

ILLINOIS POLLUTION CONTROL BOARD

ENVIRONMENTAL RECYCLING AND	)	
DISPOSAL SERVICES, INC.	)	
	)	
Petitioner,	)	PCB 16-76
	)	
v.	)	
	)	
WASTE MANAGEMENT OF ILLINOIS, INC.	)	
WILL COUNTY AND WILL COUNTY BOARD	)	
	)	
Respondents.	)	

**NOTICE OF FILING**

**To: See attached Service List.**

PLEASE TAKE NOTICE that on August 19, 2016, I filed with the Illinois Pollution Control Board, **Opening Brief of Petitioner**, a copy of which is attached hereto and herewith served upon you.

Dated: August 19, 2016

Respectfully Submitted,

ENVIRONMENTAL RECYCLING AND  
DISPOSAL SERVICES, INC.

By: /s/George Mueller  
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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DISPOSAL SERVICES, INC.	)	
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Petitioner,	)	PCB No. 16-76
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v.	)	
	)	
WILL COUNTY, ILLINOIS, WILL COUNTY	)	
BOARD, WASTE MANAGEMENT OF	)	
ILLINOIS, INC.	)	
	)	
	)	
Respondents.	)	

**OPENING BRIEF OF PETITIONER**

NOW COMES Environmental Recycling and Disposal Services, Inc. (“ERDS”), by its attorney, George Mueller, and submits this as its opening post-hearing brief herein.

**INTRODUCTION**

Waste Management of Illinois (“WMII”) filed an application pursuant to 415 ILCS 5/39.2 seeking local siting approval from the Will County Board for horizontal and vertical expansion of the Laraway Recycling and Disposal facility (“Laraway”). The facility is located immediately south of the City of Joliet.

The Village of Rockdale, the City of Joliet, and Environmental Recycling and Disposal, Inc. appeared as objectors at the public hearings held on October 14<sup>th</sup>, 19<sup>th</sup> and 21<sup>st</sup>, 2015. Only ERDS sought review of the County Board’s decision approving the decision.

The waste stream at the Laraway facility essentially consists of special wastes, primarily contaminated soils and bulk liquids. These are technically deemed non-hazardous. Laraway proposes to continue to accept the same waste stream in the future, and in fact, one of the

conditions of site approval was that the nature of the waste stream remain as it is currently. WMII proposes that the facility would accept approximately 10,000 tons of waste per day, and that would extend the facility life by ten years. The design capacity is 30.4 million tons. The service area is essentially Northeastern Illinois and Lake County, Indiana.

The facility has a controversial history as it succeeds and surrounds on three sides the closed ESL landfill, which is the subject of an ongoing corrective action system put in place to address ground water impacts. The entire site sits atop the Silurian Dolomite Aquifer, which is in close proximity to the ground surface.

### **STANDARD OF REVIEW**

The Board reviews a local siting authority's findings of fact in Section 39.2(a) to determine whether those findings were against the manifest weight of the evidence. *Fairview Area Citizen's Task Force v. Pollution Control Board*, 198 Il App. 3<sup>rd</sup> 541 (3d Dist. 1990). 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 Illinois Supreme Court has made it clear that the Board has a duty to conduct a hearing during which the Board must "make factual and legal determinations on evidence." *Town and Country Utilities, Inc. v. PCB*, 225 Il 2<sup>nd</sup> 103 (2007). The Board is required to apply its "technical expertise in examining the record, to determine whether the record supported the local authority's decision." *Id* at 123. Although the Board does reweigh the evidence, it must examine

the record using its own technical expertise to ensure that the decision was not against the manifest weight of the evidence.

This review is obviously more than a rubber stamp of a local authority's decision.

It is particularly telling that in *Town and Country*, as in the present case, the siting authority's decision as to one of the Criteria was not definitive, as it required either additional subsequent information, or additional work to be done by a third party. In this case, the County's decision on Criterion vi (Traffic) is entirely dependent on future, speculative road and intersection improvements by third parties.

An overly deferential interpretation of the manifest weight standard creates the danger of a mechanical, insubstantial and erroneous holding by the Board. The deference afforded to the local decision maker under a manifest weight standard is not boundless. *Kousoukas v. Retirement Board of Policeman's Annuity*, 234 Ill 2<sup>nd</sup> 446 (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 Firefighter's Pension Board*, 368 Ill App 3<sup>rd</sup> 205 (5<sup>th</sup> District, 2006).

