BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 07-113
	)	
THE CITY OF ROCHELLE, an ILLINOIS MUNICIPAL CORPORATION and THE ROCHELLE CITY COUNCIL,	)	
	)	
Respondents.	)	

NOTICE OF FILING

TO: All Counsel of Record (see attached Service List)

PLEASE TAKE NOTICE that on August 1, 2007, the undersigned filed electronically with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, the **Opening Brief of Rochelle Waste Disposal LLC**, a copy of which is attached hereto.

Dated: August 1, 2007

Respectfully submitted,

ROCHELLE WASTE DISPOSAL, L.L.C.

s/Charles F. Helsten
Charles F. Helsten
One of Its Attorneys

Charles F. Helsten
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on August 1, 2007, she served a copy of the foregoing upon:

Hon. John McCarthy 45 East Side Square, Suite 301 Canton, IL 61520 jjmccarthy@winco.net	Donald J. Moran Pedersen & Houpt 161 N. Clark St., Suite 3100 Chicago, IL 60601-3142 dmoran@pedersenhoupt.com
Glenn Sechen, Esq. Schain Burney Ross & Citron Ltd 222 N. LaSalle St., Suite 1910 Chicago, IL 60601 gsechen@schainlaw.com	David Tess, Esq. Tess & Redington 1090 N. Seventh St. P.O. Box 68 Rochelle, IL 61068 dtess@oglecom.com
Alan Cooper, Esq. Attorney at Law 233 E. Route 38, Ste. 202 P.O. Box 194 Rochelle, IL 61068 cooplaw@rochelle.net	Emily Vivian David Wentworth II Hasselberg, Williams, Grebe, Snodgrass & Birdsall 125 SW Adams St., Ste. 360 Peoria, IL 61602-1320 evivian@hwgsb.com dwentworth@hwgsb.com
Bradley Halloran Illinois Pollution Control Board 100 West Randolph Street Suite 11-500 Chicago, IL 60601 hallorab@ipcb.state.il.us	Mr. Bruce W. McKinney Rochelle City Clerk Rochelle City Hall 420 North 6th Street Rochelle, IL 61068 bmckinney@rochelle.net

via electronic mail before the hour of 5:00 p.m., at the addresses listed above.

/s Nicola Nelson_____

HINSHAW & CULBERTSON LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
(815) 490-4900

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OPENING BRIEF OF ROCHELLE WASTE DISPOSAL L.L.C.

For the reasons set forth herein, the Petitioner, Rochelle Waste Disposal, L.L.C. ("RWD"), respectfully requests that this Honorable Board refuse to affirm the challenged Special Conditions imposed by the Rochelle City Council ("City Council") in conjunction with its grant of local siting approval for expansion of the Rochelle Municipal Landfill. Special Conditions 8, 13, 22, 23, 26, 28, 33 and 34, which are at issue in this appeal, are purportedly related to Criteria (ii) and (vi). The evidence, however, shows that the challenged conditions are not reasonable and necessary to accomplish the purposes of Section 39.2 of the Illinois Environmental Protection Act ("the Act"), and are inconsistent with the regulations promulgated by this Honorable Board. Moreover, the challenged Special Conditions are not supported by the underlying record and run contrary to the terms of the Host Agreement executed by and between RWD and the City.

I. BACKGROUND

The Petitioner, RWD, is the current Operator of the Rochelle Municipal Landfill, located in Rochelle, Illinois. On March 3, 2006, the City Manager submitted a report concerning his investigation into the possible expansion of the Landfill. (Application, Vol. II, Appendix A). In that report, the City Manager concluded that expansion of the Landfill offered a number of

potential benefits to the City including the opportunity to exhume Unit I of the existing Landfill, an unlined area which dates back to the 1970's. Thereafter, the City engaged in negotiations with RWD, and on or about September 26, 2006, the City and RWD entered into a Restatement of Host Agreement and Agreement for Operation/Development of City of Rochelle Landfill No. 2 ("Host Agreement"). The Host Agreement sets forth the terms and conditions for the operation of the facility and a proposed expansion of the existing facility. (*See generally*, Host Agreement).

The Host Agreement provides that RWD will cooperate with the City in planning and designing the expansion, and will continue as the Operator of the expansion. (*Id.*). In addition, the Host Agreement specifies that RWD will pay the City annual base fees, as well as per ton fees, and that RWD will pay additional specified sums if the siting authority grants approval for the expansion consistent with the terms of the Host Agreement. (*Id.*). The Host Agreement further provides that RWD will donate certain real property to the City to facilitate the expansion and accommodate re-disposal of waste from Unit 1 of the existing landfill. (*Id.*). Finally, the Host Agreement provides that "[t]he City and its officers, council members and employees will not take any action which has the intended or probable effect of interfering unreasonably with the operation or expansion of the facility or the Expanded Facility." (*Id.* at ¶ 5.2.) The terms of the Host Agreement were the product of extensive investigation, study, and negotiation between the parties, and the terms memorialize the parties' respective willingness to shoulder certain specific costs, make certain specific payments, undertake certain specific duties and assume certain specific responsibilities.

On or about October 16, 2006, the City filed its Application with the Rochelle City Council seeking local siting approval for the proposed expansion. Five days of hearings on the

Application ensued, commencing on January 22, 2007 and concluding on February 8, 2007. Thereafter, the City Council met to consider action on the Application, pursuant to Section 39.2(e) of the Act and pursuant to the City's local siting ordinance. The local siting ordinance sets forth procedures and requirements consistent with the Act, and specifies that an Application must meet the nine siting criteria set forth at Section 39.2 of the Act. Those criteria are:

> (i) the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve;
>
> (ii) the facility is so designed, located and proposed to be operated that public health safety and welfare will be protected;
>
> (iii) the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;
>
> (iv) (A) for a facility other than a sanitary landfill or waste disposal site, the facility is located outside the boundary of the 100 year flood plain or the site is flood-proofed; (B) for a facility that is a sanitary landfill or waste disposal site, the facility is located outside the boundary of the 100 year flood plain, or if the facility is a facility described in subsection (b)(3) of Section 22.19a, the site is flood-proofed;
>
> (v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fires, spills, or other operational accidents;
>
> (vi) the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows;
>
> (vii) if the facility will be treating, storing or disposing of hazardous waste, an emergency response plan exists for the facility which includes notification, containment and evacuation procedures to be used in case of an accidental release;
>
> (viii) if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan; and
>
> (ix) if the facility will be located within a regulated recharge area, any applicable requirements specified by the Board for such areas have been met.

In addition, the City's Siting Ordinance requires that the landfill siting decision must be:

> by resolution in writing, specifying the reasons for the decision, such reasons to be in conformity with section 39.2(a) of the act. In granting site location approval, the city council may impose such conditions as may be reasonable and

> necessary to accomplish the purposes of the act to the extent that said conditions are not inconsistent with act and the regulations promulgated by the state pollution control board.

(Rochelle Municipal Code, Article III, Division 1, Sec. 78-77(b)).

