BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
	)	
Petitioner,	)	
	)	No. PCB 04-186
vs.	)	(Pollution Control Facility
	)	Siting Appeal)
COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: All Attorneys of Record

PLEASE TAKE NOTICE THAT on November 20, 2007, I mailed for filing with the Illinois Pollution Control Board, Chicago, Illinois, the attached **Respondent County Board of Kankakee County, Illinois' Brief in Support of its Decision to Deny Siting Approval to Waste Management of Illinois, Inc.**, a copy of which is herewith served upon you.

DATED: November 20, 2007

COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS,

BY: HINSHAW & CULBERTSON

/s/
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RESPONDENT COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS' BRIEF IN SUPPORT OF ITS DECISION TO DENY SITING APPROVAL TO WASTE MANAGEMENT OF ILLINOIS, INC.

For the reasons set forth herein, Respondent, County Board of Kankakee County, Illinois ("Kankakee County Board"), respectfully requests that this Board affirm its decision to deny siting approval to Waste Management of Illinois, Inc. ("Waste Management"), the Petitioner herein.

INTRODUCTION

Waste Management attempts to make the history of this case sound much more exciting and intriguing than it actually is, asserting that it is a "long and complex story involving conspiracy, deceit, perjury and political intimidation." (Petitioner's Brief, p. 2). A review of the facts of this case actually reveals that it is rather straightforward. On August 16, 2002, Waste Management submitted an Application for local siting approval for an expansion of the existing Kankakee Landfill located in unincorporated Kankakee County, Illinois. Public hearings on that Application were conducted before a hearing officer, John McCarthy, and the Kankakee County Regional Planning Commission from November 18, 2002 through December 6, 2002. The Application was approved by the Kankakee County Board on January 31, 2003. This Board reversed the Kankakee County Board's approval of Waste Management's siting application on

January 9, 2003 on jurisdictional grounds because one property owner did not receive notice as required under Section 39.2(b) of the Illinois Environmental Protection Act (Act). *See County of Kankakee v. City of Kankakee*, PCB 03-31, 33, 35 (Jan. 9, 2003).

After this Board reversed the County Board's approval of Waste Management's 2002 Application, Waste Management filed a new Application for local siting approval for an expansion of the existing Kankakee Landfill on September 26, 2003. According to Waste Management's counsel, the Application Waste Management filed in 2003 was "essentially the same as the siting request filed by WMII on August 16, 2002, that was approved by the Kankakee County Board on January 31, 2003[,] [w]ith the exception of updated information concerning Ordinance requests, criteria 1, 3 and 8 reports, and new information relating to prefiling notice." (Cover letter to Vol. I of Waste Management App. filed on Sept. 26, 2003).

Public hearings on Waste Management's 2003 Application were held before Hearing Officer John McCarthy and the Kankakee County Regional Planning Commission from January 12, 2004 to January 21, 2004. The Kankakee County Regional Planning Commission recommended approval of Waste Management's Application in a divided vote of 9-3 on March 9, 2004. (C.4114).[1] In its 14-page report, the Commission recommended that one special condition be imposed with respect to criterion (i), fifty-six special conditions be imposed with respect to criterion (ii), six special conditions be imposed with respect to criterion (iii), two special conditions be imposed with respect to criterion (v), fourteen special conditions be imposed with respect to criterion (vi), and three special conditions be imposed with respect to criterion (viii). (C.4101-4114). On March 17, 2004, the Kankakee County Board voted to deny

[1] The record with respect to Waste Management's 2003 Siting Application is cited as "C.[page number]." The IPCB Hearing regarding Waste Management's 2003 Siting Application is cited as "IPCB Hrg. [date], pp. [page numbers]. Exhibits from the IPCB Hearing regarding Waste Management's 2003 Siting Application are cited as IPCB Hrg. [party introducing exhibit] Ex. [number], p. [page number(s)]

Waste Management's Application for local siting approval, finding that Waste Management failed to satisfy criteria (i), (iii) and (vi) of Section 39.2(a) of the Illinois Environmental Protection Act (Act). (C.4115-C.4125). Specifically, 16 of the 28 County Board members voted that criteria (i) and (vi) had not been met, and 18 of the 28 County Board members voted that criterion (iii) had not been met. (C.4116, 4123, 4124). The Kankakee County Board determined that the proceedings were "conducted in a fundamentally fair manner." (C.4115).

On April 21, 2004, Waste Management filed a Petition for Hearing to Contest Site Location Denial with this Board, arguing that the Kankakee County Board's denial of criteria (i), (iii) and (vi) was "fundamentally unfair, unsupported by the record and against the manifest weight of the evidence." (Petition for Hearing to Contest Site Location Denial, para. 8). For the reasons set forth below, the Kankakee County Board's decision to deny siting approval to Waste Management was fundamentally fair, supported by the record and was not against the manifest weight of the evidence. As a result, this Board should affirm the decision of the Kankakee County Board denying Waste Management's Application for expansion.

STATEMENT OF FACTS

1. Facts Related to Criterion (i)

Waste Management presented the testimony of Cheryl Smith, who also testified at the 2002 siting hearing regarding need. (C.2607). Since the 2002 siting hearing, Ms. Smith updated the report that she drafted on criterion (i). (C.2607, p. 49). Her findings in her 2003 report were substantially different than her findings in 2002, in that she determined that the capacity shortfall for the service area in 2003 was 10 million tons less than she estimated in 2002, with her finding a capacity shortfall of 59 million tons in 2002 and 49 million tons in 2003. (C.2607, pp. 70-71). Based on this capacity shortfall and her assumption that the existing Kankakee Landfill will

close in 2005, she concluded that there would be a need for this facility in 2009 or 2010. (C.2607, p. 72).

Ms. Smith admitted that her calculations regarding when the need for the facility would arise were based on recycling rates that were substantially below the current recycling rates of several communities. (C.2607, pp. 55-56). For example, Ms. Smith used a recycling rate for the County of Kankakee that was 16% below its current recycling rate, and a recycling rate for the City of Chicago that was 8% below its current recycling rate. (C.2607, pp. 55-56). Ms. Smith admitted that if the recycling goals of the various communities in the service area were met, there would be sufficient capacity in the service area until 2015. (C.2607, p. 76).

Ms. Smith also admitted that her need report did not consider several facilities in or near the service area that were in the siting and/or permitting process and would be able to handle waste in the service area. (C.2607, p. 58). Most notably, Ms. Smith did not include in her report or her need calculations the 27 million tons of capacity that would be available from the Town & Country Landfill, located directly in Kankakee County, for which siting approval has been granted. (C.2607, p. 81). Ms. Smith also did not include in her analysis the vertical expansion of the Livingston Landfill even though it has received siting approval and 80% of the 30 million ton capacity will be available to the service area identified by Waste Management. (C.2607, pp. 77-78, 110-111). She also did not consider a proposed 10 to 15 million ton expansion of a Chicago landfill that would greatly reduce the capacity shortfall for the service area. (C.2607, pp. 87-88).

Ms. Smith also failed to consider in her need report other landfills that are currently permitted and available to receive waste from the service area, including Prairie View, Brickyard Landfill and Spoon Ridge Landfill. (C.2607, pp. 76-80). Ms. Smith conceded that the available capacities of Prairie View, Spoon Ridge and Town & Country would total 80 million tons, which

is almost two times the capacity shortfall that Ms. Smith found for the service area in her report. (C.2607, p. 82-84). While Ms. Smith noted that Spoon Ridge is currently inactive, she agreed that Spoon Ridge could open at any time and that if it was opened, nothing would prevent it from taking Kankakee County waste. (C.2607, p. 85). She also conceded that if there was a demand for capacity, Spoon Ridge would be opened. (C.2607, p. 100).

2. Facts Related to Criterion (iii)

WMII presented the testimony of two witnesses with respect to Criterion (iii), Ms. Patricia McGarr and Mr. Christopher Lannert. Ms. McGarr testified that she gathered additional information and data since her testimony at the 2002 siting hearing but was still of the opinion that the proposed expansion would not have an adverse impact on surrounding property values. (C.2605, pp. 33-35, 41). A great deal of Ms. McGarr's testimony consisted of her explaining why she had testified in 2002 to having an Associate's Degree when the records from the college that she attended reflected that she had not graduated nor received an Associate's Degree. (C.2605, pp. 43-75).

While Ms. McGarr testified that the existing Kankakee Landfill has no impact on property values, she admitted that she performed no appraisals and had only cursory conversations with homeowners to determine if that conclusion was supported. (C.2605, pp. 113-15). In reaching her conclusions regarding criterion (iii), Ms. McGarr relied on the Poletti study, which she admitted was for the siting of another facility with a different target area. (C.2605, pp. 120-21).

Ms. McGarr conceded that she had only analyzed eight farm transactions in the target area over a twelve year period, and six farm transactions in an eight year period in the control area. (C.2606, pp. 16-17). Based on such a small number of transactions, Ms. McGarr admitted

that removal of one transaction can make a big difference. (C.2605, pp. 153-54). In fact, simply removing two transactions drastically decreased the price in the control area. (C.2606, p. 19). Ms. McGarr admitted that she could not determine from a numerical and statistical perspective whether the number of sales was statistically significant for either the target or control area. (C.2606, p. 69).

Because Ms. McGarr only examined a few transactions, she had to supplement her report by relying on another landfill study, Settler's Hill, to conclude that criterion (iii) was met. (C.2605, p. 141-42; C.2606, p. 67). Although Ms. McGarr initially asserted that the target area for Settler's Hill was similar to the target area for the proposed expansion, she later stated that she did not statistically compare Kane County, where Settler's Hill is located, to Kankakee County. (C.2605, p. 145; C.2606, p. 61). Later in her testimony, Ms. McGarr admitted that there are significant differences between Kankakee County and Kane County, including the fact that Kane County has a commuter rail line to Chicago and Kankakee County does not. (C.2606, p.43). She also admitted that she did not study and compare the populations of Kane and Kankakee counties and admitted that the population changes of those counties are very different. (C.2606, p. 78-79).

In reaching her conclusion that there is no negative impact on properties surrounding a landfill, Ms. McGarr used a target area of one mile surrounding the landfill. (C.2605, p. 125). However, Ms. McGarr admitted that she did not perform any research to determine if land beyond one mile could be negatively affected by a landfill and was not aware of a study suggesting that properties two miles from a landfill can be adversely affected. (C.2605, p. 126; C.2606, p. 4-5). She admitted that she had no scientific basis for choosing a one mile radius. (C.2606, p. 57). Ms. McGarr admitted that the size of the target area could greatly affect the

results of a study regarding impacts on a landfill and further admitted that she arbitrarily chose not to extend the target area to Iroquois County. (C.2605, pp. 48, 50).

Ms. McGarr further admitted that there were features of the control area that could negatively affect property values that the target area did not possess, thereby negating the results of her study that there was no negative impact on property values nearest the landfill. (C.2606, pp. 45, 51-53). For example, Ms. McGarr admitted that the Interstate and railroad bisect the control area, but they do not bisect land in the target area. (C.2606, p. 45). She also admitted that there is more river frontage in the target area. (C.2606, pp. 51-52). Ms. McGarr admitted that she did not even consider these characteristics when determining the values of properties in the control area versus target area even though Ms McGarr admitted that riverfront property is more appealing than railroad property. (C.2606, pp. 52-53, 66).

Christopher Lannert testified regarding the compatibility of the proposed facility. Although Mr. Lannert testified that the predominant uses of the property surrounding the facility are agricultural, he admitted that a new convention center and aquatic center are being built nearby and that he did not consider those facilities in his analysis because they were not present when he performed his study prior to the 2002 siting hearings. (C.2607, pp. 11-12). He also admitted that he did not review the City of Kankakee Comprehensive Plan and did not speak to banks, developers, businesses or residents in completing his compatibility analysis. (C.2607, p. 12). Mr. Lannert admitted that growth can be expected in the area near the landfill between I-57 and the Iroquois River. (C.2607, p. 18). Nevertheless, Mr. Lannert did not perform any numerical analysis to determine if the proposed expansion will retard that growth. (C.2607, p. 18).