*Town and Country* actually sets forth a much less deferential process by which the PCB is to review the local siting authority's decision. The Supreme Court made it clear that the Board's role is not simply an irrelevant, interim review, and that "final authority as to technical decisions" rests with the PCB, not with the local siting authority. *Id* at 122, 23.

#### **CRITERION i**

Is the facility necessary to accommodate the waste needs of the area it is intended to serve? The WMII witness for this Criterion was Sheryl Smith, not an engineer nor licensed in

any profession, who has offered the same tired and repetitive testimony on behalf of WMII dozens of times. The significant difference between this testimony and other testimony previously offered by Ms. Smith is that here she was dealing with a special waste landfill, and she simply didn't have the knowledge or information to accurately compute either future generation of waste, or future disposal capacity available to the service area.

Ms. Smith used a traditional approach, generally accepted for ascertaining need for a new or expanded municipal solid waste landfill. Unfortunately, her testimony revealed that the data needed to make her calculations is not available for the special waste streams received at Laraway. Her approach generally was to identify the types of waste to be received at the facility, identify how much waste would be generated from the service area over the proposed operating life of the facility, compute the net amount of that waste which would require disposal, identify what solid waste facilities are available to receive that waste for disposal and lastly, to evaluate the remaining disposal capacity from those facilities to receive the waste.

Ms. Smith indicated there are three types of waste that are anticipated to be received at Laraway. The first is industrial waste, consisting of waste generated by industrial manufacturing processes, including off spec products, sand blasting grit and paint sludges. This category also includes pollution control waste, such as fly ash or scrubber sludges. The second type of waste streamed is construction and demolition debris. The third type of waste is contaminated soils, which are generated through the excavation of industrial properties, such as manufactured gas plants. (Tr 80-82).<sup>1</sup>

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<sup>1</sup> All references to the local hearing transcript will be to Tr and the page number. All the pages in the local hearing transcript are numbered sequentially, even though the hearing took place over three days.

On cross examination, Ms. Smith did not know how much fly ash was generated in the service area or even how many plants were generating fly ash. (Tr 96-98). She estimated, without knowing a specific number, that ten percent of the volume received at Laraway was water treatment sludge, but could not provide any data. (Tr 99).

Of greater concern, Ms. Smith had very little knowledge about contaminated soils, a waste stream that according to the County's staff report, represents seventy percent of the tonnage received at Laraway. Ms. Smith indicated that contaminated soils consist of manufactured gas plant remediation (MGP) waste, but did not know with certainty what manufactured gas plants are. (Tr 100). She did not know whether at some point in the future, there would be no further MGP waste. She simply projected that waste volumes previously reported for this waste stream would continue to be generated. (Tr 102). She indicated another source of contaminated soils is clean up of leaky underground storage tanks, but didn't know whether there would be more or less of these in the future.

In summary, with regard to future generation of waste streams that come from cleanup of previously polluting activities, while it makes sense to believe that as we complete these clean ups, the amount of waste generated will be diminished, Ms. Smith did not use such an analysis. Instead, she simply made projections based on past waste generation data without any knowledge as to whether future generation will be greater, equal to or less than past generation of these waste streams. (Tr 105). Significantly, the County staff acknowledged this flaw in Ms. Smith's testimony, euphemistically stating in their report "certain wastes identified by the Applicant for disposal, may have a range of generation and disposal pathways that are difficult to pinpoint without waste specific state wide or county wide studies." (County Staff Report, page 5).

Ms. Smith not knowing how much waste will actually be generated is further evidenced by the fact that construction and demolition debris, another of the waste streams, is required by State Statute to be recycled at C&D facilities at a seventy-five percent rate, but such recycling is not tracked by the State. (County Staff Report, page 5). Ms. Smith did not even consider these C&D recycling facilities in her analysis. (Tr 114). Ms. Smith also admitted that counties in the service area vary widely in methodology in reporting per capita or per employee industrial waste generation. (Tr 129-130).

In summary, Ms. Smith's waste generations rates are speculative, based on obsolete and divergent reporting technologies by the counties in the service area, and they do not even look for trends in future generation. Her waste generation numbers are therefore a guess. Since the bulk of the projected waste stream is contaminated soils, Ms. Smith's complete lack of knowledge about whether there is a finite amount of contaminated soils that needs to be cleaned up and her complete lack of knowledge about whether modern, more environmentally conscious activities are still generating contaminated soils is disturbing, to say the least.