The City Council's decision on a siting permit must be based on the evidence admitted at the public hearing, the entire siting record and, *to the extent supported by the record*, the recommendation of the Hearing Officer. (*Id.*). In this case, the Hearing Officer stated in his Findings of Fact, Conclusions of Law and Recommendations that, "…the application meets the criteria set forth in Section 39.2 of the Act and I recommend that the City Council approve the request for local siting approval subject to the special conditions which are set forth hereinafter." (Hearing Officer's Findings of Fact, Conclusions of Law and Recommendations, at p. 5).

With respect to Criterion (i), the Hearing Officer concluded that the Applicant met the requirements, having shown that the facility is necessary to accommodate the waste needs of the area it is intended to serve. (Hearing Officer's Findings of Fact, Conclusions of Law and Recommendations, at p. 10).

As to Criterion (ii), the Hearing Officer concluded that the Applicant's expert testimony was more credible than that provided by the expert retained by CCOC, and he opined, "I agree with the opinions expressed by Mr. Drommerhausen and Mr. Moose. Their testimony appears to be uncontradicted and unrebutted." (*Id.* at p. 20). He accordingly found that the requirements of Criterion (ii) were met.

The Hearing Officer similarly found that Criteria (iii), (iv), (v), (vi), (vii), (viii) and (ix) were met. (*Id.* at p. 25, 27, 34, 36, 37).

With respect to Criterion (vi), the hearing officer observed that the only testimony concerning that criterion was provided by the applicant's expert, Mr. Werthmann, and after

reciting the evidence presented, the Hearing Officer concluded that Criterion (vi) was met. (*Id.* at p. 34).

Although he found that all the statutory criteria were met, the Hearing Officer nevertheless recommended imposing numerous Special Conditions, which he proposed in order to "encourage compliance by the operator and assist in minimizing the concerns of CCOC." (*Id.* at 38) (emphasis added).

On or about April 11, 2007, the City Council passed Resolution R07-10, in which the Council rendered its findings. The Resolution includes the finding that every siting criterion was met, and, accordingly, grants approval of the site expansion. Notably, the voting record memorialized in the Resolution reveals that the Council members' votes were virtually unanimous in finding that the Applicant demonstrated compliance with every criterion. However, the Resolution imposes thirty-seven (37) Special Conditions, some of which echo the conditions proposed by the Hearing Officer.

In the aftermath of the Council's Resolution, RWD filed a Motion for Reconsideration in which it objected to Conditions 8, 13, 22, 23, 26, 28, 33 and 34. On May 14, 2007, the City Council passed Resolution R07-18, which affirmed the siting permit approval and the imposition of the conditions, but modified Condition 34.

The Special Conditions challenged in this appeal are not necessary to accomplish the purposes of the Act, are inconsistent with the Board's regulations, and would significantly alter the terms negotiated by the City and RWD in the Restatement of the Host Agreement; many of the Special Conditions would dramatically increase the costs of operation and unreasonably interfere with operation of the proposed expansion and the economic feasibility of the project. Moreover, they enjoy no support in the record, and are derived largely from the Council

Members' eagerness to defer to the opinions of their hired experts outside the record, and to minimize concerns of the CCOC.

The Criteria at issue in this appeal

No Special Conditions were imposed in conjunction with the Council's findings concerning Criteria (iv), (v), (vii), (viii) and (ix). The conditions imposed in R07-10 are associated with: Criterion (i) (Condition 36, not at issue in this appeal); Criterion (ii) (Conditions 1-32, some of which are at issue); Criterion (iii) (Condition 37, not at issue in this appeal); and Criterion (vi) (Conditions 33-35, of which 33 and 34 are at issue). As a result, the Special Conditions at issue in this appeal relate only to Criteria (ii) and (vi).

The fact that imposing certain conditions might "minimize the concerns" of a citizens' group (CCOC) is not a legitimate legal basis for imposing Special Conditions pursuant to a grant of siting approval. Because the Council's imposition of the challenged conditions is not reasonable and necessary to accomplish the purposes of the Act, is unsupported by the record of the proceedings, contravenes the terms of the Host Agreement, and is designed in large part simply to shift, *ex post facto*, the City's previously agreed-upon financial obligations onto RWD, the conditions are improper and should be stricken.

II. STANDARD OF REVIEW

In an appeal seeking review of conditions, the Petitioner bears the burden of proving that the Application as submitted, without the conditions, would not violate the Act or the Board's regulations. *Browning-Ferris Industries of Ill., Inc. v. PCB*, 179 Ill.App.3d 598, 607, 534 N.E.2d 616 (2nd Dist. 1989); *Jersey Sanitation Corp. v. IEPA*, PCB-00-082 at *6 (June 21, 2001). A condition that is not necessary to accomplish the purposes of the Act or Board regulations is arbitrary and unnecessary and must be deleted. *Jersey Sanitation,* at *4-5.

When considering whether a condition is necessary to accomplish the purpose of a Section 39.2(a) siting criterion, the Board must determine whether the local government's decision to impose the condition is against the manifest weight of the evidence. *Waste Mgmt. of Ill. v. Will Co. Bd.*, PCB 99-141 at *3 (Sept. 9, 1999) (*affirmed*, *Will Co. Bd. v. Ill. PCB*, 319 Ill.App.3d 545 (3rd Dist. 2001).

III. ARGUMENT

In granting approval for a site, the governing body of a municipality may impose only those conditions that are reasonable and necessary to accomplish the purposes of Section 39.2, and are not inconsistent with the regulations promulgated by the Board. *Waste Mgmt. of Ill. v. Will Co. Bd.*, PCB 99-141 at *2 (Sept. 9, 1999). To be permissible, a conditions must be "reasonable and necessary to meet the waste needs of the area." *Will Co. Bd. v. PCB*, 319 Ill.App.3d 545, 548 (3rd Dist. 2001).

The evidence presented in this case confirms that the proposed expansion is designed and proposed to be operated so as to protect public health, safety and welfare, and the Applicant demonstrated compliance with all of the siting criteria of Section 39.2(a) *without* the Special Conditions. The challenged conditions are not necessary to assure compliance with the Act and are inconsistent with the regulations promulgated by the Board. They are therefore improper, and should accordingly be deleted.

A. The Challenged Conditions are Not Reasonable and Necessary to Accomplish the Purposes of Section 39.2 and are Inconsistent with the Board's Regulations

Of the eight (8) Special Conditions challenged in this appeal, the Council's Resolution associates Conditions 8, 13, 22, 23, 26, and 28 with Criterion (ii). (Resolution R07-10). Conditions 33 and 34 were associated with Criterion (vi). In each case, however, the Special

Conditions imposed by the City Council are not reasonable, and are not necessary to achieve compliance with the Act.

1) Conditions 8, 13, 22, 23, 26, 28, purportedly imposed pursuant to Criterion (ii)

A. Evidence regarding Criterion (ii)

The Applicant, by its own admission, submitted an exhaustive, comprehensive Application whose data establishes that the proposed expansion complies fully with Criterion (ii). In addition, expert witness testimony concerning Criterion (ii) was provided at the public hearings by Daniel Drommerhausen, Devin Moose, and Charles Norris. Both Drommerhausen and Moose testified that the Application for the proposed expansion complies with the requirements of Criterion (ii). Norris had no opinion as to whether the Application complies with Criterion (ii).

i. Application data

(a) The Locale/Geology/Water Safety

Application data shows that the site complies with all requirements relevant to Criterion (ii). The site is located in an area which is primarily agricultural, planted in row crops. (Application, 2.2-3). The nearest airport to the proposed expansion is a municipal airport that is over 10,000 feet from the site. (Application, Table 2.1-1 (A)). The expansion area is not located within the FEMA 100-year floodplain. (Application, Table 2.1-1 (B)). A wetland determination and delineation has been conducted, and the expansion has been designed and located to minimize disturbance potential to wetland areas. (Application, Table 2.1-1(C)).

