

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN BOTTOM CONSERVANCY, and )  
)  
SIERRA CLUB, )  
)  
Co-Petitioners, )  
)  
v. ) PCB\_07-84\_\_\_\_\_ )  
) (Pollution Control Facility )  
CITY OF MADISON, ILLINOIS, and ) Siting Appeal )  
)  
WASTE MANAGEMENT OF ILLINOIS, INC., )  
)  
Respondents. )

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NOTICE OF FILING

Please take notice that on the 15<sup>th</sup> day of October, 2007, I have filed with the Office of the Clerk of the Pollution Control Board petitioner's reply brief, a copy of which is herewith served upon you.

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PETITIONERS' REPLY BRIEF

**Argument**

**I.**

**A. There is no substantive buffer between the proposed landfill and Horseshoe Lake State Park**

In their opening brief petitioners showed (pp. 6-7) that the proposed facility is incompatible with the surrounding area because the railroad tracks provide no meaningful buffer for many of the persons using Horseshoe Lake State Park.

For its response Waste Management argues (p. 11) that there are additional significant buffers between Horseshoe Lake State Park and North Milam. Specifically, it points to (p. 11) the distance between the activities at the north end of the Park, open fields, the Lake itself, and a 30-acre wetland mitigation area.

Horseshoe Lake State Park is a 2,968-acre Park. C 0456 (Ex. ABC 8), 0458, 0459, 0460. The uses at the far end of the Park may be buffered by the acreage that consists of the Park itself (for the activities "located on the north side," "open fields, distance and the lake

itself” (C 1020)), but that is not the case for those who use the other parts of the Park. For example, Waste Management’s consultant conceded that, if constructed, the landfill would be bounded by railroad tracks on the landfill’s Northern boundary. C 0458. The Fish and Wildlife area at the southern end of the Park abuts these railroad tracks. C 0462. Much of the nature and wildlife observation is at the southern end of the Park. People fish in and on Horseshoe Lake. C 1538. People also use the lake for subsistence fishing. C 2160, C2165. People hunt along the Lake and on the Lake itself. C1538. Many of the public hunting blinds are located along the southern portion of the Lake. C 1543. Horseshoe Lake is just 2,000 feet from the proposed landfill. Ex. ABC 8 (Location Map), C 0456. The record simply does not support the assertion that there are additional significant buffers between most of the Park and North Milam.

Waste Management next asserts (p. 11) that its consultant’s report proposed a phased-in screening of North Milam from off-site views with natural materials. Waste Management is attempting to fabricate a buffer for the landfill, while in operation, where none exists. The consultant’s discussion of these natural materials is set out in the section of his report that deals with North Milam’s “End Use Plan.” C 0487. These materials are not proposed to serve as a buffer during the operation of the landfill. That these materials are not a buffer for the landfill’s operations is confirmed by the consultant’s testimony. There was no effort to evaluate the visual impacts of the landfill during the landfill’s operation. C 1051. And Waste Management’s consultant made no attempt to evaluate impacts from odor during the landfill’s operation upon nature observers, birdwatchers, those walking trails, fishing, picnicking, camping and hunting, or upon anyone else. C 1021. Moreover, with expansions, the proposed landfill may operate for many years beyond its initial 17-year proposed life span.<sup>1</sup>

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<sup>1</sup> In its brief Waste Management characterizes (p. 1) the proposed landfill as an expansion of the existing Milam landfill, but the proposed landfill sits in a different city, a different county, and on the opposite side of the Cahokia Canal. C 0019; Ex. ABC 8 (Location Map), C 0456. It is a different landfill.

The location of the proposed landfill is incompatible with the surrounding area. It is located just 2,000 feet from a State park used by hundreds of thousands of people every year. C 0456. It is not possible to minimize that incompatibility.

**B. American Indian Mounds are located on the proposed landfill site and ancient human remains have been found at the site**

Petitioners showed in their opening brief (p. 3) that Waste Management encountered Native American sites (sites 1316, 1375, and 1385) at the proposed landfill site.

Waste Management responds (pp. 12-13) that the impacts to these Mounds are irrelevant and not part of the siting criteria analysis. The Native American Mounds are a predominant part of the surrounding area. These Mounds are associated with the Cahokia Mounds World Heritage Site. C 1539, 2069. Waste Management's disturbance of these sites (see opening brief, p. 3) has provoked an ongoing outcry from the Native American community:

The value of Cahokia Mounds . . . is inestimable as both a Sacred Site for American Indians and an important resource for people throughout the world. . . . There is no other place in the United States that has a greater claim to importance as a Sacred Place than does Cahokia.