The foregoing notwithstanding, Ms. Smith's available disposal capacity analysis is even worse. Her computation of available disposal capacity is set forth in section 4.2.1 of the siting application, where she wrote, "for the purpose of this report, the percent of disposal capacity available for industrial waste at each Illinois landfill, is represented by the percent of industrial waste reported as received at the landfill, as reported in the 2012-2015 EPA capacity forms." Ms. Smith admitted that her use of the term "industrial waste" encompasses all the special waste streams received at Laraway. (Tr 131). She also admitted that all the other landfills in the service area or reasonably available to the service area are legally able to take this industrial/special

waste in any quantity and that the percentage of the various waste streams currently received at those other landfills is more determined by market conditions. (Tr 132).

According to Ms. Smith, the percentage of special waste received at other landfills in the service area or reasonably available to the service area is relatively small. Projecting that only this small percentage of total disposal capacity for all non-hazardous waste streams will be available in the future makes it easy to conclude that there is a net deficit of available capacity for special waste in the service area.

What Ms. Smith and the County fail to acknowledge is that ALL the landfill capacity at other landfills in the service area or taking waste from the service area such as Livingston, Winnebago, Lee County, DeKalb, Orchard Hills and Newton County, Indiana is legally available for the wastes currently projected to continue to go to Laraway. The percentage that other landfills such as those just mentioned receive of these waste streams, such as contaminated soils, is driven not by legal restrictions, but by market forces. Presumably then, Laraway has undercut the market financially, and as a result it receives the majority of those materials. For Ms. Smith to opine that future landfill availability to take special waste is limited to the percentage of their capacity allocated to special waste in the past is totally unsupported and arbitrary. It is also the only way Ms. Smith can make her need equation work.

What Ms. Smith and what the County Board ignore, is that market driven volume, when there is ample other volume legally available, does not equate to need, because the special waste streams received at Laraway are not restricted from other MSW landfills. Accordingly, the Applicant, in order to demonstrate need here, should have performed a generation and capacity analysis for all waste streams, including MSW.



The County Staff report, relied upon by the County Board in making its decision, largely talks around this fatal flaw in the needs analysis, and then ultimately takes a pragmatic, but not legally justified, approach by concluding the best evidence of need for future expansion is that volume received at Laraway over the past years has been increasing. What this really says, is that the market may perceive a need for a Laraway expansion because of economics and pricing and not because of genuine capacity shortfall in the service area. It would be an appealing argument, but for the myriad of appellate cases which have consistently held that need must be real and urgent and not merely a matter of convenience.

In light of the foregoing, other flaws in Ms. Smith's analysis such as the failure to consider finally sited, but not yet permitted, disposal capacity that would significantly increase total capacity available to the service area, such as the Winnebago Landfill East expansion, are almost trivial.

**CRITERION ii**

The Applicant previously owned and operated the ESL landfill, which is closed and known to be polluting ground water and the environment. WMII also previously sought to expand the ESL landfill. At that time, the County Board, perhaps in a more contemplative mindset, concluded "given the hydrogeology of the proposed landfill expansion site and the admission by the Applicant of ultimate cell failure for leakage and the inability of the Applicant to provide reasonably positive assurance against the ultimate contamination of the Silurian Dolomite Aquifer, the proposed expansion site appears to be unsuitable for landfill purposes." *Waste Management of Illinois v. County Board of Will County*, PCB 82-141 (April 7, 1983, slip opinion at 7). Dale Hoekstra, a low-level operative for WMII testified that in the most recent year, the maximum daily waste volume received at Laraway was 19,000 tons. (Tr 461). One has

to wonder whether the check for host fees for that day and on similar days may not have become more important than protecting a precious aquifer?

The Laraway landfill surrounds the ESL landfill on three sides (Tr 342). The uppermost aquifer, the Silurian Dolomite, is approximately ten feet below ground level. (Tr 353, 423).

Perhaps, WMII has improved as an operator since 1983, perhaps not. However, geologic conditions at the site have not changed and that means we still have a major regional ground water aquifer in close proximity to the bottom of the proposed site. In other words, there are little by way of natural barriers to leachate migration, and the inevitable leakage will quickly migrate into the ground water.

Exceedances of applicable ground water quality standards established by the EPA have been reported at multiple monitoring wells on the site, the most recent being at well G-188 in the fourth quarter of 2014. While WMII's resident hydrogeologist, Joan Underwood, purports to explain these away as coming from "alternate sources," the fact of the exceedances itself, combined with the proximity with the Silurian Dolomite Aquifer is troubling. Apprehension about the safety of the site further expounds based upon the fact that Ms. Underwood chose to use a one-dimensional ground water impact assessment model, with generic transport equations and assumptions, because she admitted that site specific conditions are too complex to truly model in a three-dimensional space.