There are no known faults that have displaced during the Holocene Epoch within 200 feet of the site, and there are no documented unstable areas beneath the excavation. (Application, Table 2.1-1(D/E). There are no reported karst areas or areas of known underground mining

within the proposed area. (*Id.*). The proposed expansion site is not located within a seismic impact zone that has a 10% chance of exceeding .10 g in 250 years, and it has been designed to achieve a safety factor greater than 1.3 against slope failure under seismic conditions. (Application, Table 2.1-1(F).

The area does not encompass any rivers designated for protection under the Wild and Scenic Rivers Act, and Phase I Archaeological Surveys for the existing landfill and the expansion area of found no evidence of materials that meet the requirements of Section 4 of the Illinois State Agency Historic Resources Preservation Act. (Application, Table 2.1-1(G/H). Development will not proceeding without confirmation from the IHPA that there are no significant historical, architectural, or archeological resources within the proposed expansion areas. (*Id.*). The proposed expansion will not impact any potentially endangered or threatened species. (Application, Table 2.1-1(H/I)).

The proposed expansion will not violate any area-wide or state-wide water quality management plan, and the extensive stormwater management features constructed during landfill development will reduce the potential for downstream flooding and improve the quality of runoff when compared to existing conditions. (Application, Table 2.1-1 (J)). There are no community water supply wells within 2,500 feet of the waste boundary, as per the setback zones defined in Section 14.2 and 14/3 of the Illinois Environmental Protection Act. (Application, Table 2.1-1(K)). No sole source aquifer or regulated recharge area is located within the proposed expansion site. (Application, Table 2.1-1(L)).

The facility's operations will be screened from view along South Mulford Road, East Creston Road, South Locus Road, and Illinois route 38 by a vegetated earthen berm or fence with a total height of no less than 8 feet. (Application, Table 2.1-1(L/M). The proposed expansion

will be located more than 500 feet from all occupied dwellings, schools, retirement homes, hospitals, or like institutions unless written permission for a closer distance from the owner is provided prior to permit approval. (Table 2.1-1(N)).

The hydrogeologic analysis conducted by Shaw Environmental confirmed that the proposed expansion is located and designed so as to protect the public health, safety, and welfare. (Application, Section 2.2-1). The geology of the site will supplement the proposed expansion design and will provide a high level of environmental safety. (*Id.*).

The site features a low-permeability cohesive soil (Tiskilwa Formation) which is present across the site and which will separate the proposed landfill from the uppermost aquifer. (*Id.*) The average thickness of the clay between the base of the liner and the uppermost aquifer is approximately 25.3 feet across the expansion area. (Application, 2.2-47). Field and laboratory testing and field observations indicate that this soil will effectively restrict vertical and horizontal movement of groundwater and will serve as an additional environmental safeguard at the proposed site. (*Id.*)

The analysis of the site's geology and hydrogeology included a total of 73 continuously sampled boring locations, and installation of 66 monitoring wells. (Application, Section 2.2-1). The site conditions will allow a comprehensive groundwater monitoring system to be implement which will adequately verify that groundwater resources are not being impacted by the landfill. (Application, Section 2.2-2). The groundwater monitoring system for the site consists of a network of groundwater quality monitoring wells located both upgradient and downgradient of the proposed expansion. (Application, Section 2.8-1). The proposed final monitoring network consists of 34 groundwater monitoring wells located within the uppermost aquifer. (*Id.*)

(b) Litter control

The Application establishes that the site will feature a number of operating procedures to minimize and control litter. (Application, Section 2.6-6). Incoming refuse vehicles will be required to be fully-enclosed or to have covers or tarps to prevent waste from blowing out of the vehicles. (*Id.*). The active disposal area will be kept as small as possible and will be covered at the end of each day with daily cover materials including soil, synthetic covers, and alternate daily cover materials as approved by the FDA. (Application, Section 2.6-6) (but see Condition 13, which, paradoxically enough, would dramatically increase the size of the working face). The entire facility will be surrounded with a perimeter fence and exterior berm to collect litter that may escape beyond the active face. (*Id.*) Daily activity will be modified during periods of high winds. (*Id.*) Temporary litter fences will be used near the active face to provide additional protection against blowing litter. (*Id.*). Operations will be suspended whenever sustained winds reach 35 mph, in times of tornado alert, or if the City determines the Operator has not or is not able to adequately prevent or control blowing litter from leaving the facility. (*Id.*) Laborers will patrol the facility and the surrounding property to collect any litter that escapes the active fill area, including litter caught by the portable and perimeter fencing, with collected litter being placed either directly into the landfill and covered, or placed in a secure, covered container for later disposal. (*Id.*).

Laborers will conduct daily inspection of Mulford Road from the landfill facility entrance gate extending north to Illinois Route 38. (Application, Section 2.6-7). They will also inspect Illinois Route 38 from the intersection of Mulford Road extending west to the Interstate 39 interchange. (*Id.*).

ii. Mr. Daniel Drummerhausen

Mr. Drommerhausen is a professional geologist at Shaw Environmental who holds a master's degree in hydrogeology. (Tr. 1/23/07 at 199). He testified concerning the process of conducting a geologic/hydrogeologic site analysis. His testimony included a detailed explanation of the geology of the landfill site and the role of geology in the landfill's design, including the importance of predicting potential migration pathways and the accompanying need for designing appropriate monitoring systems to ensure safety. (Tr. 1/23/07 at 200-205; 214-15). He discussed the boring sampling and analysis performed to ascertain whether the site is appropriate for the proposed landfill expansion. (Tr. 1/23/07 at 205-208). He also explained the importance of soil and rock core sampling, and the process of determining the quality and type of soil and rock that are present, as well as the presence of fracturing if any. (Tr. 1/23/07 at 209-213). He described the extensive testing that was done to determine conductivity at the site. (Tr. 1/23/07 at 216-226).