Mr. Lannert testified that he was paid $275.00 per hour to complete his study and provide testimony for Waste Management. (C.2607, pp. 12-13). He also admitted that in all matters in which he has testified for waste haulers, he has always found that a facility is located to minimize incompatibility. (C.2607, p. 16).

Furthermore, during the public comment period, Michael Watson submitted, as an exhibit to his Proposed Findings of Facts, a "Technical Review of Criterion 3 of Waste Management of Illinois, Inc. Application for Expansion of the Kankakee Landfill." (C.2858-2876). That Technical Review was performed by Peter E. Hopkins of Hopkins Appraisal Service. (C.2859-60). According to Mr. Hopkins, "the application filed by Waste Management of Illinois, Inc. is flawed and fails to meet Criterion 3 . . ." (C.2859). Specifically, Mr. Hopkins found that the appraisal methods and techniques used by Waste Management were improper because they improperly averaged prices of property. (C.2866-867). He also concluded that the criterion (iii) study was improper because there was no consideration of the nature of farmland prices. (C.2867-69). He also found that the "inclusion of the Settler's Hill study in its report is an inappropriate comparison." (C.2870-71). Finally, Mr. Hopkins explained that the property value guarantee plan offered by Waste management was inadequate. (C.2871-72). In conclusion, Mr. Hopkins stated, "the Criterion 3 analysis submitted by Waste Management in its application for a landfill expansion, is flawed at its most basic level, inaccurate, and therefore, fails, even with testimony to meet Criterion 3." (C.2872).

3. Facts Related to Criterion (vi)

With respect to criterion (vi), Waste Management presented the testimony of one witness, Stephen Corcoran, who also testified at the 2002 siting hearing. (C.2610). Mr. Corcoran testified that he attached some data to his 2003 report that may or may not have been attached to

the 2002 report he prepared. (C.2610, p. 9). At the 2003 siting hearing, Mr. Corcoran provided additional data that was not included in his report, including an analysis of the site driveway. (C.2610, pp. 13, 16).

Mr. Corcoran explained that the expansion is located in the corridor between I-57 to the west and the Iroquois River on the east. (C.2610, p. 17). As a result, the main route for traffic to the facility will be south along Route 45/52 for most traffic. (C.2610, p. 20). Route 45/52 consists of one lane of traffic in each direction with no discernable shoulder. (C.2610, p. 20). Mr. Corcoran admitted that even though the route to the proposed expansion is one of the two possible routes that will be used by Town & Country Landfill when its landfill is complete and will certainly cause more traffic on the road, he did not factor in the traffic from the Town & Country facility when he examined criterion (vi). (C.2610, pp. 11-12). He also did not take into account the traffic that will be created by the convention center and aquatic center that are being built at or near the intersection of I-57 and Route 45/52 because he was not aware of those developments. (C.2610, pp. 21-22). Mr. Corcoran admitted that his traffic counts were two years old and had not been updated despite additional developments in the area. (C.2610, p. 71).

When Mr. Corcoran performed his traffic count, he counted 12 school buses between the hours of 7:00 a.m. and 8:00 a.m., which overlaps a peak time for the landfill, with 64 trips in and out between 6:00 a.m. and 8:30 a.m. (C.2610, pp. 44-45). He also agreed that a busy time for landfill traffic will be from 2:00 p.m. to 4:00 p.m., which will also coincide with school bus traffic. (C.2610, p. 47). While Mr. Corcoran counted the number of school bus trips made along the route at different times, he did not determine how many children enter and exit buses along Route 45/52 between I-57 and 6000 South Road. (C.2610, p. 23). He also failed to contact the

school district during the school year to determine what bus routes exist in that area and how many total school buses travel along that route. (C.2610, pp. 23-25).

Mr. Corcoran admitted that he performed his traffic count study in January and did not determine a seasonal adjustment factor. (C.2610, pp. 28-29). Even though he admitted that there is a fairground nearby, he did not take into account what the traffic would be like during fair season and did not perform any research to determine when the fair runs or what traffic is generated during the fair. (C.2610, pp. 70-71). He also admitted that his report did not account for construction traffic even though he is aware that there will be construction traffic during the operation of the landfill. (C.2610, pp. 33-34). Mr. Corcoran further admitted that his report did not contain an analysis of the sight distances at the intersection 6000 South Road and Route 45/52. (C.2610, pp. 62-64).

Mr. Corcoran agreed that mud on the roadway could be a danger to traffic in the area and explained that Waste Management was going to account for that through its 900 foot paved road from the scale house to the entrance. (C.2610, pp. 47-48). He also testified that Waste Management plans to keep the roads clean, but Mr. Corcoran admitted that he has not seen a written program from Waste Management about that. (C.2610, pp. 49, 79).

In opposition to Mr. Corcoran's testimony, Mr. Brent Coulter testified on behalf of an objector with respect to criterion (vi). Mr. Coulter is a registered professional engineer, specializing in traffic and transportation engineering and planning. (C.2613, p. 5). He has performed numerous traffic studies in the past, and it was his opinion that Waste Management failed to satisfy criterion (vi). (C.2613, p. 8). In reaching that conclusion, Mr. Coulter reviewed Waste Management's traffic impact study, observed the highway operations on Route 45/52 near

the site, and talked to the head of School Bus Services for Clifton School District. (C.2613, pp. 8-9).

Mr. Coulter concluded that Waste Management has failed to comply with criterion (vi). (C.2613, pp. 7-8). He reached that conclusion for the following main reasons: 1) Waste Management failed to consider traffic from committed developments, including the Town & Country facility; 2) the application does not minimize the impact on school bus operations; 3) the median for the northbound and southbound turn lanes is inadequate; 4) the shoulder size is inadequate; 5) the length of the southbound left turn lane is inadequate; 6) the sight distance used by Waste Management was improper; and 7) there should be a mandatory program for cleaning up mud from the roadway. (C.2613, pp. 10-61).

4. Facts Related to Fundamental Fairness

In an attempt to prove its contrived allegations of "conspiracy, deceit, perjury and political intimidation," Waste Management deposed all but one of the Kankakee County Board members. During those depositions, counsel for Waste Management attempted to inquire into the specific reasoning of the Board members; however, counsel for Kankakee objected to such questions and instructed the deponents not to answer because such questions improperly invaded the mental processes of decision-makers. See IPCB Hrg. Officer Ex. 2; pp. 83-84; Hrg. Officer Ex. 3, pp. 10-11. As a result, Waste Management filed a Motion to Compel, requesting that this Board require County Board members to answer questions about why they or other Board members voted against Waste Management's 2003 Application. (See Waste Management's Motion to Compel (March 15, 2005)). On April 5, 2004, Hearing Officer Bradley Halloran issued an Order denying Waste Management's Motion to Compel, explaining that "[c]onsistent with prior Board precedent, the integrity of the decision making process of the Kankakee County Board requires that the mental processes of decision-makers be safeguarded here, where

petitioner WMII has made no strong showing of bad faith or improper behavior to justify any inquiry into the decision making process." (Hearing Officer Order (April 5, 2005)) (citation omitted).

The Illinois Pollution Control Board Hearings took place on April 6, 2004 and April 7, 2004. Prior to the hearings, Hearing Officer Bradley Halloran granted a motion *in limine* prohibiting any inquiry into the mental processes of County Board members with respect to their decision on Waste Management's 2003 siting Application and even prohibited the County Board's own attorney at times from inquiring into whether County Board members considered conversations outside of the siting hearings as evidence. (IPCB Hrg. 4/6/05, pp. 218-21).

a. Testimony of County Board Members

At the IPCB hearings, 18 Kankakee County Board members testified. Additionally, the depositions of five county board members, including the Vice-Chairman of the County Board, were admitted as evidence. (IPCB Hrg. Officer Exs. 2-6). Of those 23 individuals who provided testimony, twelve voted in favor of Waste Management's 2002 Application and against its 2003 Application based on one or more criteria (Board Members Hertzberger, Romein, Meents, Marcotte, LaGesse Faber, James, Vickery, Barber, Jackson, Waskowsky, and Olthoff), five did not vote on Waste Management's 2002 Application and voted against its 2003 Application (Board Members Gibbs, Scholl, Stauffenberg, McLaren and Graves), two voted against both applications (Board Members Martin and Bernard), and four voted in favor of both applications (Board Members Wilson, Washington, Bertrand and Lee). (IPCB Hrg. Petitioner's Exs. 7-8).

The testimony from these County Board members reveals that all County Board members received letters from members of the public regarding the proposed expansion. (IPCB Hrg 4/6/05, pp. 58, 214, 229-30, 279, 308, 310; IPCB Hrg. 4/7/05, pp. 13-14, 54, 66-68, 94, 128, 158-

59, 193, 215, 234, 278, 303, Hrg. Officer Ex. 2, pp. 78-79; Hrg. Officer Ex. 3, pp. 23-24; Hrg. Officer Ex. 4, pp. 10-11; Hrg. Officer Ex. 5, pp. 9; Hrg. Officer Ex. 6, pp. 31-32).[2] However, most of the County Board members did not read the majority of the letters and, therefore, did not know whether the letters were in favor of or opposed to the application. (IPCB Hrg. 4/6/05, pp. 58, 214-15, 296, 310, 322; IPCB Hrg. 4/7/05, pp. 67, 94, 128-29, 193-94, 215, 234; Hrg. Officer Ex. 2, p. 79; Hrg. Officer Ex. 6, pp. 32-33). Board members who read the letters read some that were in favor of the landfill in addition to some that were opposed to the expansion. (IPCB Hrg. 4/7/05, p. 14). The letters contained nothing different than what was stated at the siting hearings. (IPCB Hrg. 4/7/05, pp. 40-41, 58). None of the Board members were threatened or intimidated by the letters that they received. (IPCB Hrg. 4/6/05, pp. 255, 296; IPCB Hrg. 4/7/05, pp. 102, 197-99, 226, 294). Many board members turned in the letters that they received to the County Clerk. (IPCB Hrg. 4/6/05, pp. 214, 230, 252-53; IPCB 4/7/05, pp. 159-61, 193-94, 235, 248; Hrg. Officer Ex. 2, p. 79; Hrg. Officer Ex. 3, pp. 23-24; Hrg. Officer Ex. 4, p. 11; Hrg. Officer Ex. 6, p. 33). Those letters were made part of the siting hearing record. (C.2617-2807, C.3408-3721, C.3277-3384). Several board members also received telephone calls from members of the public, some of whom were in favor of the application. (IPCB 4/6/05, p. 275; IPCB 4/7/05, pp. 12, 155; Hrg. Officer Ex. 5, pp. 9-11).

Although many of the County Board members testified that an individual by the name of Bruce Harrison attempted to contact them, most of those members had brief and limited encounters with him. (IPCB Hrg. 4/6/05, pp. 48-49, 52, 239-40, 335; IPCB Hrg. 4/7/05, pp. 68-70, 84, 91, 166, 218-21, 236, 238-39, 306-08, Hrg. Officer Ex. 2, p. 34-41, 50-51; Hrg. Officer

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[2] A summary of the testimony of Kankakee County Board members regarding *ex parte* communications is contained in Appendix A.

