance gate or causing an accident. (VB Tr., pp. 659-60, 665; Ex. 23, p.4). Mr. Hock's only

response to this criticism is flat denial and a facile comparison to another facility without any attempt to establish whether that facility is, in fact, comparable.[6] (VB Tr., pp. 929-30). Mr. Hock's testimony simply has no basis in the facts and, therefore, cannot competently contradict competing expert testimony. Again, this is not simply a matter of "credibility." Mr. Hock's testimony is without factual foundation and the Village Board's finding to the contrary was against the manifest weight of the evidence.

Expert testimony also established that if the two, very small draining orifices of stormwater Detention Pond 2 were to clog — quite likely as they are only 1.3 inches and 2.67 inches in diameter and given that the facility will regularly handle large volumes of household waste — the resulting overflow would flood Moen Avenue and the facility's parking lot, leaving standing water mixed with refuse and garbage. (VB Tr., pp. 667, 785-86, 788; Ex. 23, pp. 5, 7). Mr. Hock's only response is to claim he intended for the facility's parking lot to flood. (VB Tr., p. 597). He does nothing, however, to explain why standing water mixed with garbage and refuse on public roadways is no threat to the public's health, safety or welfare. To describe this failure as a mere issue of credibility is to abdicate any responsibility to review the local decisionmaker's findings. Those findings were against the manifest weight of the evidence and should have been reversed.[7]

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[6] There is no evidence that Matteson Transfer Station requires 180-degree turns on sloped surfaces or that failure to properly execute the entry turn would result in a collision with the entry gate and, therefore, no basis for comparison to the proposed transfer station here.

[7] It should be noted that the Board's decision regarding criterion (viii) (consistency with Will County's Solid Waste Management Plan) should also be reversed, but for much more fundamental reasons, namely, that both the local decisionmaker and the Board failed, as a matter of law, to properly interpret the Plan. Instead, they mistook criterion (viii) for a purely factual question and treated a question of statutory interpretation as if it were the proper subject for (unsupported) expert testimony. These decisions should be reviewed *de novo*.

CONCLUSION

Therefore, for all of the reasons stated above, this Board should reconsider its April 21, 2016 Opinion and Order in order to conduct a substantive review of the evidence presented below under the manifest weight of the evidence standard, as required, and, upon such review, should vacate the Opinion and Order and enter an Order reversing the decision of the Village of Rockdale.

Dated: May 26, 2016

Respectfully submitted,

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