Drommerhausen discussed the potentiometric monitoring done for the proposed site. (Tr. 1/23/07, at 235-36). He testified that after the analysis was completed, Shaw Environmental concluded that the Tiskilwa formation at the site, approximately 25 feet of clay, silty clay and silt, will effectively restrict vertical and horizontal movement of groundwater and will serve as an additional safeguard for the proposed facility. (Tr. 1/23/07 at 227, 237). Shaw Environmental also found that the geology and hydrogeology at the site is uniform and predictable, and is consistent with findings that have been approved and reviewed by IEPA at the existing permitted landfill. (Tr. 1/23/07 at 237-38). Drommerhausen explained that the critical areas of the proposed site will feature one HDPE liner, then a geosynthetic clay liner, then another HDPE liner, and finally three (3) feet of clay. (Tr. 1/23/07 at 239-40). He concluded that even using very conservative parameters, the modeling done for the site showed that the

proposed design would be in compliance with IEPA standards for groundwater impact. (Tr. 1/23/07 at 241).

iii. Mr. Devin Moose

Mr. Moose is a civil engineer with more than twenty years of experience in landfill design, who is the director of the St. Charles, Illinois office of Shaw Environmental. He explained that the Application in this case complies with the relevant regulations pertaining to seismic impact zones, flood plains, wetlands, endangered species and setback requirements. (Tr. 1/24/07 at 146-150; PowerPoint 21 to 25; *see also* Application 2.1-1 to 14). For example, although the required setback from community water supply wells is 2,500 feet, in this case the proposed facility is more than 6,000 feet from the nearest such well. (Tr. 1/24/07 at 149-150). Mr. Moose testified as to the site's favorable geology for a landfill, which will be complemented by a composite liner system composed of three feet of compacted clay beneath a 60-mil high-density polyethylene (HDPE) liner. (Tr. 1/24/07 at 154-55; PowerPoint 29; see also Application 2.3-4). He testified as to the additional engineered clay liner that will be enhanced in areas where there could be standing leachate. (Tr. 1/24/07 at 161-62). He also testified concerning the final cover system, as well as the systems to be used for installing wells to remove gas from the landfill. (Tr. 1/24/07 at 167-172).

Mr. Moose testified that the Groundwater Impact Evaluation run by Mr. Drommerhausen showed that even when utilizing extremely conservative assumptions, models show there will be no impact from the landfill development within 100 feet of the waste boundary even 100 years after closure. (Tr. 1/24/07 at 172-73; PowerPoint 51; see also Application 2.7-1 to 31). He testified that the appropriate monitoring wells will be installed to detect releases. (Tr. 1/24/07 at 173-75; PowerPoint 52-53). Finally, he testified that the proposed expansion will include

exhumation of the old unlined landfill, Unit 1, which will occur as quickly as possible, with the waste from Unit 1 being placed into Cell One of the expansion area. (Tr. 1/24/07 at 177-79). This process will involve removing the accumulated waste from an area that is currently unlined, and placing it into a modern, lined area, thereby providing substantial environmental benefits. (*Id.*) He explained that a construction quality assurance ("CQA") officer will be on-site to oversee the exhumation, and that the exhumation activities will also be reviewed and permitted by IEPA. (Tr. 1/24/07 at 178-179).

iv. Mr. Charles Norris

Mr. Charles Norris, a consultant and professional geologist retained by an objector, the Concerned Citizens of Ogle County ("CCOC"), is not an engineer, and had no opinion concerning the engineered components of the proposed expansion. (Tr. 1/25/07 at 255-56; 259). Most importantly, Mr. Norris testified that he would not render an opinion as to whether the proposed expansion satisfies Criterion (ii). (Tr. 1/26/07 at 156). He did, however, opine that if the City Council granted siting approval, the Application would likely be routinely approved by the IEPA. (Tr. 1/25/07 at 262). He further opined that Unit 1 could probably be managed even without any exhumation, and he encouraged the City Council to consider alternatives to exhumation of Unit 1. (Tr. 1/25/07 at 324-25). Mr. Norris went on to explain that he would make no recommendation to the City Council concerning Unit 1. (Tr. 1/26/07 at 195).

When viewed together, the Application and the testimony of the experts at the hearing showed conclusively that the Applicant has met the requirements of Criterion (ii) without the need for imposition of the Special Conditions at issue in this appeal.

1. <u>Condition 8</u> (imposing duties of litter control along a route not authorized for waste transport) is not necessary to comply with Criterion (ii) and so is not necessary to achieve the purpose of the Act.

Condition 8 requires that:

> The Operator shall, at a minimum, inspect on a daily basis the public rights of way, and areas adjacent to these rights of way, from the landfill facility gate North on Mulford Road and along Route 38 West to the Interstate 39 interchange and Route 38 East through Creston to Woodlawn Road. Litter collection along these rights of way shall be performed at least once per week, and more often if the City Manager determines from review of evidence that the Operator is responsible for the litter.

(Resolution R07-10, Attachment A, ¶ 8).

According to Resolution R07-10, Special Condition 8 was imposed pursuant to the Board's consideration of Criterion (ii).

Notably, the City of Rochelle observed in its Response to RWD's Motion for Reconsideration that litter control was carefully considered in the formulation of the Application, and that the City did not believe the additional litter control measures described in Condition 8 were necessary. (Applicant's Response to Operator's Motion for Reconsideration at 10-11). Most importantly, the City noted that "there was no testimony that the requirements [for litter control] set forth in the [A]pplication were inadequate, and no testimony with respect to any necessity for additional litter control [measures]. . .beyond those set forth in the [A]pplication and testified to by the City's witnesses." *Id.* Thus, the City found there is no support in the record for this condition.

As explained above, the Application delineates numerous, detailed operating procedures that will minimize and control litter. (Application, Section 2.6-6). In addition to requiring that incoming vehicles must be fully-enclosed or be covered with tarps, the active waste disposal area will be kept small and will be covered at the end of each day. (*Id*). The entire facility will be surrounded with a perimeter fence and exterior berm which will catch litter that might otherwise escape beyond the active face. (*Id.*) Daily activity will be modified during periods of high winds, and temporary litter fences will be used near the active face, with operations suspended during periods of high, sustained winds, tornado alert, or if the City finds that the Operator is not

adequately controlling litter. (*Id.*) Laborers will patrol the facility and surrounding area to collect any escaping litter, and will conduct daily inspection of Mulford Road from the landfill facility entrance gate extending north to Illinois Route 38. (Application, Section 2.6-7). They will also inspect Illinois Route 38 from the intersection of Mulford Road extending west to the Interstate 39 interchange. (*Id.*).

Special Condition 8 expands the area for litter control to include all public rights of way and areas adjacent to those rights of way, along Route 38 East through Creston to Woodlawn Road. However, Condition 35 mandates that all transfer trailers traveling to and from the facility are mandated to do so by utilizing Route 38 West of Mulford Road to the Interstate 39 Interchange. (Resolution R07-10, ¶ 35). Thus, waste hauling cannot even occur along the expanded route required by Condition 8.

In the aftermath of the Motion for Reconsideration, the City Council met to consider the request that the Special Conditions be modified or deleted. With respect to Condition 8, Council Member Hollonbeck stated that she believed it was a good idea to expand the area of required litter patrol because it would show that the City wanted to be a "good neighbor" to Creston. (Tr. 5/8/07 at 8-9). Council Member Berg responded that he was in favor of Special Condition 8 because he was unhappy with the Operator's "history." (*Id*. at 9). According to Berg, "The operator's history of – they stood right there and said we haven't done a very good job operating this landfill, and that was one of my reasons for saying let's expand it up to Woodlawn Road. . .I think we need to hold their feet to the fire on it." (*Id*. at 9-10).

Council Member Hayes questioned whether it was appropriate to so expand the area of litter monitoring, and whether it was appropriate to assume that litter found along area roadways was attributable to the landfill. He observed,

> We that live in Rochelle have seen the litter across from the Sullivan's store more recently where none of the transfer trailers go by and it's been worse than I've ever seen it before, and it is not in a route of any of the transfer trailers or any of the – which is a problem. My question is how – how would one determine that they're respons – that the operator or the transfer company is responsible for any particular route? . . .[Y]ou go on routes, which I do on a fairly regular basis, where there is no – there are no trucks, there are no landfills and the trash is still in the trees along those roads, and who makes that determination? …I don't know how all the trash on a certain route can deem to be the responsibilities of the operator of the site.