Ex. 4, pp. 8-9). Ms. Hertzberger was confronted by Mr. Harrison on one occasion for approximately two minutes. (IPCB Hrg. 4/6/05, pp. 48-49, 52). Mr. Gibbs had one attempted phone conversation with Mr. Harrison that lasted less than 45 seconds. (*Id.* at 212-13). Mr. Romein had one telephone call from Mr. Harrison that lasted less than two minutes. (*Id.* at 239-40). Mr. Harrison made a few comments to Mr. Scholl prior to and/or during the siting hearings. (*Id.* at 275). Mr. Stauffenberg had a brief encounter from Mr. Harrison when Mr. Harrison asked him to go to lunch, but Mr. Stauffenberg cancelled when he realized that Mr. Harrison wanted to discuss the proposed expansion. (IPCB Hrg. 4/7/05, pp. 68-69). Mr. LaGesse had a short telephone call from and one brief unsolicited face-to-face encounter with Mr. Harrison. (*Id.* at 84-86, 91). Mr. Harrison came to Mr. James' office, but Mr. James refused to speak to him. (*Id.* at 166). Mr. Harrison came uninvited and unannounced to Ms. Barber's office, and Mrs. Barber escorted him out. (*Id.* at 220-21). Mr. Harrison came to Mr. McLaren's business on two occasions. (*Id.* at 236, 238-39). Mr. Harrison spoke to Mr. Washington for approximately two minutes. (*Id.* at 306-08). Mr. Harrison telephoned Ms. Latham Waskowsky on two occasions and came to her home once, at which time Ms. Waskowsky instructed Mr. Harrison never to return. (Hrg. Officer Ex. 2, pp. 34-35, 40, 50-51). Mr. Harrison called Ms. Lee and spoke for less than one minute. (Hrg. Officer Ex. 4, pp. 8-9).

While four board members did have longer conversations with Mr. Harrison, lasting approximately 30 to 45 minutes, two of those board members, Elmer Wilson and Duane Bertrand, voted in favor of the proposed expansion. (IPCB Hrg. 4/6/05, p. 259-60; Hrg. Officer Ex. 5). Additionally, six board members who voted against the 2003 siting application, Mr. Martin, Ms. Faber, Mr. Marcotte, Mr. Vickery, Ms. Jackson and Mr. Graves all stated that they

had absolutely no contact with Mr. Harrison. (IPCB Hrg. 4/7/05, pp. 20, 27, 53-54, 126-28, 191; Hrg. Officer Ex. 3, pp. 18-20, 24).

All of the board members who were contacted by Mr. Harrison did not initiate the contact themselves and advised Mr. Harrison that they could not speak to him about the proposed expansion. (IPCB Hrg. 4/6/05, pp. 52, 73-74, 212, 221, 253, 264, 269, 312-13, 321; IPCB Hrg. 4/7/05, pp. 91-93, 166; Hrg. Officer Ex. 5, pp. 25-26). The board members further testified that they did not consider anything that Mr. Harrison said to be evidence. (IPCB Hrg. 4/6/05, pp. 74; IPCB Hrg. 4/7/05, pp. 178; Hrg. Officer Ex. 5, pp. 36-37). Moreover, they did not think anything Mr. Harrison said was different than what they heard during the siting hearings (IPCB Hrg. 4/6/05, pp. 295, 323). The board members did not speak to Mr. Harrison or anyone else about the substance of the application outside of the siting hearings. (IPCB Hrg. 4/6/05, pp. 74, 322; IPCB Hrg. 4/7/05, pp. 134, 140-41, 215-16, 226). Finally, the board members who had contact with Mr. Harrison unanimously agreed that they were not intimidated or threatened by Mr. Harrison. (IPCB Hrg. 4/6/05, pp. 79, 253-54, 269-70, 295-96; IPCB Hrg. 4/7/05, pp. 105, 177, 246-48). There was no testimony or evidence that anything that Mr. Harrison said prejudiced or impacted any decision of a County Board member.

b. Testimony of Robert Keller

In an attempt to prove its "conspiracy theory" between Mr. Harrison, Mr. Watson and Mr. Keller, Waste Management called Robert Keller to testify at the Illinois Pollution Control Board hearing. Mr. Keller testified that Mr. Watson is a neighbor of his and considers him to be his friend. (IPCB Hrg. 4/5/07, p. 97). Mr. Keller has driven a truck for Mr. Watson's business, United Disposal. (*Id.* at 97-98). Mr. Keller was aware that Mr. Watson was opposed to the proposed expansion, but he stated that he does not know if he learned that from newspaper

reports, hearsay or from Mr. Watson himself. (*Id.* at 101-02). Mr. Keller has known Bruce Harrison for more than 10 years and has allowed Mr. Harrison to leave his trailer on his property from time to time. (*Id.* at 110-11). Mr. Keller assumed that Mr. Harrison was opposed to the proposed expansion based on hearsay from other people and from the hearings themselves. (*Id.* at 112-13, 116). Mr. Keller stated that he is not aware of Mr. Harrison ever performing work for Mr. Watson, but Mr. Harrison has helped Mr. Keller with his work at times. (*Id.* at 113).

Mr. Keller stated that he never talked to Mr. Harrison about his efforts to oppose Waste Management's proposed expansion. (*Id.* at 116). Mr. Harrison used Mr. Keller's phone when he lived on Mr. Keller's property, but Mr. Keller stated that Mr. Harrison never informed Mr. Keller that he used his phone to place calls to County Board members. (*Id.* at 117-18). Mr. Keller testified that he had spoken to Mr. Harrison once in the month prior to his testimony, but Mr. Keller stated that Mr. Harrison did not tell Mr. Keller where he was living. (*Id.* at 120-27). Since Mr. Harrison moved away in the fall or summer of 2004 until April of 2005, Mr. Keller stated that he had only spoken to Mr. Harrison three times. (*Id.* at 131). Mr. Keller testified that he does not know if Mr. Watson has been in communication with Mr. Harrison. (*Id.* at 132).

Mr. Keller had a "No dump. No Chicago garbage" sign in his yard, but testified that he did not know where he obtained that sign or who created it. (*Id.* at 144-45). Mr. Keller drafted a letter in opposition to the proposed expansion that he sent to all of the County Board members. (*Id.* at 133-34). Mr. Keller received a list of the County Board members so that he could mail his letter to each of them. (*Id.* at 132-33). That letter is included in the record. (*Id.* at 158; C.2743). Mr. Keller also sent thank you notes to board members who voted against the expansion. (*Id.* at 148).

ARGUMENT

I. THE COUNTY BOARD'S DENIAL OF SITING APPROVAL SHOULD BE UPHELD BECAUSE IT WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

In order to grant siting approval to a pollution control facility, such as the expansion sought by Waste Management in this case, the County Board or local governing body must find that the Applicant has satisfied all of the criteria set forth in section 39.2(a) of the Act. *See* 415 ILCS 5/39.2(a); *Waste Management of Illinois, Inc. v. Illinois Pollution Control Board*, 160 Ill.App.3d 434, 443, 513 N.E.2d 592, 597 (2d Dist. 1987). If any one of the criteria listed in section 39.2(a) is not met, the Application must be denied. *See id.* In this case, the Kankakee County Board found that three criteria set forth in section 39.2(a) were not met. Specifically, the County Board found that the Applicant failed to show compliance with criteria (i), (iii) and (vi). (C.4115-25). Because Waste Management did not satisfy all of the statutory criteria, the Kankakee County Board was required to deny siting approval.

The Kankakee County Board's denial of Waste Management's Application must be upheld because the County's decision that the Applicant failed to comply with criteria (i), (iii) and (vi) was clearly not against the manifest weight of the evidence. It is well-settled that a county board's decision to grant or deny siting approval can only be reversed if the decision is contrary to the manifest weight of the evidence. *Waste Management*, 160 Ill.App.3d at 441-42, 513 N.E.2d at 597. The manifest weight of the evidence standard is to be applied to each and every criterion on review. *Id.* The manifest weight of the evidence standard is consistent with the legislative intent to grant local authorities the power to determine the site location suitability of a proposed new regional pollution control facility. 160 Ill.App.3d at 441, 513 N.E.2d at 596.

It is the sole province of the hearing body to weigh the evidence, resolve conflicts in testimony and assess the credibility of the witnesses. *Tate v. Illinois Pollution Control Board*, 188 Ill.App.3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989).

In determining whether a decision is against the manifest weight of the evidence, it is not sufficient that a different conclusion may be reasonable. *Wabash and Lawrence Counties Taxpayers and Water Drinkers Association v. Pollution Control Board*, 198 Ill.App.3d 388, 392, 555 N.E.2d 1081, 1085 (5th Dist. 1990). A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, plain or indisputable. *Worthen v. Roxana*, 253 Ill.App.3d 378, 384, 623 N.E.2d 1058, 1062 (5th Dist. 1993). When reviewing a decision under a manifest weight of the evidence standard, the reviewing court may not reweigh evidence and may not reassess the credibility of witnesses. *Id.; Wabash*, 198 Ill.App.3d at 392, 555 N.E.2d at 1085. In this case, the evidence and testimony presented at the siting hearings clearly establishes that the decisions of the County Board with respect to criteria (i), (iii) and (vi) were not against the manifest weight of the evidence but were clearly supported by the evidence.

A. THE KANKAKEE COUNTY BOARD PROPERLY CONCLUDED THAT THE PROPOSED EXPANSION WAS NOT NECESSARY TO ACCOMMODATE THE WASTE NEEDS OF THE SERVICE AREA.

Section 39.2(a)(i), also known as the need criterion, requires that an applicant for local siting approval demonstrate that the proposed facility "is necessary to accommodate the waste needs of the area it is intended to serve." 415 ILCS 5/39.2(a)(i). This criterion requires that the applicant show that a facility is "reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capabilities, along with any other relevant factors." *Waste Management of Illinois, Inc. v. Illinois Pollution Control Board*, 122 Ill.App.3d 639, 645, 461 N.E.2d 542, 546 (3d Dist. 1984). Where other available facilities are sufficient to meet the future waste needs of the service area,

expansion is not "reasonably required." *Id.* at 546-47. The applicant bears the burden of establishing need. *Waste Management, Inc. v. Illinois Pollution Control Board*, 123 Ill.App.3d 1075, 1087, 463 N.E.2d 969, 979 (2d Dist. 1984). Where an applicant establishes nothing more than that a landfill will be convenient, the applicant fails to establish that criterion (i) is met. *See Waste Management*, 123 Ill.App.3d at 1085, 463 N.E.2d at 976.

Based on the testimony of Waste Management's only criterion (i) witness, Cheryl Smith, it is clear that the Kankakee County Board properly found that Waste Management failed to establish that expansion of the Kankakee Landfill was "reasonably required" for several reasons. First, the Applicant's own witness admitted that she did not even consider capacity that is available in the service area from landfills that currently exist and/or may reasonably be expected to exist in the near future. (C.2607, pp. 76-80). Including the capacities of only some of those existing and/or approved facilities would result in more than adequate landfill space for the service area for a period of over 20 years. Furthermore, Ms. Smith failed to assume an appropriate recycling rate for the communities in the service area, and if she had done so, there would not be a capacity shortfall in the service area for 12 years following the siting hearing. (C.2607, p. 76). Finally, even based on Mr. Smith's own generous calculations, the evidence has failed to demonstrate a "need" for the facility until 2009 or 2010, at the earliest, a period of six to seven years after the siting hearing. (C.2607, p. 72).

Waste Management not only failed to include in its analysis facilities that can service the area that are already existing and permitted, such as Prairie River, Spoon Ridge and Brickyard, but Waste Management's need witness failed to include in her analysis any facilities that had already received siting approval but had not yet received a permit. As explained by an Illinois Court:

> Neither the Act nor case law suggests that need be determined by application of an arbitrary standard of life expectancy of existing disposal capacities. The better approach is to provide consideration of other relevant factors such as future development of other disposal sites, projected changes in amounts of refuse generation within the service area and expansion of existing current facilities.