Sam Valenti, American Indian, C1589.

There are mounds on the land that they want to expand into. There's also a burial site and this is very sacred to indigenous people.

Deanna Wagner-Brice, C 1457.

You're putting in a landfill next to Cahokia proper and potentially directly on top of where remains have been discovered. We in contemporary society have a

moral obligation to do the right thing. We wouldn't do that to a cemetery of today. Nobody would stand for that.

Carrie Wilson, consultant for the Osage Nation, C 2153.

[I]f you do this landfill, you are – you are digging into our ancestors, you are desecrating our ancestors, especially these burials. It's like me going to a cemetery and dig up your relatives, your families, your relatives and take them out to do a landfill so the City can make money out of this.... This affect [sic] us indigenous people, our native people all over the world

Ruben Aguirre, member of the Tongva Nation, C 1459.

Further, Waste Management's disturbance of these sites has provoked criticism from persons who study these Mounds:

In addition to this garbage adversely affecting one of Illinois most important tourist attractions, two pre-Columbian mounds associated with the Cahokia mounds culture are located within the proposed area of development, as is another site containing human remains and other features such as houses that are significant.

John Kelly, Ph.D., Archaeologist, Asst. Dir Powell Archaeological Research Center, C 2069.

[T]he identification of two pre-Columbian mounds within the proposed area of development, and recovery of human remains from a site that has been determined eligible for inclusion on the National Register of Historic Places, are additional reasons that consideration be given to finding another location for the St. Louis region's garbage.

Cahokia Archaeological Society, C 2074.

Waste Management's reliance (p. 12) upon *Hoesman v. City Council of the City of Urbana*, PCB 84-162 (March 7, 1985) and *Clutts v. Beasley*, 185 Ill. App. 3d 543, 546, 541 N.E.2d 844, 846 (5<sup>th</sup> Dist. 1989), is misplaced. These cases do not refute the fact that the Native American Mounds are as much a part of the "character of the surrounding area" as are the other areas in the vicinity of the proposed landfill. See p. 7, *infra*.

Finally, Waste Management argues (p. 13) that the evidence demonstrates that the Mounds are not located within North Milam. First, that is not what the record shows. See pp. 9 - 10, *infra*. Second, whether some of the Mounds are onsite or offsite, Waste Management's actions to develop the proposed landfill have disturbed these sites. C 1592, 1593, 2084, 2087, 2095.

**C. The site is within 2,140 feet of the Cahokia Mounds World Heritage Site and National Historic Landmark Boundary**

In their opening brief, petitioners showed (p. 8) that there is widespread opposition to the landfill because of the landfill's impact on the Cahokia Mounds World Heritage Site.

Waste Management counters (pp. 14-15) that its consultant determined that the proposed landfill is physically and visually separated from Cahokia Mounds, and that there is no evidence to refute that opinion. There is evidence to the contrary in the form of the existing landfill:

You go up on Monks Mound, you look out and you see a landfill and its very distressing. Some people ask if this is another mound.

Deanna Wagner-Brice, C 1457.

You go up on Monks Mound and you can see it. Monks Mound is the highest Native American site. It's disrespectful to build a landfill higher than that.

Jim Bensman, C 1469.

The landfill will certainly detract from the overall experience of visitors to Cahokia Mounds Heritage Site in that it will be a visual detraction, especially from the top of Monk's Mound.

John Kelly, Archaeologist, Asst. Dir Powell Archaeological Research Center, C2069.<sup>2</sup>

A landfill by its very nature is a mound. Monks Mound is the largest prehistoric earthen construction in the Americas. C 1547. It is simply not possible to minimize the incompatibility of the proposed landfill with Cahokia Mounds.

**D. The proposed landfill will take eighteen acres of wetlands**

Petitioners showed in their opening brief (p. 8) that the proposed landfill will take 8.5 acres of farmed wetlands and 9.9 acres of forested wetlands.