(Tr. 5/8/07 at 13) (emphasis added).

Notwithstanding Mr. Hayes' observations, the Council Members voted to impose Condition 8. The Council's vote to retain this condition is perhaps unsurprising, given comments made during their initial consideration of this condition at the April 11, 2007 meeting, when Council Member Berg explained that the litter control requirements were not so much about ensuring that the landfill did not generate litter in the area, as they were designed as a sort of public relations measure. He explained, "It's a perception issue. I mean, anybody who drives 38, who's the first person you're going to think of if you see a bunch of garbage out there? You're going to think of the landfill. You're going to think of the trucks that go to that landfill. That's why they indeed have the onus on them to keep it clean." (Tr. 4/11/07 at 83) (emphasis added).

Clearly, the record contains no evidentiary support for requiring the expanded litter control requirements imposed by Condition 8. There is no evidence to show it is necessary for compliance with Criterion (ii). Accordingly, Condition 8 is not necessary to accomplish the purposes of Section 39.2 of the Act and is not consistent with this Board's regulations. It should therefore be deleted.

2. <u>Condition 13</u> (imposing a 6 year deadline to exhume waste from Unit 1) is not necessary to comply with Criterion (ii) and is therefore not necessary to accomplish the purposes of the Act.

Condition 13 requires that:

> The Operator shall complete the exhumation and redisposal of waste from Unit I as soon as practicable, but in no event later than six (6) years from the date an IEPA permit is issued for the expansion, except as otherwise provided by the City Council for good cause shown. The waste exhumation and redisposal shall be restricted to the months of November, December, January, February and March unless it is demonstrated to the City Council that the process can occur in other months without off-site odor migration or other impacts associated with the process.

(Resolution R07-10, at Attachment A, ¶ 13).

In considering Condition 13, it is important to remember that the waste to be exhumed from Unit 1 was continuously deposited at the site, year-round, over a twenty-three year period, from 1972-1995. Clearly, this represents a substantial amount of waste in terms of weight and volume. Condition 13 not only requires that all of the waste be exhumed within six years, it also limits exhumation work to the months of November through March, thus effectively requiring the Operator to remove 276 months (23 years x 12 months) of accumulated waste within, at most, and under optimal conditions, 30 months (6 years x 5 months). Notably, the months during which exhumation is permissible under this Condition are those most likely to include substantial periods of inclement weather. There is no evidence in the record to support the proposition that the exhumation must be completed within six years in order to protect the public health, safety and welfare.

Rather, the Application includes Shaw Environmental's discussion of the proposed exhumation, and provides detailed plans and procedures, including the equipment to be used, the method of excavation of cover, the proposed hours and times of year for the exhumation, the nature and quantity of cover to be used, the procedures to be used in addressing any hazardous

waste that may be encountered, an air monitoring program, stormwater management requirements, and other safety procedures. Shaw Environmental generally estimates that relocation of Unit 1 could be accomplished over a 5-10 year period. (Application, Section 2.6, page 2.6-24).

The only other empirical evidence concerning the exhumation of Unit 1 was provided by Devin Moose, of Shaw Environmental, who explained that the full exhumation process would take "on the order of about 10 years" to complete. (Tr. 1/25/07, pp. 321-23) (emphasis added). Moreover, the Host Agreement negotiated between the City and RWD provides at Section 7.4 that the exhumation is to be "commenced and completed within a commercially reasonable time," with the City to bear the first $850,000.00 of the cost and the Operator to bear the balance of the cost. This cost apportionment was based on the parties' clear and unequivocal agreement that exhumation would be performed in a *commercially reasonable* timeframe. Moreover, the Host Agreement clearly provides that the timing, sequence, and manner of exhumation will be determined by the IEPA, and by the mutual agreement of the City and the Operator.

Public clamor for acceleration of the exhumation timeframe, unaccompanied by any scientific or professional analysis establishing the necessity, or even the feasibility, of performing such accelerated exhumation fails to establish that the acceleration is necessary to protect the public health, safety and welfare. The timeframe proposed in Condition 13 was not established as a result of a risk assessment, feasibility study, or health and safety analysis, and did not arise pursuant to any investigation into the nature, quality, and quantity of waste in Unit 1. Notably, the expert for Concerned Citizens of Ogle County ("CCOC"), Mr. Norris, testified that he did not even believe exhumation of Unit 1 was necessarily required *at all* to protect

public safety. (Tr. 1/25/07 at 324-26). In fact, he specifically urged the Council to consider *not* exhuming Unit 1. (*Id.*).

During the meeting that led up to passage of Resolution R07-10 and the imposition of the Special Conditions, the Attorney for the City Council explained that it could be assumed that between two and two and a half million yards would need to be exhumed. (Tr. 4/11/07 at 87). He opined that, "It would be difficult to certainly complete it within six years" and noted that "testimony at the hearing indicated that the applicant, the operator believed that a 10 year period was the appropriate period over which this waste could be exhumed and later then redisposed." (Tr. 4/11/07 at 85) (emphasis added).

Articulating a sentiment that surfaces repeatedly during the course of the Council's meetings, Council Member Hayden declared, "Well our paid consultant and the paid hearing Officer said six years, so why don't we give them six." (Tr. 4/11/07 at 88) (emphasis added). Member Berg immediately responded, "I like that idea, six years." (*Id.*)

When the City Council met on May 8, 2007 to discuss the Motion for Reconsideration, Council Member Berg appeared to have second thoughts, and expressed concern that forcing a rushed exhumation could lead to problems, noting that "when you start putting arbitrary time periods on things – there's not one person out here that has a clue how long this is going to take. . .We're sitting here trying to make a decision that frankly we don't have the knowledge to make as far as how long it's going to take." (Tr. 5/8/07 at 23) (emphasis added).

Berg further noted that "when you start hurrying people on things that's when things happen when you put those arbitrary time lines, deadlines on people." (Tr. 5/8/07 at 24-25) (emphasis added). Council Member Hayes echoed that concern, observing that:

> I don't have the expertise to make this decision, but the fact of the matter is we don't need it to be done any faster to make it more

> risky to the health, safety and welfare of the people. . . .I'm sure that the Applicant and the operator would like to have it out of there and into a land facility as soon and as practically financially as possible. . . .[W]hat's in the best interest of the community is to get it out of there – like you said, get it out of there as soon as we can but don't race to get it out of there to where we can't get the – where the blowing factor is connected, the smell is an issue, and the safety is issue and the inspections are impractical. . . So in my opinion we have to – we can't restrict it, shorten up the time any more or anything. We have to allow some flexibility, because no one knows what we're getting into when we get there.

(Tr. 5/8/07 at 27-28) (emphasis added).

It was pointed out during the Council's deliberations that the Host Agreement calls for exhumation to be completed within a commercially reasonable time, as did the Application. The Council Members, however, were clearly uncomfortable with the concept of something being "commercially reasonable," calling that concept "too big of a gray area" and an "undefined standard." (Tr. 5/8/07 at 29, 30).