Waste Management of Illinois, Inc. v. Illinois Pollution control Board, 175 Ill.App.3d 1023, 1033-34, 530 N.E.2d 682, 691 (2d Dist. 1988) (emphasis added). When determining need, it is appropriate "to consider proposed facilities, whether in or out of the county, if such facilities will be capable of handling a portion of the waste disposal needs of the county and will be capable of doing so prior to the projected expiration of current disposal capabilities within the county such that the needs of the county will continue to be served." 175 Ill.App.2d at 1032, 530 N.E.2d at 690.

In this case, Waste Management's witness failed to take into account millions of tons of landfill capacity that are reasonably likely to become available in the near future from new landfills and landfill expansions that have received site location approval, including the Livingston Landfill, which, when operational, will be able to accept a majority of its waste from the service area and the Town & Country proposed landfill to be located directly in Kankakee County. Because Waste Management failed to even consider the available capacity created by new facilities that have already received approval, it was more than reasonable for the Kankakee County Board to conclude that Waste Management failed to meet its burden of proving a need for the facility. This is especially true since Waste Management's own witness admitted that the capacity of only one of the proposed facilities along with the two existing facilities in the service area totalled 80 million tons, which greatly exceeds the 49 million ton shortfall calculated by Waste Management's own witness. Because the testimony of Waste Management's own witness revealed that proposed facilities in the area would be sufficient to fulfill the wast needs of the

service area for the next 20 years, it was clearly proper for the Kankakee County Board to find that there was not a need for the expansion of the Kankakee Landfill.

Waste Management also failed to meet its burden of proving that the facility was "reasonably required" because Waste Management's witness used improper calculations in finding that there will be a capacity shortfall in six to seven years following the siting hearing by using recycling rates that were significantly lower than the current recycling rates of various communities, including Kankakee County and the City of Chicago. (C.2607, pp. 55-56). In doing so, Ms. Smith overestimated the need for the facility. If Ms. Smith had assumed that the recycling goals of the communities were reasonable when adopted and that the likelihood that those goals would be met was also a reasonable expectation, there would not be a capacity shortfall until 2015, or 12 years after the siting hearing. (C.2607, p. 76). Consequently, even without considering the available capacity of the existing and proposed landfills excluded by the Applicant's witness, it is clear that there will likely not be a shortage of capacity in the service area for at least twelve years.

Several Illinois courts have found that where there is capacity in the service area for ten years or more, criterion (i) is not met. *See Waste Management of Illinois, Inc. v. Pollution Control Board*, 122 Ill.App.3d 639, 461 N.E.2d 542 (3d Dist. 1984); *Waste Management of Illinois, Inc. v. Pollution Control Board*, 123 Ill.App.3d 1075, 463 N.E.2d 969 (2d Dist. 1984); *Waste Management of Illinois, Inc. v. Pollution Control Board*, 175 Ill.App.3d 1023, 520 N.E.2d 682 (2d Dist. 1988). In a 1984 *Waste Management* case from the Third District, the Illinois Appellate Court ruled that the decisions of the Will County Board and the Illinois Pollution Control Board that criterion (i) was not met were not against the manifest weight of the evidence where "the facts, as found by the county and by the PCB, with support in the record, show that

the waste needs of Will County can be handled for ten years with existing available facilities within the area now served, without additional facilities being necessary." 122 Ill.App.3d at 644-45, 461 N.E.2d at 546. Because "[t]he evidence, as found by the PCB and the county, indicated that other available facilities were sufficient to meet the future waste needs of the area served . . ., this proposed expansion was not reasonably required to meet those needs." 122 Ill.App.3d at 645, 461 N.E.2d at 546-47. The court explained that if circumstances were to somehow change, the County Board would be free to examine the facts as they exist at that time, explaining that "[t]he decision does not foreclose future applications for the site, based upon changes in the relevant factors, whether waste production, other sites, or economic costs of transportation." 122 Ill.App.3d at 645, 461 N.E.2d at 546-47.

The Second District relied on the Third District's holding in *Waste Management* in finding that an applicant failed to establish need where the evidence and testimony established that there would not be a capacity shortfall for ten years. 123 Ill.App.3d at 1086, 463 N.E.2d at 978. Because the Illinois appellate court in that case "likewise found that the uncontradicted testimony indicated existing facilities could handle the waste production for ten years," the court affirmed the PCB's ruling that the applicant failed to establish that the facility was necessary. *Id.* Similarly in a 1988 *Waste Management* case, the appellate court found that there was no need for a proposed facility where there was nine or ten years of disposal capacity in the service area. 175 Ill.App.3d at 1033, 530 N.E.2d at 691. Specifically, the court ruled that where evidence at a 1987 siting hearing established that "there would not be a need for additional disposal facilities until at least 1996 or 1997[,]' "the PCB's determination that Waste Management did not sustain its burden of satisfying criterion (i) is not against the manifest weight of the evidence." *Id.*

As is made clear by the cases set forth above, the Kankakee County Board's decision

regarding criterion (i) was not against the manifest weight of the evidence because, using the appropriate recycling rates, there is more than ten years of landfill capacity available for the service area. As such, the Kankakee County Board properly found that Waste Management's proposed expansion was not "necessary."

Finally, even if this Board accepts as true all of the calculations of Waste Management's need witness, Waste Management still cannot establish that Kankakee County Board's decision regarding criterion (i) is against the manifest weight of the evidence because Waste Management's own witness testified that there will not be a capacity shortfall until six or seven years after the siting hearing. (C.2607, p. 72). In *A.R.F. Landfill, Inc. v. Pollution Control Board*, 174 Ill.App.3d 82, 528 N.E.2d 390 (2d Dist. 1988), the court held that the local siting authority's decision regarding criterion (i) was not against the manifest weight of the evidence where the applicant admitted that additional landfill space would not be needed until at least six years after the siting hearing. Specifically, the court ruled that where the testimony at a 1987 siting hearing provided that "additional space would not be needed until 1993[,]" the applicant "did not establish a current need for additional landfill space in Lake County." *A.R.F.*, 174 Ill.App.3d at 91-92, 528 N.E.2d at 396. Likewise, in this case, this Board must find that even if there will be a capacity shortfall within six or seven years after the siting hearing, the Kankakee County Board's decision was not against the manifest weight of the evidence. This is particularly true based on the deficiencies in the Ms. Smith's testimony, which clearly establish that there is likely much more than six or seven years of capacity available to the service area.

Based on the foregoing, it is clear that the Kankakee County Board's decision regarding criterion (i) was not against the manifest weight of the evidence because Waste Management

failed to sustain its burden of proving that facility at issue was necessary to meet the waste needs of the service area.

B. THE KANKAKEE COUNTY BOARD PROPERLY FOUND THAT THE APPLICANT FAILED TO ESTABLISH THAT THE FACILITY IS SO LOCATED TO MINIMIZE THE INCOMPATIBILITY WITH THE CHARACTER OF THE SURROUNDING AREA AND TO MINIMIZE THE EFFECT OF THE VALUE OF THE SURROUNDING PROPERTY.

Section 39.2(a)(iii) of the Act, also known as criterion (iii), provides that the County Board shall approve the site location suitability for a new regional pollution control facility only if "the facility is located so as to minimize the incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property." 415 ILCS 5/39.2(a)(iii). This criterion requires an applicant to demonstrate more than minimal efforts to reduce the landfill's incompatibility. *File v. D & L Landfill, Inc.*, 219 Ill.App.3d 897, 907, 579 N.E.2d 1228, 1236 (5th Dist. 1991). An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize the incompatibility. *Waste Management of Illinois, Inc. v. Illinois Pollution Control Board*, 123 Ill.App.3d 1075, 1090, 463 N.E.2d 969, 980 (2d Dist. 1984).

Based upon all of the testimony and public comments regarding this criterion, it was not against the manifest weight of the evidence for the County Board to conclude that the facility was not located so as to minimize the incompatibility with the character of the surrounding area, or to minimize the effect on the value of the surrounding property. Even though the only witnesses to testify regarding criterion (iii) were Waste Management's witnesses, the County Board was not required to accept their opinions that the proposed facility was located to minimize incompatibility with the surrounding area. This is especially true in light of the public comment filed by a real estate appraiser, who concluded that Waste Management "fails, <u>even with testimony</u>, to meet Criterion 3." (C.2872) (emphasis added).

Even where no conflicting expert testimony is presented, the County Board is free to find that an Applicant failed to meet the criteria set forth in Section 39.2 of the Act because the trier of fact determines what weight should be accorded to expert testimony. *See In re Glenville*, 139 Ill.2d 242, 251, 565 N.E.2d 623, 627 (1990). As explained by the Illinois Supreme Court: "Even if several competent witnesses experts concur in their opinion, and no opposing expert testimony is offered, it is still within the province of the trier of fact to weigh the credibility of the expert evidence and decide the issue." *Id.* While the trier of fact is not allowed to arbitrarily reject expert testimony, it is within the province of the trier of fact to disbelieve such testimony. *Id.* In this case, it is clear that the Kankakee County Board reviewed the testimony of Waste Management's witnesses and found that despite their testimony to the contrary, criterion (iii) was not met. That decision should be affirmed because it is the province of the local siting authority, and not this Board, to weigh the evidence and assess the credibility of the witnesses. *Fairview Area Citizens Taskforce v. Illinois Pollution Control Board,* 198 Ill.App.3d 541, 550, 555 N.E.2d 1178, 1184 (3d Dist. 1990).

In this case, the credibility of the witnesses was especially relevant to the criterion (iii) witnesses, particularly Patricia McGarr, who at the first siting hearing testified that she had an Associate's degree, but at the second siting hearing had an updated resume that omitted the reference to that degree. (C.2605, p. 54). In fact, at the 2003 siting hearing, Ms. McGarr admitted that she was told that she was not entitled to an Associate's degree and had to take another class in order to obtain her Associate's degree. (C.2605, pp. 73, 101-102).

Furthermore, Ms. McGarr's credibility and expertise could properly have been questioned by the Kankakee County Board because she admitted that she did not perform any appraisals of property herself and relied on cursory conversations with homeowners to determine

the values of properties surrounding the landfill and whether or not those properties would be negatively impacted by the proposed expansion. (C.2605, pp. 114-15). Ms. McGarr's testimony and conclusions were further called into question because in reaching her conclusions, Ms. McGarr relied on the Polettti study, which she admitted was a study for an entirely different landfill with an entirely different target area. (C.2605, pp. 119-21). The strength of Ms. McGarr's study and conclusions was further weakened by her concession that she had not studied enough transactions and, therefore, had to rely on another landfill study, Settler's Hill, to conclude that criterion (iii) was met. (C.2605, p. 141-42; C.2606, p. 67).

The inadequacy of Ms. McGarr's conclusions related to "impact" on property values becomes especially clear when viewed from the fact that she was only able to analyze only eight farm transactions in the target area over a twelve year period, and only six farm transactions in an eight year period from the control area. (C.2606, pp. 16-17). Based on such a small number of transactions, Ms. McGarr admitted that removal of one transaction can make a big difference. (C.2605, pp. 153-54). In fact, simply removing two transactions drastically decreased the price in the control area. (C.2606, p. 19). Ms. McGarr admitted that she could not determine from a numerical and statistical perspective whether the number of sales was statistically significant for either the target or control area. (C.2606, p. 69).

Ms. McGarr's credibility was further called into doubt when she testified that there were no significant differences between the Settler's Hill landfill and the proposed expansion (C.2605, p. 145), but later admitted that she did not statistically compare Kane and Kankakee counties. (C.2606, p. 61). Ms. McGarr also later admitted that there are significant differences between Kankakee County, the location of the proposed expansion, and Kane County, the location of the Settler's Hill facility, including the fact that Kane County has a commuter rail line to Chicago

and Kankakee County does not. (C.2606, p.43). She also admitted that she did not study and compare the populations of Kane and Kankakee counties and that the population change of those counties is very different. (C.2606, p. 78-79).