Waste Management responds (p. 7) that it was not required to submit evidence about the impacts to the wetlands because the wetlands are subject to a separate review process under the Clean Water Act. That the wetlands are subject to a separate review process does not insulate them from review here.<sup>3</sup> The wetlands are as much a part of the "character of the surrounding area" as are, for example, the "natural open areas," discussed by Waste Management's consultant in his report. C 0459. Wetlands provide "fish and wildlife habitats, natural water quality improvement, flood storage, . . . opportunities for recreation and aesthetic appreciation . . . Wetlands are among the most productive ecosystems in the world, comparable to rain forests and coral reefs." U.S Environmental Protection Agency, *Wetlands Functions and Values*, online at

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<sup>2</sup> Waste Management points to (p. 15) the IHPA letter that it submitted under an offer of proof. Cahokia Mounds was declared a World Heritage Site by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1982, one of just 20 such sites in the United States. See <http://whc.unesco.org>. The IHPA cannot sign away the protection due a World Heritage Site. Nor can it represent the tribal nations and indigenous peoples that consider a site sacred because of the existence of mounds, burials or the discovery of prehistoric remains.

<sup>3</sup> Similarly, that the Illinois Department of Natural Resources administers the State's parks did not insulate Waste Management from evaluating the impact of the proposed landfill on Horseshoe State Park. See, e.g., C 0462.

<http://www.epa.gov/watertrain/wetlands>. See also C 2158. Horseshoe Lake and the area wetlands are on the Mississippi River flyway. C 2164.

The siting criteria require Waste Management to locate the proposed landfill in a manner that minimizes incompatibility with the surrounding area, including the wetlands. The 13.9 acre moderate to high quality wetlands complex lies in the central portion of the property. C 1939. It is not possible to minimize the incompatibility of North Milam with these wetlands.

**E. No effort was made to determine whether the proposed landfill would be compatible with the surrounding area during the landfill's operation.**

In their opening brief petitioners pointed out (pp. 8-9) that Waste Management made no effort to determine whether the proposed landfill would be compatible with its surroundings during its operation. C 1025-1026, 1051.

Waste Management responds (p. 16) that operational issues are not meant to be determinative of compatibility under criterion (iii), relying upon *Hoesman v. City Council of the City of Urbana*, PCB 84-162 (March 7, 1985). However, *Hoesman* makes clear that “the future reconstruction or development of the site are irrelevant to the current *compatibility of an operating site* with the surrounding area” (emphasis supplied). See also, e.g., *Waste Management of Illinois, Inc. v. Pollution Control Bd.*, 123 Ill.App.3d 1075, 1088, 463 N.E.2d 969, 979, (Ill. App. 2nd Dist. 1984) (expert evaluates landfill's operation and effects as part of compatibility analysis). That Waste Management mentions the operation of the landfill during its discussion of criteria (ii) and (v), or mentions its phased-in plan for screening as part of its End Use Plan, does not cure a complete failure to evaluate the compatibility of the landfill during the landfill's operation.

*Summary*

For the reasons set forth above, and for the reasons set out in petitioners' opening brief, the proposed landfill is not located so as to minimize incompatibility with the character of the surrounding area. In fact, it is not possible to minimize the incompatibility of the proposed



landfill with the character of the surrounding area.

**III.**

**A. and B.**

**The siting proceedings were fundamentally unfair because Waste Management failed to present evidence during the public hearing of the Native American Mounds, the ancient remains, and the wetlands at the site, and petitioners were precluded from examining Waste Management's witnesses about these Mounds, remains and wetlands**

In their opening brief (pp. 10-13) petitioners showed that the proceedings before the City of Madison were not fundamentally fair because Waste Management presented no evidence of the on-site Native American Mounds, the ancient human remains, or the wetlands during the public hearing and, at the hearing, petitioners were precluded from inquiring into these Mounds, remains and wetlands.

In response Waste Management asserts (pp. 2, 19) that it is not fundamentally unfair to limit cross examination to relevant evidence concerning the statutory criteria. The issue, thus, is clearly defined. If the Native American Mounds and wetlands are a part of the "character of the surrounding area," then Waste Management should have presented proof of the landfill's compatibility with the Mounds and the wetlands, and petitioners should have been permitted to inquire about the Mounds and the wetlands during the hearing before the City.