Of even greater significance is the fact that this Condition seeks to wrest from the IEPA its regulatory authority to determine the permit conditions under which exhumation and relocation of the waste will occur. Thus, the Condition is not only inconsistent with the Board's regulations, it is in direct contravention of the regulations. It is the IEPA, not the City Council, that should decide the methodology and timeframe for the exhumation. Council Members Berg and Hayes were right to have second thoughts. The Council clearly lacks the expertise to make this type of determination.

In summary, requiring completion of the full exhumation process within the compressed timeframe dictated by Condition 13 would drastically increase the cost of operations, and severely undermine the Operator's ability to go forward with the proposed expansion. Moreover, it contravenes the clear and unequivocal agreement of the parties on this specific issue as reflected in the Host Agreement, which, again, was submitted as part of the Application in this

case. It is also in direct conflict with the Board's regulations, inasmuch as it seeks to vest the City Council with authority to determine the permit conditions for the exhumation. Finally, this condition is unsupported by evidence in the record, and is not required to meet Criterion (ii). Clearly, Special Condition 13 should, and must, be deleted.

3. <u>Conditions 22 and 23</u> (imposing expanded berming requirements) is not necessary to accomplish the purposes of the Act.

Condition 22 requires that:

> The plan of operations shall include the construction of operational screening berms of between six (6) and eight (8) feet in height along the Southern edge and partially along the East and West edges of operating cells to help to block the operations from view from Creston Road as well as help contain litter and reduce noise impacts. The Operator shall propose, and the City Manager shall consider for approval, the placement and limits of the operational berms prior to each cell's development. Final approval must be obtained prior to new cell construction. The City Manager shall consider the height of the active face, the distance from the site boundary, and the presence of other visual barriers (such as Unit 2) and the effectiveness of other litter and noise control strategies (such as litter fences and permanent perimeter berms) in making its determination.

(Resolution R07-10, Attachment A, ¶ 22).

Condition 23 requires:

> Perimeter berms shall be built in advance of the cells in order to screen operations to a reasonable extent. It is recommended to require the berms to be built at least 500 feet in advance of the Easternmost edge of the cell being constructed. By way of example, prior to completion of Cell 3's liner, the Southern berm along Creston Road shall be constructed from E 4,200 to E 6,500, which extends approximately 600 feet East of the cell. The vegetation shall be established (with at least a one-year growing period) prior to waste being placed within 400 feet of a cell with active waste placement. The berm shall be at least 14 feet in height, placed between the waste footprint and Creston Road, and located between E 4,500 and E 7,500.

(Resolution R07-10, Attachment A, ¶ 23).

As a threshold matter, Condition 22 vests excessive, arbitrary discretion in the City Manager to decide berming requirements on an *ad hoc* basis, creating the potential for disruption of operations at the site. In addition, Conditions 22 and 23 call for extended berm heights and

placements for both the perimeter berm, which must be fourteen (14) feet high according to Condition 23, and for the operational screening berms, which must be six (6) to eight (8) feet high according to Condition 22. Inasmuch as Condition 23 requires a fourteen (14) foot tall perimeter berm, it is unnecessarily duplicative and redundant to also require the construction of six (6) to eight (8) foot tall operational screening berms inside the facility.

The Administrative Code provides that a facility located within 500 feet of a township or county road or state or interstate highway shall have its operations screened from view by a barrier no less than 8 feet in height. (Title 35, Section 811.302(c)). In keeping with this, the Applicant specifically proposed to screen the facility's operations from view along South Mulford Road, East Creston Road, South Locus Road, and Illinois Route 38 by a vegetated earthen berm or fence with a total height of not less than 8 feet. (Application, Table 2.1-1(L/M). Yet here, without any basis in the record, the Council seeks to require that the perimeter berm be fourteen (14) feet high, or seventy-five percent taller than the law requires. This mandate is excessive, particularly given the fact that the landfill is located in an agricultural area consisting primarily of fields of corn and soybeans. Moreover, testimony by witnesses Shaw Environmental and Chris Lannert at the hearing established that the proposed berms were carefully considered by the City in formulating the Application.

The engineering challenges and additional costs associated with these additional berm requirements would have a serious, deleterious effect on the economic feasibility of the project, while offering no additional benefit to the public health, safety and welfare. Increasing the berm height would necessarily create a much larger base for the berm, not only for engineering reasons but also because the berm must be landscaped and maintained, and worker safety concerns would limit the degree of permissible slope. Thus, a higher berm consumes a substantial amount

of footprint area, making that area unavailable for waste disposal. As a result, the additional berming requirement contributes to making the project financially and technically impracticable and infeasible, and is inconsistent with the terms of the Host Agreement.

The discussion of the City Council members when they met on May 14, 2007 to reconsider the conditions are illuminating, and shed light on the motive behind these conditions. At that meeting, Condition 22 only narrowly survived, by a vote of 4 to 3. Council Member Hollonbeck observed that the active faces are so high she didn't believe an operational screening berm, no matter what its height, would do anything to obstruct the view of operations. (Tr. 5/8/07 at 36). She further noted that she had taken another look at the pictures provided by expert witness Lannert, and that with respect to those pictures:

> if you look back at those it didn't seem to me that an operational berm would do much, so I confess I hadn't done that when we were looking at special conditions. Just the topography is such that either the rollingness of the site or whatever you can see this onsite tower really easily but you can't really see the operational – the – active face. So that was my opinion on – after rereading and looking at their Item 6, Special Condition 22 I would be inclined to delete it.

(Tr. 5/8/07 at 36-37) (emphasis added).

The transcript of the May 8, 2007 Council meeting also reveals that Council Members erroneously believed that granting the Motion's request concerning Special Condition 22 and 23 would leave the landfill with no berms whatsoever. Council Member Hayden stated "they say it's tactically and financially impractical to construct a 14-foot berm. If we eliminate both of these we either have a zero foot – no berm or 14-foot high, there's nothing suggested in between?" (Tr. 5/8/07 at 35). The Council's attorney, Mr. Moran, replied, "Nothing has been suggested in between by what's indicated here, that's correct." (*Id.*).

However, as to Special Condition 23, Ms. Hollonbeck then responded that:

> Mr. Lannert does propose a berm all the way around the perimeter and it would move along with the construction of the new cells, but it was only 8 to 10 feet tall, not 14. . . So the – the motion to consider – to reconsider didn't say go back to 8 to 10 feet, it just said 14 feet is technically and financially impractical. So I don't know what we do about that.

(Tr. 5/8/07 at 37).

Mr. Berg opined that the operational berm was "more of a punitive measure to the operator than it is an operational advantage to anybody. It's saying you have done a bad job, we're going to make you put another berm in." (Tr. 5/8/07 at 38) (emphasis added). Member Hollonbeck agreed. (*Id.*). After some discussion, Attorney Moran then suggested, "Even though the motion hasn't specifically requested relief other than the suggestion that the 14-foot berm be simply deleted, that requirement, you could certainly consider based upon the contents of the record of modifying the condition to reflect what you believe to be the appropriate evidence presented and what the evidence would support, and it may be that 8 to 10-foot berm as set out in the report that Mr. Lannert did." (Tr. 5/8/07 at 39). Ms. Hollonbeck pointed out the testimony of Lannert concerning the proposed 8 to 10 foot berm, and suggested that the Council approve that berm height. (*Id.* at 40). She opined again that the proposed 14 foot berm had been intended merely as a punitive measure. (*Id.* at 41).