Additionally, Ms. McGarr's study was questionable because she arbitrarily chose a mile radius as her target area even though she had no scientific basis for doing so. (C.2605, p. 125; 2606, p. 57). Ms. McGarr admitted that the size of the target area could greatly affect the results of a study regarding impacts on a landfill and further admitted that she arbitrarily chose not to extend the target area to Iroquois County. (C.2605, pp. 48, 50).

Ms. McGarr further admitted that there were features of the control area that could negatively affect its property values that the target area did not possess, thereby negating the results of her study that there was no negative impact on property values nearest the landfill. (C.2606, pp. 45, 51-53). Those features include an interstate, railroad bisection and less river frontage. (C.2606, pp. 45, 51-52). Ms. McGarr admitted that she did not even consider these characteristics when determining the values of properties in the control area versus the target area. (C.2606, pp. 52-53, 66).

Finally, Ms. McGarr's report and testimony could properly have been disregarded by the Kankakee County Board because they were simply unreliable. The objector's counsel pointed out problem after problem with the chart relied upon by Ms. McGarr in reaching her conclusions because the information contained in Ms. McGarr's report did not match the alleged sources of that information. (C.2606, pp. 26-36). In fact, Ms. McGarr admitted that she did not check each and every entry in her chart. (C.2606, p. 38). Although Ms. McGarr testified later and provided a corrected copy of the table located in her report (C.2615, p. 10), the harm had already been

done, and the Kankakee County Board was free to determine that Ms. McGarr was not thorough or dependable.

The testimony of Waste Management's other criterion (iii) expert, Mr. Lannert, was also called into question through his testimony. Mr. Lannert testified that the facility was located to minimize the incompatibility with the surrounding area; however, he admitted that he did not review the City of Kankakee Comprehensive Plan A, or speak to any banks, developers businesses or residents to determine if that was in fact true. (C.2607, p. 12).

The Board may also have concluded that Mr. Lannert's testimony was biased because he was paid $275 per hour to perform his study and further admitted that whenever he testifies for waste haulers, he always comes to the conclusion that the proposed facility is located to minimize incompatibility. (C.2606, pp. 12-13, 16). In one of the only cases in which Mr. Lannert concluded that a landfill was not compatible with the surrounding area, he so found because the area was ripe for development; however, Mr. Lannert conceded that the area between I-57 and the Iroquois River, the area where the facility is proposed to be expanded, is also expected to grow and admitted that he did nothing to determine whether the facility would retard development. (C.2606, p. 18).

Based on the foregoing testimony, it is clear that the credibility of both of Waste Management's witnesses with respect to criterion (iii) was weighed by the County Board. The credibility of Waste Management's criterion (iii) witnesses, particularly Ms. McGarr, was further weakened by the report submitted as public comment from a real estate appraiser specifically criticizing Waste Management's criterion (iii) report and concluding that it was flawed and inaccurate. (C.2858-76). Because it was the role of the Kankakee County Board to assess the

witnesses' credibility, which were clearly an issue with respect to criterion (iii), the County Board's determination with respect to criterion (iii) should not be set aside.

C. THE KANKAKEE COUNTY BOARD PROPERLY FOUND THAT THE APPLICANT FAILED TO ESTABLISH THAT THE TRAFFIC PATTERNS TO OR FROM THE FACILITY WERE DESIGNED TO MINIMIZE THE IMPACT ON TRAFFIC FLOWS.

Section 39.2(a)(vi) of the Act, referred to as criterion (vi), requires that the applicant establish that "the traffic patterns to or from the facility are so designed as to minimize the impact on traffic flows." 415 ILCS 5/39.2(a)(vi). Although Mr. Corcoran testified that criterion (vi) was met, Mr. Coulter had many criticisms of Mr. Corcoran's traffic design and report, establishing that Waste Management failed to meet its burden of establishing criterion (vi).

First, Mr. Coulter testified that in analyzing traffic at and around the facility, Waste Management failed to take into consideration both existing and committed development. (C.2613, pp. 39-40). If Waste Management had considered committed development, it would have considered traffic that will come from the proposed Town & Country landfill as well as from the existing convention center and aquatic park, which are being built at the intersection of I-57 and Route 45/52. (C.2613, pp. 41-42).

Furthermore, Mr. Coulter pointed out that Waste Management's traffic design and report failed to establish the impact on school bus operations because he failed to account at all for school bus operations. (C.2613, pp. 13-14). Mr. Coulter explained that the facility traffic will most certainly impact school bus operations because, according to his conversations with school district officials, the school buses travel between 7:00 a.m. and 7:45 a.m. and 3:00 p.m. to 3:45

p.m., which are very busy times for the facility. (C.2613, p. 12). Those buses make multiple stops within the 5000 and 6000 blocks of Route 45, the area where there will be tremendous traffic to the facility. (C.2613, p. 27). The fact that the Applicant did not adequately account for school bus traffic is a major problem because stopped buses can create the potential for dangerous situations. (C.2613, pp. 12-13).

Mr. Coulter also found that the design of the roadway is improper and does not minimize impacts on traffic because the median between the northbound and southbound turns lanes is only 12 feet, instead of 14 feet, as recommended by the Illinois Department of Transportation (IDOT) for these types of intersections. (C.2613, pp. 14-16). According to Mr. Coulter, the extra two feet provides "an extra margin of safety, especially when you have a very high volume of truck traffic as this site will have." (C.2613, p. 15).

Mr. Coulter also explained that there is an inadequate shoulder to the roadway of Route 45/52 because there really is none to speak of. (C.2613, p. 15). Based on the high speed and volume of truck traffic, both the State of Illinois Design Practice and national guidance from the American Association of State Highway Transportation Officials (AASHTO) provide that there should be a paved shoulder of at least eight feet. (C.2613, p. 16). Such a shoulder could make operations more safe for school buses when they stop to pick up and/or drop off students. (C.2613, p. 32).

Mr. Coulter also found that the length of the southbound turn lane is inadequate, as it is only 430 feet in length and should be 530 feet in length. (C.2613, p. 15). Both the IDOT Manual and AASHTO Manual, which is the codified national standardization of highway designs used throughout the country, establish that the length of the lane should be 530 feet. (C.2613, p. 16).

Moreover, Mr. Coulter concluded that Waste Management used an improper minimum sight distance of 570 feet, while the correct sight distance that should have been used is 1,000 to 1,100 feet because the traffic on the route will be primarily truck traffic. (C.2613, pp. 17-20). Because Waste Management's Application did not indicate that there will be 1,100 feet for the sight line to and from the north and south of the property, Mr. Coulter found that Waste Management failed to satisfy criterion (vi). (C.2613, p. 51).

Finally, Mr. Coulter determined that Waste Management did not satisfy criterion (vi) because it did not establish any mandatory procedure for cleaning mud and debris from the roadway. (C.2613, p. 21). It is important that mud be cleaned up as quickly as possible and should be a mandatory practice of the landfill site operation. (C.2613, p. 21). Because there was nothing in section (vi) of Waste Management's Application establishing mandatory procedures for cleaning trucks that will enter the roadway, Waste Management failed to satisfy the criterion. (C.2613, pp. 59-60).

With respect to criterion (vi), there was conflicting testimony, with Waste Management's witness testifying that the criterion was met, and an objector's witness pointing out numerous deficiencies establishing that criterion (vi) was not met. As the trier of fact, the County Board was able to weigh and assess the testimony of the various witnesses and determine which witness and testimony it found to be more credible. *See Fairview,* 198 Ill.App.3d at 550, 555 N.E.2d at 1184. Furthermore, the County Board members were free to use their own knowledge and familiarity with local traffic conditions to determine that criterion (vi) was not met. *See Hediger v. D&L Landfill,* PCB 90-163 (Dec. 20, 1990). Because the County Board was in the best position to weigh the evidence and testimony regarding criterion (vi), this Board should uphold the County Board's decision.

D. IT WAS THE PROVINCE OF THE COUNTY BOARD ALONE TO DECIDE WHETHER THE STATUTORY CRITERIA WERE MET.

In its Brief, Waste Management pays much lip service to the fact that the Kankakee County Regional Planning Commission recommended that the County Board approve Waste Management's siting application in a "49-page report." (Petitioner's Brief, p. 7). However, the truth is that the Commission did not issue a 49 page report but, rather, issued a 14 page report, which was comprised almost entirely of 79 conditions that the Commission believed were necessary for the application to meet the statutory criteria. While the work of the Commission was certainly important and served to satisfy substantial and additional opportunities for public input, the fact that the Commission recommended approval of Waste Management's Application is irrelevant because it was the ultimately the duty of the County Board, and the County Board alone, to determine if the statutory criteria of the Act were met. *See* 415 ILCS 5/39.2(a) ("The county board of the county or the governing body of the municipality . . . shall approve or disapprove the request for local siting approval for each pollution control facility which is subject to such review.") (emphasis added).

Moreover, a review of the Commission's Recommendations actually supports the County Board's decision to deny siting approval to Waste Management and proves that the County Board's decision was not against the manifest weight of the evidence. Although the Commission recommended that the County Board find that criteria (i), (iii) and (vi) had been met, the Commission found it necessary to impose special conditions on each of those criteria. In fact, the Commission suggested one special condition for criterion (i), six special conditions for criterion (iii), and fourteen special conditions for criterion (vi). (C.4102, C.4109-12).

An examination of the recommended special conditions reveals that Waste Management failed to meet its burden of establishing the statutory criteria. For example, with respect to

criterion (iii), the Commission recommended a special condition requiring Waste Management to construct berming and barriers that were not proposed by Waste Management, clearly establishing that the berming and barriers proposed by Waste Management were inadequate. (C.4109-10). Additionally, with respect to criterion (vi), the Commission recommended 14 conditions, many of which exemplify the deficiencies in Waste Management's Application that were pointed out by Mr. Coulter. (C.4111). For example, the Commission required the landfill operator to "demonstrate to the County that sight distance of at least 1,015 feet of visibility can be achieved by the final entrance design" and make modifications for proposed road improvements, including a larger median and longer deceleration lane. (C.4111-12). As explained by Mr. Coulter, these are issues that Waste Management should have resolved in its Application, but failed to do.

It is well-settled that it is the responsibility of an applicant to establish that a proposed facility meets all of the statutory criteria. *Guerrettaz v. Jasper County*, PCB 87-76, slip op. at *9 (Jan. 21, 1988). It is not the duty of a county board or governing body of a municipality to correct the deficiencies of an application by imposing numerous special conditions that must be met. In this case, it is clear that Waste Management did not meet its burden of proving that the statutory criteria were met. As a result, the Commission felt it necessary to impose 79 special conditions. The Kankakee County Board, on the other hand, properly concluded that even with the inclusion of those special conditions, Waste Management's Application was still deficient. Considering all of the testimony and evidence presented by Waste Management and the objectors, the County Board's decision was not against the manifest weight of the evidence.

II. THE SITING HEARINGS WERE FUNDAMENTALLY FAIR.

Section 40.1 of the Illinois Environmental Protection Act allows an applicant whose application has been denied by a county board to seek review from this Board to determine if the

local siting proceedings were fundamentally fair. 415 ILCS 5/40.1(a). During such a review, the burden is on the applicant. *Id.* In this case, Waste Management has clearly failed to meet its burden of establishing that the siting hearings before the Kankakee County Board were fundamentally unfair.

There is a presumption that county board members engaged in landfill siting hearings under Section 39.2 of the Act are objective and capable of fairly judging the particular controversy. *See Waste Management*, 175 Ill.App.3d at 1040, 530 N.E.2d at 695. That presumption may only be overcome if "a disinterested observer might conclude that the administrative body, or its members, had in some measure adjudged the facts as well as the law of the case in advance of hearing it." *Waste Management*, 175 Ill.App.3d at 1040, 530 N.E.2d at 696. In this case, Waste Management has failed to present any evidence establishing that a disinterested observer would conclude that the Kankakee County Board pre-judged Waste Management's Application.