To support its argument Waste Management relies upon (p. 12) *Clutts v. Beasley*, 185 Ill. App. 3d 543, 546, 541 N.E.2d 844, 846 (5<sup>th</sup> Dist. 1989). Waste Management correctly points out that, in *Clutts*, the court held that a guarantee against contamination is not required by the statute. 541 N.E.2d 844, 846. But *Clutts* does nothing to refute the point that the Native American Mounds and the wetlands are as much a part of the "character of the surrounding area," as are,

for example, the open fields or farmland, addressed by Waste Management as part of its compatibility analysis.

Waste Management also relies upon (pp. 20-21) *Land and Lakes Company v. Pollution Control Board*, 319 Ill. App. 3d 41, 51, 743 N.E.2d 188, 196 (3<sup>rd</sup> Dist. 2000). In *Land and Lakes*, the objectionable document had been submitted by the siting authority's staff. See *Land and Lakes Company v. Will County Board*, PCB 99-136 at 4 (August 5, 1999). This Board made clear that the document was not expert testimony but instead was "a summary of the testimony, the public comments, and recommendations from the authors of the document." *Land and Lakes Company v. Will County Board*, PCB 99-136 at 9. The objectionable document in *Land and Lakes* was different from the documents submitted by Waste Management here - documents needed to satisfy one of the siting criteria. Here Waste Management declined to put forth its proof until 28 days after the conclusion of the hearing.

Further, petitioners showed in their opening brief (pp. 11-12) that they were precluded from inquiring into these matters during the hearing before the City. In advance of that hearing, petitioners had received papers concerning the Mounds from Waste Management's Mr. Durako. Tr. 22. Petitioners gave these papers to archeologist Dr. John Kelly for his review. Tr. 23. Dr. Kelly was critical of the papers, the procedures, the absence of an archaeological report on the discovery of the human remains, and the way the surveys were reported and conducted. Tr. 27. He gave to petitioners notes for petitioners to use to question and rebut Waste Management's report. ABC Ex. 11.<sup>4</sup>

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<sup>4</sup> The Board may consider additional evidence relevant to the fundamental fairness of the local siting proceedings where the evidence necessarily lies outside the record. *Land and Lakes Company v. Illinois Pollution Control Board*, 743 N.E.2d 188, 194 (Ill. App. 3d Dist. 2000).

At the hearing petitioners were prepared to elicit from Waste Management testimony about the landfill's impacts to the Native American Mounds discovered at the site. C 1045-46. Dr. Kelly had reported to petitioners that "it is not clear what sites are actually within the project area and what will be impacted." The lack of clarity concerning the impacts to these Mounds remains. For example, in its brief, Waste Management points to (pp. 5-6) a January 16, 2007, letter from Mr. Shinn to support the following assertions: "no American Indian Mounds have been located within North Milam;" "there are no known burial sites within the site;" "site 1316 is not within North Milam's footprint;" "site 1385 is not on WMII-owned property and is 1,000 feet from North Milam's boundary;" and "site 1375 also is outside North Milam." A careful reading of Mr. Shinn's letter (C 1591-1593), however, shows that none of these statements is supported by that letter. What the letter does say is that although the "North Milam site is well outside the established boundaries of the Cahokia National Landmark World Heritage site<sup>5</sup> . . . it is certain the investigated prehistoric sites are associated with Cahokia." C 1593. Further, an attachment to this same letter says that the "investigation of the 180 acres that make up the proposed project contained 7 archeological sites." C 1607.

Finally, Waste Management (p. 20) and the City (p. 4) both argue that it was for petitioners to determine what information they believe is important, and to make that submission. That simply is not feasible when petitioners lack access to the land that would allow them to gather the data.

For the reasons put forth above, the Native American Mounds and wetlands are a part of the "character of the surrounding area." Accordingly, Waste Management should have presented

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<sup>5</sup> In its brief Waste Management concedes that the proposed landfill is only 2,140 feet outside the boundaries.

proof of the landfill's compatibility with the Mounds and the wetlands, and petitioners should have been permitted to inquire about these Mounds and wetlands at the public hearing. It is even more fundamentally unfair because Mayor John Hamm wrote to the two archaeological organizations stating that the City's decision was based on the archaeological report submitted as public comment. C 2246-47.

**C. There is no written decision of the City specifying the reasons for the decision**

In their opening brief, petitioners showed (pp. 13-14) that there is no written decision here that specifies the reasons for the City's decision to approve the landfill. 415 ILCS 5/39.2 (e); *Land and Lakes Company v. Illinois Pollution Control Board*, 319 Ill. App.3d 41, 45, 743 N.E.2d 188, 191 (Ill. App. 3d Dist. 2000).