Council Member Eckardt then declared, "I think the conditions were put in there because of previous performance and *I think that's part of what this is all about, and I think for us to drop **any** of those would be a big mistake*." (*Id*. at 42) (emphasis added). When others tried to determine whether there was any evidence in the record to support the heightened berm requirements, it was observed that it was the Council's consultant who talked about the so-called operational berms, and Attorney Moran then observed "I don't recall if that was specifically identified by one of the witnesses in their testimony or referred to." (*Id*. at 42). He went on to

confirm that it was the Council's hired consultant who came up with the idea for a 14 foot perimeter berm. (*Id.*).

When Council Member Hayden asked Attorney Moran whether there was any evidence in the record to support the 14-foot requirement, Moran responded that he would have to "go back and look through the record. Frankly, I don't recall specifically that number being used either in the application or the testimony, although I can't say definitively that it's not someplace in the record." (*Id*. at 47). He then opined, "Obviously the consultant determined that was an appropriate height…[and] they obviously felt on some basis that the 14 feet was appropriate, but I can't point to you a specific part of record where we see that 14 feet." (*Id*. at 47-48).

Ultimately, when it came time to vote on the perimeter berm, Council Member Hayden declared that he was voting to affirm the Special Condition's requirement of a 14 foot berm, explaining, "I make that vote because of the inconsistencies in the record and *I have to go with the experts that I hired*." (*Id*. at 52.) (emphasis added). The rest of the Council Members followed suit in voting to affirm the Special Condition.

Rather than relying on the evidence in the record, the Council members appear to be motivated by a desire to be punitive and "hold [RWD's] feet to the fire", and by an unjustified reliance on the opinion of the Council's "paid" consultant. As Council Member Hayden stated at one point, "I listened to the consultant, I think he's smarter than I am…" (Tr. 4/11/07 at 91). Moreover, at least one Council Member appeared to believe the consultant may have been influenced by a desire to be punitive as well, as illustrated in the following colloquy:

> MR. HAYDEN: Where did the experts get that information from when they came up with the conditions, they knew it had to meet the record?
>
> MS. HOLLONBECK: I guess I'm going to go along with Dennis' analysis, <u>maybe it was just a punitive measure to put those</u>

> operational berms in, because it wasn't part of Mr. Lannert's presentation.

(Tr. 5/8/07 at 41) (emphasis added).

The transcripts make clear that there was a determined attempt to use RWD's past operational shortcomings as a whipping boy to justify the imposition of conditions entirely unrelated to those shortcomings or violations, and this is a prime example of that effort.

Because Conditions 22 and 23 enjoy absolutely no support in the record, and offer no additional benefit to the public health, safety, and welfare, they should be deleted.

4. Condition 26 (requiring the Operator to pay the City's costs associated with the City's review of plans and permit applications) is not necessary to accomplish the purposes of the Act.

Condition 26 requires:

> The City Manager, and its legal and technical consultants, shall have the right to be involved in the permitting for the horizontal and vertical expansion of the Rochelle Municipal Landfill. As part of this involvement, the City Manager and its consultants may attend meetings between the Operator and its consultants and the IEPA. The City Manager and its consultants may also review and comment on the Operator's applications (provided such technical review and comment is conducted within 30 days of receipt of the information) prior to the Operator's submission of the applications to the IEPA. The technical review comments shall be incorporated into the applications or addressed to the satisfaction of the City Manager. ***The Operator agrees to reimburse the City for reasonable costs of its consultants to review and comment on the Operator's applications and submissions***.

(Resolution R07-10, Attachment A) (emphasis added).

Condition 26 requires the Operator to pay the City's costs of oversight. The Assessment of costs to a particular party is hardly necessary to establish that the facility is so designed, located, and proposed to be operated that public health, safety and welfare will be protected, and, as such, it is not necessary to accomplish the purposes of the Act with respect to Criterion (ii), the alleged basis for this Condition. Moreover, the Council's attempt to impose these costs on the Operator is manifestly unfair, inasmuch as the City previously negotiated the terms which it

felt should apply to the issue of City review and oversight; those terms are memorialized in the Host Agreement. That Agreement provides that the City shall have the opportunity to review all plans and permit applications prior to their being submitted, but imposed no obligation on RWD to reimburse the City for costs incurred in doing so. Moreover, there is simply no basis in the record for imposing a requirement that the Operator pay the costs of the oversight the City wishes to exercise, and this condition is quite simply an attempt to alter the financial terms of the Agreement.

Condition 26 is financially burdensome, impracticable, redundant and unnecessarily duplicative, and runs directly counter to the Host Agreement, which the City previously negotiated and expressly included as part of its Application. Most importantly, this blatant cost-shifting maneuver is not necessary for public safety, and so is not required to accomplish the purposes of the Act with respect to Criterion (ii), as alleged by the City Council.

5. <u>Condition 28</u> (mandating that the Operator incorporate the City Manager's comments into the Operator's Groundwater Impact Assessment prior to submitting the GIA as a permit application) is not necessary to comply with Criterion (ii) and so is not necessary to achieve the purposes of the Act.

Condition 28 provides that:

> The operator shall submit the groundwater impact assessment (GIA) planned to be submitted to the IEPA as a permit application to the City Manager for review. The City Manager and its consultants may provide the Operator comments (within 30 days of receipt of the information) that must be incorporated or addressed prior to submitting the GIA to the IEPA as a permit application.

(Resolution R07-10, Attachment A, ¶ 28).

Interestingly enough, the Host Agreement provides that to the extent the Operator must file "any state or federal Supplemental Permits, Significant Modification Permits, Renewal Permits, special waste stream permits, adjusted standards, variances, and other permits or authorization…necessary or appropriate for the operations, development, expansion, or closure

of the landfill" the City "will cooperate with the Operator in all such applications or petitions filed by the Operator." (Host Agreement at 3.13). The Host Agreement further provides that the Operator agrees to provide the City with reasonable notice prior to filing such applications, and that the Operator will not seek any permit, variance or standard that will have a material adverse effect on the City without the City's prior written approval. (*Id.*).

In contrast with the cooperative relationship described in the Host Agreement, which was the end-result of extensive, previous negotiations between the parties, Special Condition 28 would drastically alter that relationship, and would essentially vest the City with carte blanche, unilateral authority to alter the content of any GIA permit filed by the Operator. This Special Condition would undermine the cooperative arrangement contemplated by the Host Agreement, and is clearly not necessary to ensure the protection of public health, safety or welfare. As noted above, relevant provisions of the Host Agreement, which was included as a part of the City's Application, more than suffice in this regard. This Condition is therefore not necessary to accomplish the purposes of the Act, and should be deleted.

5. <u>Conditions 33 and 34</u> (imposing the cost of additional Mulford Road improvements) are not necessary to accomplish the purposes of the Act as to Criterion (vi).