A. THE *EX PARTE* CONTACTS IN THIS CASE DID NOT "IRREVOCABLY TAINT" THE SITING HEARING PROCESS.

In this case, Waste Management asserts that the siting hearings were fundamentally unfair based on *ex parte* contacts through letters, telephone calls and in-person contacts between county board members and various members of the public, particularly Mr. Bruce Harrison. However, *ex parte* contacts do not, in and of themselves, require reversal. *Residents Against a Polluted Environment v. County of LaSalle*, PCB 96-243, slip op. at *8 (Sept. 19, 1996). Rather, the complaining party must show that the *ex parte* contacts caused harm. *Id.* A decision will only be reversed due to *ex parte* contacts if it is "irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency

was obliged to protect." *E & E Hauling, Inc. v. Pollution Control Board,* 116 Ill.App.3d 586, 606, 451 N.E.2d 555, 571 (2d Dist. 1983).

In order to determine whether *ex parte* contacts warrant reversal, a court should consider the following: 1) the gravity of the *ex parte* communications; 2) whether the contacts may have influenced the agency's ultimate decision; 3) whether the party making the improper contacts benefited from the agency's ultimate decision; 4) whether the contents of the communications were unknown to the opposing parties, who therefore had no opportunity to respond; and 5) whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose. *E & E Hauling,* 116 Ill.App.3d at 607, 451 N.E.2d at 571, *citing PATCO v. Federal Labor Relations Authority*, 685 F.2d 547, 464-65 (D.C. Cir. 1982). As explained more thoroughly below, the *ex parte* contacts in this case were not such that they "irrevocably tainted" the siting hearing process, as they were not grave, did not influence the Kankakee County Board, did not benefit any party, and the contents of the communications were known by Waste Management. Therefore, the County Board's decision must be upheld.

1. The Communications by the Public, Including Mr. Harrison, Were Not So Egregious to Warrant Reversal.

The *ex parte* communications in this case were exclusively non-substantive contacts consisting of members of the public expressing their opinions about the proposed expansion to County Board members in the form of letters, telephone calls and some in-person contacts. This Board in *Gallatin National Bank v. Fulton County* held that communications were <u>not</u> grave when they involved "non-substantive matters." PCB 91-256, slip op. at *9 (June 15, 1992). As explained by this Board in *Gallatin*, the hearing officer and committee members "did not discuss the merits of the case with anyone . . . and were not influenced in any way when making the recommendation for the . . . County Board Meeting." *Id.* Because the communications were

non-substantive and the county board was not influenced by the communications, the petitioner "failed to demonstrate how it [was] prejudiced or how the alleged contacts or lack of notice compromised the County Board's decision." *Id.*

Likewise, Waste Management has failed to demonstrate that it was prejudiced by any *ex parte* communications because, like the contacts in *Gallatin*, the contacts with the Kankakee County Board were non-substantive, consisting merely of opinions from members of the public, particularly Mr. Bruce Harrison. Like the county board members in *Gallatin*, The Kankakee County Board members specifically testified that they did not discuss the merits of Waste Management's Application with anyone outside of the siting hearings, including Mr. Harrison. (IPCB Hrg. 4/6/05, pp. 74, 322; IPCB Hrg. 4/7/05, pp. 134, 140-41, 215-16, 226). They also testified that they did not consider anything said during *ex parte* communications to be evidence. (IPCB Hrg. 4/6/05, pp. 74; IPCB Hrg. 4/7/05, pp. 178; Hrg. Officer Ex. 5, pp. 36-37). As such, Waste Management has failed to establish any prejudice as a result of the non-substantive communications.

While Waste Management greatly exaggerates Mr. Harrison's attempted communications with the County Board members, the evidence taken at the IPCB hearing on April 6 and 7, 2005 establishes that the majority of County Board members stated that they had little to no contact with Mr. Harrison. For example, Ms. Hertzberger was approached by Mr. Harrison on only one occasion for approximately two minutes (IPCB Hrg. 4/6/05, pp. 48-49, 52); Mr. Harrison made only one unsolicited telephone call to Mr. Gibbs that lasted less than 45 seconds (*Id.* at 212-13); Mr. Romein also had one telephone call from Mr. Harrison that lasted less than two minutes (*Id.* at 239-40); Mr. Harrison merely made a few comments to Mr. Scholl prior to and/or during the siting hearings (*Id.* at 275); Mr. Stauffenberg had a brief encounter with Mr. Harrison when Mr.

Harrison asked him to go to lunch, but Mr. Stauffenberg cancelled and did not attend the lunch (IPCB Hrg. 4/7/05, pp. 68-69); Mr. LaGesse had a short telephone call from Mr. Harrison and one brief face-to-face encounter with him (*Id.* at 84-86, 91); Mr. Harrison came to Mr. James' office, but Mr. James refused to speak to him (*Id.* at 166); Mr. Harrison came uninvited and unannounced to Ms. Barber's office, and Mrs. Barber escorted him out (*Id.* at 220-21); Mr. Harrison came uninvited to Mr. McLaren's business on two occasions (*Id.* at 236, 238-39); Mr. Washington was approached by Mr. Harrison once for approximately two minutes (*Id.* at 306-08); Mr. Harrison telephoned Ms. Latham Waskowsky on two occasions and came to her home once, at which time Ms. Waskowsky instructed Mr. Harrison never to return (Hrg. Officer Ex. 2, pp. 34-35, 40, 50-51); Mr. Harrison tried to speak with Mr. Lee in a telephone call that lasted less than one minute. (Hrg. Officer Ex. 4, pp. 8-9). Additionally, Mr. Martin, Ms. Faber, Mr. Marcotte, Mr. Vickery, Ms. Jackson and Mr. Graves all stated that they had absolutely no contact with Mr. Harrison. IPCB Hrg. 4/7/05, pp. 20, 27, 53-54, 126-28, 191; Hrg. Officer Ex. 3, pp. 18-20, 24.

Furthermore, the County Board members who had these unsolicited contacts from Mr. Harrison unanimously testified that they did not initiate the contacts themselves and advised Mr. Harrison that they could not speak to him about the proposed expansion. (IPCB Hrg. 4/6/05, pp. 52, 73-74, 212, 221, 253, 264, 269, 312-13, 321; IPCB Hrg. 4/7/05, pp. 91-93, 166; Hrg. Officer Ex. 5, pp. 25-26). Several Board members also testified that Mr. Harrison's comments were no different than what was stated at the siting hearings. (IPCB Hrg. 4/6/05, pp. 295, 323). As such, the communications were clearly not grave, as they were a mere reiteration of what was presented at the siting hearing. *See Town of Ottawa v. Illinois Pollution Control Board*, 129

Ill.App.3d 121, 126, 472 N.E.2d 150, 154 (3d Dist. 1985) (finding that *ex parte* communications were not grave because they contained nothing novel).

Based on the testimony of the County Board members, it is clear that the communications were not so grave or egregious as to require reversal; however, Waste Management greatly overestimates the nature of Mr. Harrison's contacts with County Board members in order to justify its position. For example, Waste Management describes two contacts between Board Member Jamie Romein and Mr. Harrison but fails to point out that these contacts occurred after the County Board's March 17, 2004 vote on Waste Management's Application and, therefore, could not have influenced Mr. Romein's decision to vote against Waste Management's siting application, as Waste Management contends. (IPCB Hrg. 4/6/05, pp. 241-48; 253). Further, although Waste Management asserts that Mr. Harrison's comments were extreme and outrageous, the Kankakee County Board members unanimously agreed that they were not threatened or intimidated by Mr. Harrison's contact. (IPCB Hrg. 4/6/05, pp. 79, 253-54, 269-70, 295-96; IPCB Hrg. 4/7/05, pp. 105, 177, 246-48).

In the case of *Land and Lakes Co. v. Randolph County Board of Commissioners*, PCB 99-69 (Sept. 21, 2000), the *ex parte* contacts were much more egregious than the contacts in this case, as the County Board Chairman was subjected to numerous "pranks," including having tires flattened on his construction equipment, receiving a package that appeared to be full of garbage, having orders placed in his and/or his wife's name to a florist, furniture store and a restaurant. Slip op. at *4. Nevertheless, this Board found that such contacts were insufficient to establish a lack of fundamental fairness because the applicant "was given a full and complete opportunity to offer and support its application." Slip op. at *19. According to this Board:

> Public hearings were held before the Planning commission where witnesses for Land and Lakes testified in support of the multi-volume application. Opposition

> to the application was also heard at that hearing. After the close of the public hearing, a thirty-day comment period was held. Thus, Land and Lakes was aware of the opposition and had the opportunity to respond.

Id. Likewise, in this case, Waste Management employed several witnesses to testify in support of its two-volume application, heard objectors at the siting hearing and had an opportunity to respond to those objectors, as well as any comments submitted during the comment period. Therefore, Waste Management, like Land and Lakes, "was given a full and complete opportunity to offer and support its application" and has failed to establish that the *ex parte* contacts were grave enough to require reversal.

Several courts have explained that *ex parte* contacts with members of the public regarding a siting application are inevitable and not grave. The court in *Waste Management*, 175 Ill.App.3d at 1043, 530 N.E.2d at 697, explained that public officials being contacted by members of the public through telephone calls, letters and personal contacts expressing opinions for or against a landfill does not establish that a hearing lacks fundamental fairness. *Id.* Specifically, the court in *Waste Management* explained that telephone calls, letters and personal contacts are merely expressions of public sentiment and concluded that "the existence of strong public opposition does not render a hearing fundamentally unfair where, as here, the hearing committee provides a full and complete opportunity for the applicant to offer evidence and support its application." *Waste Management*, 175 Ill.App.3d at 1043, 530 N.E.2d at 697-98. Likewise, in *Fairview Area Citizens Taskforce v. Pollution Control Board*, 198 Ill.App.3d 541, 555 N.E.2d 1178 (3d Dist. 1990), the court explained:

> *[E]x parte* communications from the public to their elected representatives are perhaps inevitable given a county board member's perceived legislative position, albeit in these circumstances, they act in an adjudicative role as well. Thus although personal *ex parte* communications to county board members in their adjudicative role are improper, there must be a showing that the complaining party suffered prejudice from these contacts.

Id. at 549.

In this case, Waste Management has completely failed to show that the non-substantive communications from members of the public were so grave that they were prejudiced by them. In fact, the evidence clearly establishes that the contacts were from members of the public expressing their opinions about the landfill, both for and against it. Because such types of contacts are "inevitable," they are certainly not grave.

2. **The communications did not influence the ultimate decision.**

The second issue to be considered under the *E & E Hauling* factors is whether the alleged *ex parte* contacts influenced the County Board's ultimate decision. In this case, through the Motion in Limine, County Board members were not able to discuss what factors did and did not influence their votes with respect to Waste Management's siting application. However, their testimony clearly reveals that they were not influenced by Mr. Harrison, as they specifically testified that they did not consider anything that Mr. Harrison said to be evidence. (IPCB Hrg. 4/6/05, pp. 74; IPCB Hrg. 4/7/05, pp. 178; Hrg. Officer Ex. 5, pp. 36-37). The County Board members also unanimously testified that they were not intimidated or threatened by Mr. Harrison. (IPCB Hrg. 4/6/05, pp. 79, 253-54, 269-70, 295-96; IPCB Hrg. 4/7/05, pp. 105, 177, 246-48). Based on such testimony, Waste Management's assertions that the Kankakee County Board members were threatened into voting against Waste Management's Application are wholly untrue and must be disregarded.