The PCB has a history of protecting the Silurian Dolomite Aquifer and, through the use of its technical expertise, rejecting expert opinions that could potentially endanger this valuable public water supply. *County of Kankakee v. City of Kankakee*, PCB 03-31 (January 9, 2003, slip opinion at 27-28).

Protection of public health, safety and welfare is only one of nine siting criteria, but it should not be considered one among equals. The consequences of being wrong on this criterion may be catastrophic and are often irreversible. This is a criterion where the mandate of *Town and Country* for the Board to use its technical expertise in reviewing the evidence before the local tribunal is perhaps most important.

**CRITERION vi**

This criterion requires Applicant to prove that the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows. Applicant's case on this criterion should fail as a matter of law, because neither the application nor the testimony documented or described existing traffic flows. Accordingly, it is impossible to gage whether or not impact has been minimized. Specifically, page five of the traffic report, authored by Lynn Means, a traffic engineer, in describing existing conditions, states, "the existing site traffic was *removed* from the existing peak hour and daily traffic volumes based on the existing traffic counts at the existing site, the service area of the facility and the specific routing of waste vehicles." (Siting Application, Traffic Report, page 5, emphasis added). In other words, Ms. Means performed traffic counts, subtracted what she believed to be site related traffic and presented the remainder in the application as the "existing condition." Obviously those numbers do not represent the existing condition, because Laraway is an operating site. With current site related traffic subtracted, Ms. Means went on to conclude that all relevant traffic movements in "existing conditions" are happening at acceptable levels of service.

But those "existing conditions" are fiction because they don't consider existing site traffic. What the County Board did not hear, and what the application does not present, is a computation of the levels of service for traffic movements at relevant intersections under REAL

conditions, meaning the actual total traffic on the roadways now. Presumably the real data was not included because real current traffic conditions at one or more of the relevant intersections are already unacceptable. This conclusion is certainly consistent with anecdotal and other evidence presented by the City of Joliet, suggesting that currently Illinois Route 53, south of Joliet, is a traffic nightmare. The critical intersection, as a practical matter, in this case is the intersection of Laraway Road and Illinois Route 53, because Illinois Route 53 is the arterial road by which all site related traffic exits and enters the area.

The witness's failure to consider actual, real, current traffic volumes is compounded by the fact that she appears, frankly, incompetent. Consider the following exchange during her cross-examination:

Q: (Mr. Mueller) Okay, so the AM street peak hour delay is calculated for-and lets just confine ourselves to the Laraway Road, 53 approach, which was the very first road on the table?

A: (Ms. Means) ok.

Q: The existing AM peak hour delay is 39.2 seconds. Correct?

A: Correct.

Q: Now what is the existing AM peak hour delay for a ten thousand ton per day scenario?

A: 37.1.

Q: Why is that less than without the ten thousand tons per day?

A: Its entering in the parameters of the facility, so it accounts a different distribution of traffic with a different distribution of percent heavy vehicles. And, again, it's an actuated system, so it is – operates at a different level of delay, but it's comparable.

Q: So adding ten thousand trucks per day actually reduces the morning peak hour delay? (Counsel for WMII correctly pointed out that this reference was to 10,000 tons and not 10,000 trucks).

A: For that movement.

Q: That seems counter-intuitive to me. Doesn't it to you?

A: No. As previously described, there's different factors based on an actuated system. So when you have different movements, different truck percentages and you don't have a controlled pre-timed signal, it's not uncommon for a traffic signal to operate at different delays. And overall I would expect there to potentially be an increase, and there is.

Sometimes you could have a signal where you're giving it too much time, and it may have a different level of operation. So it's understanding how a traffic signal operates. And based on that, I believe the conclusion is valid as printed.

Q: If I go across the column or the row, to the 20,000 ton per day scenario, what is the AM street peak hour delay now?

A: for the Eastbound approach?

Q: yes.

A: 36.9 seconds.

Q: So it actually went down 2/10's of a second from a 10,000 ton per day scenario to a 20,000 ton per day scenario?

A: That is correct based upon my previous reasonings.

Q: Again, doesn't that seem counter-intuitive to you?

A: No.