Condition 33 provides that:

> The following roadway improvement shall be made to Mulford Road, at the expense of the Operator, prior to acceptance of waste within the expanded facility waste footprint:
>
> > The reconstruction of Mulford Road between Route 38 and the existing landfill entrance shall be designed to a rural standard with a dust free, all weather surface, provide a design weight limit of 80,000 pounds and shall be at least two lanes wide.

(Resolution 07-10, Attachment A, ¶ 33).

Condition 34, <u>as amended by Resolution R07-18</u>, requires:

> The improvement to Mulford Road as described in special condition 33 above shall be completed from the existing landfill entrance to Creston Road, no later than the date on which the proposed new entrance for the expansion is built and completed as required in Special Condition 16. The Operator shall pay all costs of said improvements to the new landfill entrance, and a portion of the cost of the improvements from the new landfill entrance to Creston road proportionate to the anticipated traffic attributable to the expanded facility, as determined by a traffic study.

(Resolution R07-18).

Traffic expert Werthmann testified that most of the traffic that can be expected to use the landfill is already using it, since the expansion is simply a continuation of existing operations. (Tr. 1/23/07 at 23-24, 29, 30-31). Werthmann's estimates were extremely cautious, and although the landfill expansion is expected to eventually process as much 1,000 tons of waste per day, Werthmann used a substantially higher figure – 1500 tons per day – in his calculations. (See Tr. 1/23/07 at 29). Werthmann's studies showed that the increased volume of traffic on Mulford Road would be "not significant by any means." (Tr. 1/23/07 at 34-35) (emphasis added). The Hearing Officer also noted that the evidence presented at the hearing showed that "the majority of the traffic generated by the proposed expansion is already on the roadway system. There will be little new traffic generated by the expansion." (Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendations at 31) (emphasis added).

Werthmann testified concerning the existing plans to improve Mulford Road to accommodate transfer trailers, to reconstruct the road as a two-lane road with an 80,000 pound weight limit. (Tr. 1/23/07 at p. 21). The Hearing Officer's Findings of Fact and Conclusions of Law reflect that the sole evidence concerning Criterion (vi) was presented by Werthmann. (Hearing Officer's Findings of Fact and Conclusions of Law, at 28-34).

An examination of the evidence reveals that the proposals of Special Condition 33 are largely duplicative of upgrades to Mulford Road which are already proposed for this section of

road, which will be the primary route to and from the landfill. (*See* Tr. 1/23/07 at 21). Werthmann testified that 80% of the landfill traffic would use this route. (Tr. 1/23/07 at 27; PowerPoint Slide 14). Nevertheless, despite testimony that the increase in traffic would be "not significant by any means," Condition 33 requires that the Operator bear the *full* cost of the road improvements to the Mulford Road upgrades, and also adds a requirement that the road improvements must be completed ***prior to acceptance of any waste within the expanded facility waste footprint***.

Condition 34 then requires that, in addition to the upgrades mandated by Condition 33, the Operator must also provide the same upgrades to Mulford Road heading *south* from the landfill entrance to Creston Road. There is, however, absolutely no evidence supporting the need for this expansion of the Mulford Road project, particularly in light of the fact that inbound transfer trucks can not even use the southbound-to-Creston route, since it is not rated for 80,000 pound trucks. (Tr. 1/23/07 at 170). Among the unusual aspects of this requirement is the fact that the City Council here seeks to impose a requirement that RWD pay the costs of improving *a township road*.

In addition, the area encompassed in Special Condition 34 is one that is already targeted for growth as a commercial/industrial area, and as Council Member Hollonbeck pointed out, the new landfill site entrance "won't be built for several years. . .and by that time there could be additional industry using Creston Road and Mulford Road." (Tr. 5/8/07 at 70). Council Member Hayden observed, "The person that benefits from the construction of the road, probably across the street is zoned I2, they're the people that probably will benefit from it." (*Id*. at 72) (emphasis added). Warehouses and industrial sites generate far more traffic per acre than a landfill, and it

is clearly inequitable to force the Operator to make road improvements before it even opens the new entrance, and to bear the cost of road improvements for the benefit of other entities.

Nevertheless, the members of the Council were, once again, inclined to defer to their "paid" consultants and ignore the evidence. As Mr. Berg declared, "I think our City staff gave us a very good suggestion here and I'm inclined to go with what our City staff told us, that's my opinion." (Tr. 5/8/07 at 76). Ms. Hollonbeck quickly agreed, and Mr. Berg then added, That's what we pay these people for is to give us the sound advice, that's my opinion." (Tr. 5/8/07 at 76-77). In the view of the Council Members, it appears that the actual evidence contained in the record was irrelevant, or at best superfluous, and all they really needed to decide the siting application was the unsubstantiated opinion of their hired experts.

Because the evidence does not show that the mandated upgrades to Mulford Road, which are required to be made at the Operator's expense, are necessary to comply with Criterion (vi), they do not further the purposes of the Act and should therefore be deleted.

IV. CONCLUSION

The Application submitted for the proposed expansion of the Rochelle Municipal Landfill was exhaustively thorough in every detail, and reveals that the expansion meets every one of the Section 39.2 siting criteria. As landfill sites go, this is an exceptionally good choice due to its favorable geology and overall location.

The challenged Special Conditions were clearly not necessary to accomplish the purposes of Section 39.2 of the Illinois Environmental Protection Act ("the Act"), and, as previously noted, were imposed largely to "minimize fears" of a citizen group rather than to meet the requirements of the Act. Even more troubling are the many comments by Council Members during their deliberations on the Motion to Reconsider, in which it became apparent that they were, at least in part, imposing Special Conditions as a way to punish the Operator for perceived

shortcomings in the past, and to now "hold its feet to the fire." Although reasonable minds may differ with respect to the character of the operator's record and the significance of past violations, it is impermissible to cast the record out over the waters as a vast, all-encompassing net to justify every manner of condition, from imposing the cost of unrelated road improvements to raising the requirement for the height of the landfill's berms.

Another disturbing aspect of this case is the decision maker's attempt to unilaterally reallocate previously agreed-upon costs under the guise of special conditions. Never in the history of Section 39.2 has the PCB held that special conditions can be used to allocate or shift costs. Rather, the appropriate place for determining cost allocation is in a Host Agreement. Section 39.2 recognizes the significance of the role of a Host Agreement, and accordingly requires that where there is an existing Host Agreement, that Agreement must be included as part of the record of the proceeding. Moreover, it is no accident that the statutory requirement for inclusion of the Host Agreement in the record of proceedings appears in logical sequence within the Siting Statute, in close proximity to the provision concerning imposition of Special Conditions.

In summary, the Special Conditions imposed by the Rochelle City Council were clearly not imposed to further the purposes of the Act, and are inconsistent – and in at least one instance in direct contravention with – the regulations promulgated by this Honorable Board. Moreover, there is no support in the underlying record for these conditions, the overwhelming majority of which run contrary to the terms of the Host Agreement and, in many cases, are merely being used to unilaterally shift City costs onto RWD after the parties have already negotiated a mutually acceptable agreement for the operation of the landfill site.

For all of the above-referenced reasons, this Board should order the challenged Special Conditions deleted.

Dated: August 1, 2007

Respectfully submitted,

ROCHELLE WASTE DISPOSAL

By: s/ Charles F. Helsten
Charles F. Helsten
One of Its Attorneys

Charles F. Helsten
Richard S. Porter
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900