Waste Management repeatedly asserts that the fact that some Kankakee County Board members who voted in favor of Waste Management's 2002 Application voted against its 2003 Application establishes *ex parte* contacts from Mr. Harrison influenced the County Board's decision. However, Waste Management's argument is without factual support because of those County Board members who allegedly "changed their votes," between 2003 and 2004, four

denied having any contact with Mr. Harrison. (IPCB 4/7/05, pp. 53-54, 126-28, 191, 280). Furthermore, several County Board members who were contacted and allegedly threatened by Mr. Harrison voted in favor of Waste Management's Application. (IPCB Hrg 4/6/05, pp. 264-70, 306-08; IPCB Hrg. Officer Ex. 3, pp. 8-9; IPCB Ex. 5, pp. 25-26; IPCB Hrg. Petitioner's Ex. 7). Consequently, Waste Management's theory that the conduct of Mr. Harrison was the basis for the votes of the County Board members is entirely without merit.

Moreover, Waste Management's assertion that the County Board members were not justified in changing their votes because the applications and siting hearings were the same and that "[t]he only significant difference between the [2002 and 2003] applications was the aggressive and threatening *ex parte* advocacy of Mr. Harrison" is a complete misstatement of the facts. In fact, the evidence clearly establishes that the 2002 and 2003 applications were different, as were the testimony and evidence presented at the siting hearings. Waste Management itself, through its counsel, admitted both at the siting hearing and in correspondence upon delivery of the siting application that the applications were not identical. In fact, at the siting hearing, Waste Management's counsel indicated that "additional data . . .obviously has been gathered or developed." (C.2604, p. 73) Furthermore, in the cover letter included in Waste Management's 2003 siting application, Waste Management's counsel admitted that there was "updated information regarding criteria 1, 3 and 8." 2003 (App. Cover Letter). Therefore, based on the Applicant's own admission, the applications were not identical.

Moreover, testimony provided at the siting hearing established that the applications were not identical, as witnesses regarding criteria (i) and (iii) specifically testified that the reports that they created for the 2002 Application had been updated and amended for the 2003 Application. (C.2605, pp 33-35; C.2607, p. 49; C.2610, p. 16). In fact, Ms. McGarr specifically testified that

she gathered additional information and data regarding criterion (iii) since the prior hearing. (C.2605, pp. 33-35). That new information was significant because it reduced the increase in per acre average price for the target area by more than 70% and reduced the increase in per acre average price for the target area by nearly 90%. (C.2606, p. 21). Ms. Smith also testified that she updated both her need report criterion (i) and criterion (viii) report from the 2002 hearing. (C.2607, p. 49; C.2608, p. 5). Because Waste Management's 2003 Application contained new information regarding several criteria, it was reasonable for the County Board to conclude that those criteria were not met even though the County Board found that those criteria were satisfied by Waste Management's 2002 Application.

Moreover, even if the two applications were completely identical, that does not establish that the County Board's decision with respect to Waste Management's 2003 siting application was against the manifest weight of the evidence because the County Board's decision to grant or deny siting approval is not based solely on a siting application, but is based on additional information presented during the siting hearing, as well as public comments presented during and after the hearing. In fact, Illinois courts have repeatedly stated that the public hearing is the most critical stage of the siting process. *See Land and Lakes Co. v. Illinois Pollution Control Board*, 245 Ill.App.3d 631, 642, 616 N.E.2d 349, 356 (3d Dist. 1993); *McLean County Disposal, Inc. v. County of McLean*, 207 Ill.App.3d 477, 480, 566 N.E.2d 26, 28 (4th Dist. 1991); *Kane County Defenders, Inc. v. Pollution Control Board*, 139 Ill.App.3d 588, 593, 487 N.E.2d 743, 746 (2d Dist. 1985). One County Board Member, Stanley James, specifically explained that although he thought that the 2002 and 2003 applications were essentially the same, "there was new evidence brought up in the second hearing." (IPCB Hrg. 4/7/05, p. 173). According to Mr. James:

> Well, my opinion was that there was a difference in the application because there was some new evidence and things brought in on the second one. Now, as far as

> the application as I want to sign up for something, those were probably the same, but after the total picture, they weren't the same.

(*Id.* at 179 (emphasis added)).

In this case, the evidence and testimony presented at the 2004 public hearing (on the 2003 application) was not the same as the information that was presented in the 2002 siting application and hearing. In fact, at the 2004 siting hearing, at least half of the Applicant's own witnesses presented amended data and/or reports that were not included in the 2002 Application. Specifically, Mr. Corcoran admitted that he provided additional data that was not included in the application originally. (C.2610, pp. 16). Furthermore, Ms. McGarr provided a copy of a corrected report that was not contained in the 2002 application. (C.2615, p. 10). As a result, the Kankakee County Board properly relied on information that was not contained in the siting application but was presented as evidence and testimony at the siting hearing.

It is equally clear that the evidence and testimony provided at the 2004 siting hearing was not the same as the evidence and testimony provided at the 2002 siting hearing. Most notably, at the 2004 hearing, new and additional testimony was provided by an objector's witness, Brent Coulter, who testified regarding criterion (vi) at the 2004 hearing but did not testify at all at the 2002 hearing. (C.2613). Additionally, information provided during the public comment period was different than that presented after the 2002 hearing, most notably a report from a licensed appraiser, concluding that criterion (iii) had not been met. (C.2858-2876). The fact that new and additional evidence was provided on these criteria could be a basis for the Kankakee County Board's conclusion that criterion (iii) and (vi) were not met by Waste Management in 2004.

Furthermore, there were drastically different circumstances at the time the County Board voted on the first and second applications justifying the County Board's finding that criterion (i) was not met in 2004. When the County Board voted on January 31, 2003 to approve the

expansion, there were no other landfills approved in Kankakee County because this Board reversed approval of a facility to be located in the City of Kankakee on January 9, 2003. *See County of Kankakee v. City of Kankakee*, PCB 03-31, 33, 35 (Jan. 9, 2003). When the County Board voted on Waste Management's expansion on March 17, 2004, a landfill had been approved by the City of Kankakee, only two miles from the proposed expansion, and that approval was upheld by this Board on March 18, 2004. *See Sandberg v. City of Kankakee*, PCB 04-33, 34, 35 (March 18, 2004). Based on the City of Kankakee's approval of a landfill in close proximity to the proposed expansion, it was more than reasonable for the Kankakee County Board to find that there was no longer a need for the proposed expansion and that criterion (i), therefore, had not been satisfied.

Even assuming *arguendo* that the evidence presented in 2003 Application and 2004 siting hearings on that application were substantially the same as the evidence presented in the 2002 Application and accompanying siting hearings, Waste Management has still failed to establish that Mr. Harrison's acts influenced the County Board to vote against the 2003 Application and rendered the proceedings fundamentally unfair. *See Moore v. Wayne County Board*, PCB 86-197 (June 2, 1988); *Land and Lakes v. Village of Romeoville*, PCB 92-25 (June 4, 1992); *DiMaggio v. Solid Waste Agency of Northern Cook County*, PCB 89-138 (Oct. 27, 1989). In *Moore*, the Wayne County Board took a vote on a siting application that resulted in a 7-7 tie. 1988 WL 160275, slip op. at *2. Three weeks later, the County Board voted again, and that time voted to approve the facility by a vote of 10-4. *Id.* In refusing to find that the County Board's decision was fundamentally unfair simply because several board members had changed their votes, this Board explained that the mere changing of one's vote is not evidence of an improper decision. *Id.* at *4.

Just as there was no fundamental unfairness simply because several members of the county board changed their votes in *Moore*, the same is true in this case. In fact, in this case there is even less reason to believe that the County Board's decision denying approval to Waste Management was improper because there was a new and different application filed and new siting hearing held before the Kankakee County Board, on which the County Board based its second decision. In *Moore*, on the other hand, the county board's second vote was not based on any new or additional evidence at all, but was based on the same application and siting hearing on which the county board had been unable to reach a decision only three weeks earlier. Based on the precedent set forth in *Moore*, this Board should not find that a siting hearing is fundamentally unfair simply because some county board members voted in favor of Waste Management's first siting application and against its second siting application.

This Board in *Land and Lakes* again determined that a decisionmaker changing his or her vote does not establish a lack of fundamental fairness. *See* 1992 WL 142725, slip op. at *7. In *Land and Lakes*, the petitioner alleged that fundamental unfairness resulted when a trustee changed her vote from one proceeding to the next. *Id.* However, this Board disagreed, explaining "the Board rejects Land and Lakes' contention that Pakula's vote establishes that the second proceeding was fundamentally unfair." *Id.* Additionally, in *DiMaggio*, the petitioners argued that there was a strong inference of *ex parte* contacts where the city council initially voted to deny site location approval and then, two weeks later and without further meetings, unanimously approved the siting application. 1989 WL 137358 at *4. This Board refused to find fundamental unfairness simply because city council members changed their votes *Id.* at *5. Just as this Board found in *Land and Lakes* and *DiMaggio*, the fact that some members of a local

siting authority change their votes on a siting application is insufficient to establish fundamental unfairness caused by *ex parte* contacts.

Based on the foregoing, it is clear that Waste Management has failed to establish that the *ex parte* contacts prejudiced the County Board's decision. Waste Management cannot refute the testimony from the County Board members that they did not consider Mr. Harrison's statements to be evidence and that they were not intimidated by him. The County Board's decision to deny siting approval to Waste Management was based on the evidence (or lack thereof) presented by Waste Management in its 2003 Application and during the 2004 siting hearings, not on improper contacts.

3. No Party to The Hearing Benefitted From the *Ex Parte* Communications.

The third factor under *E&E Hauling* to be considered in determining whether an *ex parte* communication irrevocably tainted the process (thereby requiring vacation of the County Board decision and remand) is "whether the party making the improper contacts benefitted from the agency's ultimate decision." *E&E Hauling*, 116 Ill App 3d at 607, 451 N.E.2nd at 572. In this case, as explained above, the contacts did not influence the Kankakee County Board's decision. Therefore, the *ex parte* contacts could not have benefited anyone. Furthermore, the contacts in this case were not made by a "party" to the action. Rather, these contacts were unsolicited communications by various members of the general public, which the Illinois courts have acknowledged are "inevitable given the County Board members' perceived legislative position." *Waste Management of Illinois vs. IPCB*, 175 Ill App 3d, 1043, 530 N.E. 2nd 697. Since there is no evidence of any benefit to a party of the action, obviously this factor weighs in favor of supporting the County Board decision.

Apparently in an attempt to allege that a party to this action benefitted from the *ex parte* communications, Waste Management asserts that there exists a "Harrison-Watson-Keller Connection." (Petitioner Brief, p. 22). In support of its conspiracy theory, Waste Management repeatedly misstates Mr. Keller's testimony at the IPCB hearing. While Mr. Keller admitted that he is friends of both Mr. Watson and Mr. Harrison, he never asserted that he is in "continuous communication" with Mr. Watson and Mr. Harrison. In fact, Mr. Keller stated that he had only spoken to Mr. Harrison twice in the six months prior to Mr. Keller's testimony at the IPCB hearing. (IPCB Hrg. 4/6/07, 120-31). Mr. Keller also never testified that he worked to together with Mr. Watson and Mr. Harrison in opposition of Waste Management's Application and specifically testified that he never talked to Mr. Harrison about his efforts to oppose Waste Management's proposed expansion. (*Id.* at 116). While Mr. Keller admitted that Mr. Harrison used his telephone, Mr. Keller asserted that Mr. Harrison never told Mr. Keller that he was using his telephone to contact County Board members. (*Id.* at 117-18). Furthermore, while Mr. Keller admitted to having a "No dump. No Chicago garbage" sign in his yard, he specifically testified that he did not know from whom he obtained that sign. (Id. at 144-45). Finally, Mr. Keller's testimony does not establish that he "appeared together" with Mr. Harrison and Mr. Watson at the County Board meeting on the day that the Motion to Renew Consideration was voted on; rather, Mr. Keller simply testified that he was present on that date and thought Mr. Watson and Mr. Harrison were as well. (*Id.* at 149).