Q: So the solution to traffic delays is to add more traffic is what you're saying? (objection sustained).  
(Tr 219-221)

The County's staff in their report did the best they could to try and salvage something from the testimony of Ms. Means. They pointed out that Ms. Means had erroneously failed to add more trucks when increasing the daily tonnage scenario from 10,000, to 15,000 and to 20,000 tons per day (County Staff Report, page 20). The staff report then dismissed this egregious error by stating, "while we feel increasing the truck percentages would result in

slightly more vehicular traffic, the overall intersection levels of service would *likely* not change.” (*emphasis added*). With regard to greater traffic delays for a scenario with no site-related traffic, than delays with site-related traffic, the County Staff Report opined that the first scenario must be representative of a current condition where site-related traffics actually is included with background traffic. However, this is a weak rationalization, since the referenced exhibit 9 in the Means report is not designated as current conditions and the report specifically indicates that current site traffic was backed out of the total counts before the numbers were presented in the report.

The bottom line is that we have no idea what real current traffic conditions are, as that information was intentionally withheld, and computation of future likely traffic conditions is nonsensical.

The traffic study gets worse. Not only are we not presented with real, actual, traffic data, but future traffic projections are premised upon the completion of two significant roadway and intersection improvements, not by the Applicant, but by third parties who also generate traffic in the area. These roadway improvements are contingent at best, and pipe dreams at worst. They are summarized on page 16 of the traffic report, the most significant being improvement and additions of more lanes and storage to the intersection of Illinois Route 53 and Laraway Road. Since we don't have real current conditions presented in the traffic report, we don't know just how bad current conditions are at this intersection, but future traffic projections include, among other things, addition of a second left turn lane from Eastbound Laraway Road onto Northbound Illinois Route 53. This is the movement that almost all trucks will make when leaving this site.

Interestingly, the two significant road improvements contemplated and being discussed were incorporated into her projections, but a minor third improvement, also listed on page 16 of

the report, was not incorporated. No explanation was offered, but the obvious presumption is that the significant improvements were needed in order to make the traffic analysis work.

Again, the County staff, struggling to try to recommend the big dollars that come from this expansion, rationalized the testimony of Ms. Means, opining (without calculations or numbers) that if the hoped for road and intersection improvements don't occur, then the third party, unrelated developments required to make those improvements won't occur either, and there will be less traffic (County Staff Report, page 19). Unfortunately, this rationalization is not quantified and therefore cannot be considered more than a guess. The County Staff report concludes on this issue, "it is reasonable to project the traffic conditions in 2018, would be similar to the current situation and roadway improvements would be implemented prior to increased demand being placed on them by major developments." (County Staff Report, page 19).

And the foregoing rationalization and conclusion from the County Staff brings us back to the catch 22 presented by the Applicant: We don't know the current situation, since it is not described and quantified in the report for the testimony.

In light of the fact that traffic analysis is fatally flawed both for failing to consider and quantify actual, current conditions and for relying upon speculative third party road and intersection improvements to project future conditions, an improper evidentiary ruling by the hearing officer in this area seems almost trivial. Nonetheless, the point must be preserved, because the hearing officer was simply wrong. The traffic report only calculated future traffic patterns and flows for the year 2018, when the expansion is expected to become operative. When counsel for ERDS asked about background traffic growth and other expected developments in the area after 2018, WMII's objection was sustained. This is a reversible error, because as argued

at the time of the objection, increased traffic after 2018 and roadway problems related thereto are a very real public health, safety and welfare issue related to the facility. Criterion vi states, “the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows.” The hearing officer erroneously believed that this referred to traffic flows in 2018, when the expanded facility is projected to open. However, existing traffic flows refers to current flows, which, as described hereinabove, were not documented in the application or testimony. Minimization on impact however would seem to be a fluid concept that relates to the entire life of the proposed expansion, and as such the absence of an impact in 2018, when there could in fact be a significant impact shortly thereafter, is misleading and prejudicial. The facility is projected to have a life of ten years. The Applicant should be required to consider and discuss minimization of impact during the entire projected life of the facility. Therefore, the Applicant’s failure to present any data beyond the 2018 snapshot is a fatal flaw and the hearing officer’s refusal to allow questioning beyond 2018, is a reversible error, in that it is fundamentally unfair.

**CONCLUSION**

For the foregoing reasons, ERDS prays that the local siting approval by the Will County Board be reversed.

Respectfully submitted,

By: /s/ George Mueller

George Mueller, Attorney

Dated: August 19, 2016

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