The City argues (p. 4) that the action taken by its City Council reflected in its written minutes of February 6, 2007, is sufficient to comply with the statutory requirement of a written decision with reasons given. Similarly, Waste Management asserts (p. 2) "the City's unanimous approval and adoption of the Hearing Officer's findings of fact and recommendations at a *transcribed* [emphasis added] City Council meeting is sufficient to satisfy Section 39.2(e). Both the City (p. 4) and Waste Management (p. 21) rely upon *Peoria Disposal Co. v. Peoria County Board*, PCB 06-184 slip op. at 33-34 (June 21, 2007.)

In *Peoria Disposal*, this Board had before it "the entire decision . . . stated verbatim in the transcript." *Peoria Disposal Co. v. Peoria County Board*, PCB 06-184 slip op. at 13. As pointed out by one of the parties, "the County Board could not have created a written decision that was more accurate and complete than the final meeting transcript. *Id.* With the reasons for the County Board's decision set out verbatim in the transcript, this Board found that the transcript and the recommended findings of fact satisfy the requirements of Section 39.2(e). *Id.*

Here, however, the City of Madison did not even mention or refer to any reasons or to any findings or to any documents stating the reasons for its approval. There is nothing in the record specifying the reasons for the decision. The City of Madison simply voted:

It was moved by Alderman Grzywacz, seconded by Alderperson Armour, to approve the Waste Management Siting Application dated September 22, 2006.

Roll call vote as follows: Yeas: Armour, Bridick, Grzywacz, Riskovsky, Hampsey, Vrabec, Gardner, and Treadway. Nays: None. Motion carried.

C 2242.

The vote, without reasons, does not satisfy the requirements of the Act.

Waste Management argues (p. 22) that the Hearing Officer's written findings of fact and recommendation together with the written transcript of the City's approval on February 6, 2007, are in accordance with Section 39.2(e). There is no written transcript of that meeting. There are only meeting minutes that give no reason for the City's decision.

Both the City (p. 4) and Waste Management (p. 21) assert that, on February 6, 2007, the City adopted the Hearing Officer's written findings of fact and recommendation. There is nothing in the record to support these assertions. These are unsupported assertions made by counsel that should be disregarded by this Board. E.g., *Wauconda Fire Protection Dist. v. Stonewall Orchards, LLP*, 343 Ill.App.3d 374, 377, 797 N.E.2d 1130, 1133 (Ill. App. 2nd Dist. 2003) (various statements in brief that are not supported by the record are not properly before the reviewing tribunal, and cannot be used to supplement the record). See also *Allstate Ins. Co. v. Kovar*, 363 Ill.App.3d 493, 499, 842 N.E.2d 1268, 1273, (Ill.App. 2nd Dist. 2006) (when party relies on matters outside the record to support its position on appeal, the reviewing tribunal may strike the entire brief or, alternatively, simply disregard the inappropriate material).

The City tries to salvage its bare vote by arguing (p. 4) that “[g]iven the paucity of competent information submitted by Petitioners during the lengthy siting process, there was no basis for the City Council to have voted otherwise.” Whether there are thousands of pages of “competent information” or none at all, the statute requires a written decision with reasons given. Without reasons, there can be no meaningful administrative or judicial review of the City’s decision:

It is clear that a decision by an administrative agency must contain findings to make possible a judicial review of the agency's decision. The Supreme Court in *Securities and Exchange Com. v. Chenery Corp.*, 318 U.S. 80, 94, 63 S.Ct. 454, 462, 87 L.Ed. 626, described the requirement stating that ‘the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.’

*Reinhardt v. Board of Ed. of Alton Community Unit School Dist. No. 11*, 61 Ill.2d 101, 103-104, 329 N.E.2d 218, 220 (Ill. 1975). *Accord Waste Management of Illinois, Inc. v. Illinois Pollution Control Bd.*, 145 Ill.2d 345, 352, 585 N.E.2d 606, 609 (Ill. 1991).

**Conclusion**

The application fails to meet the siting criteria. The proceedings conducted by the City of Madison were not fundamentally fair. Waste Management's application for siting approval should be denied.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 15th day of October, 2007, a complete copy of the foregoing document was served upon counsel for respondents by electronic mail.

/S/ Bruce A. Morrison