Regardless, the issue of whether Mr. Harrison was somehow "affiliated" with a party is a "red-herring" as there is no evidence that any attempted communication by Mr. Harrison benefitted any party. Therefore, the hearings were fundamentally fair.

4. Waste Management Was Aware of the Alleged Contacts and had an Opportunity to Respond.

In determining whether an applicant has been prejudiced by *ex parte* communications, courts are particularly concerned with whether or not the applicant had notice of the *ex parte* communications. *See City of Rockford v. Winnebago County Board*, PCB 87-92, slip op. at 20 (Nov. 19, 1987) (finding that remand was appropriate where the substance of *ex parte* contacts were not placed in the record), *aff'd,* 186 Ill.App.3d 303, 313, 542 N.E.2d 423, 431 (2d Dist. 1989) (finding that the "placing of the *ex parte* contacts on the record removed the danger of prejudice."). In this case, the *ex parte* contacts were made part of the record, as the letters to the County Board members were filed as public comments. (C.2618-2807, C.3408-3721, C.3277-3384). In fact, those letters encompass over 600 pages of the record. Furthermore, it is clear that the statements made by Mr. Harrison and other members of the public were known by Waste Management, as county board members testified that the comments made to them by Mr. Harrison were nothing different than what they heard during the siting hearings. (IPCB Hrg. 4/6/05, pp. 295, 323). Consequently, Waste Management had a clear opportunity to respond to any statements and, therefore, cannot establish fundamental unfairness.

5. **There Is No Need to Vacate the County Board Decision and No Reason to Remand.**

The fifth factor to be considered under *E & E Hauling* is whether vacation of the County Board decision and remand for further proceedings would serve a useful purpose. In this case, remand would serve no useful purpose because, unlike the applicant in the case of *City of Rockford,* the communications, including letters from members of the public, were placed on the record and thus by definition are no longer "ex parte" but rather merely public comment. Therefore, Waste Management was aware of the communications and had the opportunity to respond to them. Consequently, a remand would serve no purpose. Furthermore, Waste Management has failed to make the required showing of prejudice. Consequently, "reversing

and remanding [the County Board's] approval would appear neither appropriate nor productive." *E & E Hauling*, 116 Ill.App.3d at 607, 451 N.E.2d at 572.

Furthermore, a remand would be improper because in this case there has been no wrongdoing alleged by any member of the Kankakee County Board. Rather, all of the alleged "*ex parte*" contacts were unsolicited, and as soon as the County Board members were approached, they refused to discuss the Application. (IPCB Hrg. 4/6/05, pp. 52, 73-74, 212, 221, 253, 264, 269, 312-13, 321; IPCB Hrg. 4/7/05, pp. 91-93, 166; Hrg. Officer Ex. 5, pp. 25-26). It would be improper to remand this case to the County Board, as there has been no fundamental unfairness caused by County Board members justifying such a remand.

If a siting approval could be remanded merely because of unsolicited telephone calls and communications by aggressive members of the public to County Board members, this would create a situation where no application would ever be final, as these types of communications are inevitable. Furthermore, hypothetically an unscrupulous applicant might be tempted to make anonymous calls to members of a siting authority voicing its supposed opposition to the facility merely to have a basis for automatic remand in the event its application were not to be approved. Conversely, hypothetically a single aggressive objector, disregarding or oblivious to the rules prohibiting ex parte communications, could "control" a remand in the event of what he might deem a decision adverse to his position. It would be fundamentally unfair to remand this case for further proceedings based on the isolated acts of one individual, which were properly thwarted by the Kankakee County Board.

B. THE HEARING OFFICER PROPERLY RULED THAT WASTE MANAGEMENT COULD NOT INVADE THE MENTAL PROCESSES OF THE COUNTY BOARD.

In its Brief, Waste Management contends that it should have been allowed to inquire into the reasons and/or bases for the County Board's decision to deny siting approval to Waste

Management because the County Board did not provide factual findings in support of its decision. (Petitioner's Brief, p. 27). This is the very same argument that Waste Management made in its Motion to Compel, which the Hearing Officer properly rejected, explaining:

> The Board and courts have held that "the County Board need only indicate which of the criteria, in its view, have or have not been met." E & E Hauling, Inc., 481 N.E.2d at 609. The County's March 17, 2004 decision does so, and Section 39.2 requires no more.

(Hearing Officer Order, p. 4 (April 5, 2005)). Because the County Board properly examined and voted on each and every criteria, as specifically required by Section 39.2, inquiry into the mental processes of the decision-makers was unwarranted. (C.4115-C.4125).

Furthermore, Waste Management asserts that the Hearing Officer's rulings precluding inquiry into the mental processes of the decision-makers was improper because those rulings "prevented a determination of whether the March 17 Decision was properly and validly made, and thus whether the proceedings were fundamentally fair." (Petitioner's Brief, p. 28). However, Waste Management fails to acknowledge that before inquiry of decision-makers will be allowed, the applicant must present a strong showing of bad faith or improper behavior. *See Land and Lakes Co. V. Village of Romeoville,* PCB 92-25, slip op. at *3 (June 4, 1992). In this case, the Hearing Officer correctly found that Waste Management failed to make such a showing. As a result, the Hearing Officer properly precluded Waste Management from invading the mental processes of the Kankakee County Board members.

CONCLUSION

For the reasons set forth above, the Kankakee County Board, respectfully requests that the Illinois Pollution Control Board uphold the Kankakee County Board's decision to deny siting approval to Waste Management's proposed expansion.

Dated: _____

Respectfully Submitted,
RESPONDENT COUNTY BOARD
OF KANKAKEE COUNTY, ILLINOIS

By: /s/_____
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One of its Attorneys

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APPENDIX A

Karen Hertzberger

Board Member Hertzberger voted to find that all of the criteria were met regarding the 2002 Waste Management Application and voted to disapprove that certain criteria were not met in regard to the 2003 Application. (IPCB Hrg, 4/6/05, pp. 41-42, 46). Ms. Hertzberger met Mr. Harrison on one occasion prior to the March 17, 2004 vote for approximately two minutes. (*Id.* at pp. 48-49, 52). Ms. Hertzberger never asked to speak to Mr. Harrison, and when Mr. Harrison attempted to talk to her, she advised him that she could not talk to him. (*Id.* at pp. 52, 73-74). Ms. Hertzberger testified that Mr. Harrison made her feel uncomfortable because he was trying to talk to her about the landfill, and she knew that she was not supposed to talk about it. (*Id.* at pp. 75-76). Mr. Harrison, however, did not intimidate her. (*Id.* at p. 79). Ms. Hertzberger testified that she did not speak with Mr. Harrison or anyone else about the substance of the application outside of the siting hearings. (*Id.* at p. 74). She did not consider anything that Mr. Harrison said to her to be evidence. (*Id.*) Ms. Hertzberger received letters regarding the proposed expansion, of which she only read one. (*Id.* at p. 58). Because she did not read the letters, she did not know if they were in favor of or opposed to the application. (*Id.)*

Larry Gibbs

Board Member Gibbs did not vote on Waste Management's 2002 Application and voted that certain of the criteria were not met regarding the 2003 Application. (IPCB Hrg. 4/6/05, pp. 208, 211). Mr. Gibbs received one telephone call from Mr. Harrison, which lasted less than 45 seconds. (*Id.* at pp. 212-213). Once Mr. Gibbs "learned that [Mr. Harrison] was talking about the landfill, the conversation ended." (*Id.* at p. 212). Mr. Gibbs never solicited Mr. Harrison to talk to him about the siting application. (*Id.* at p. 221). Mr. Gibbs was mailed numerous letters

regarding the proposed expansion. (*Id.* at p. 214). When he received the first letter, he opened it, looked at it, and when he saw that it concerned the landfill, he closed it, sealed the envelope and took it to the clerk, along with the rest of the letters he received regarding the expansion. (*Id.*) He did not open the other letters and did not know if the one letter he opened was in opposition to or in favor of the expansion because he only read enough of it to determine that it was about the landfill. (*Id.* at pp. 214-15).

Jamie Romein

Board Member Romein voted to find that all of the criteria were met regarding Waste Management's 2002 Application and voted to find that some of the criteria were not met regarding the 2003 Application. (IPCB Hrg. 4/6/05, pp. 225, 227). Mr. Romein received one telephone call from Mr. Harrison prior to the March 17, 2004 vote, which lasted no more than two minutes. (*Id.* at pp. 239-40). During that telephone conversation, Mr. Romein refused to talk to Mr. Harrison. (*Id.* at p. 253). Mr. Romein did not feel threatened by Mr. Harrison at any time. (*Id.* at pp. 253-54). Mr. Romein received between 20 and 25 letters regarding the proposed expansion. (*Id.* at pp. 229-30). Mr. Romein turned all of those letters in to the County Clerk. (*Id.* at pp. 230, 252-53). He was not threatened by those letters. (*Id.* at p. 255).

Elmer Wilson

Board Member Wilson voted to find that all of the criteria were met as to both the 2002 Application and 2003 Applications. (IPCB Hrg. 4/6/05, pp. 259-60). With the understanding that Mr. Harrison wanted to discuss spiritual matters, Reverend Wilson agreed to meet Mr. Harrison. (*Id.* at p. 264). However, at the meeting, Mr. Harrison attempted to discuss the proposed expansion. (*Id.*) At that time, Rev. Wilson explained to Mr. Harrison that he could not talk about it. (*Id.*) Mr. Harrison also approached Rev. Wilson on the day of the vote on the 2003

siting Application and gave Rev. Wilson some petitions, which Rev. Wilson discarded. (*Id.* at p. 266). Rev. Wilson never approached Mr. Harrison to discuss the proposed expansion. (*Id.* at p. 269). Every time Mr. Harrison attempted to talk to the Reverend about the expansion, Rev. Wilson told him that he could not talk about it and ended the conversation as soon as he could politely do so. (*Id.*) Rev. Wilson never felt intimidated by anything that Mr. Harrison did or said to him. (*Id.* at pp. 269-70).

Bob Scholl

Board Member Scholl did not vote on Waste Management's 2002 Application and voted to find that certain criteria were not met regarding the 2003 Application. (IPCB Hrg. 4/6/05, pp. 273-74). Before the siting hearing began, Mr. Harrison approached Board Member Scholl and made comments expressing his opposition to the expansion. (*Id.* at p. 275). Nothing that Mr. Harrison said to him was different than what was said during the public hearings. (*Id.* at 295). Mr. Scholl was not intimidated or threatened by Mr. Harrison. (*Id.* at 295-96). Another individual, Mark Benoit, came to Mr. Scholl's house uninvited to talk about the proposed expansion. (*Id.* at pp. 282-83). Mr. Harrison informed Mr. Benoitt that he could not talk about the landfill. (*Id.*)

Mr. Scholl received one telephone call regarding the proposed expansion from a business in favor of the application for expansion. (*Id.* at p. 275). Mr. Scholl also received letters regarding the proposed expansion, which he glanced at, placed in an envelope and brought to the County Clerk's office. (*Id.* at p. 279). Mr. Scholl did not read those letters and was not intimidated or threatened by them. (*Id.* at p. 296).

Edwin Meents

Board Member Meents voted to find that all of the criteria were met concerning Waste Management's 2002 Application and voted to find three of the criteria were not met concerning the 2003 Application. (IPCB Hrg. 4/6/05, p. 309). Prior to March 17, 2004, Mr. Meents received a telephone call from Mr. Harrison, asking him to breakfast. (*Id.* at p. 312). Mr. Meents agreed to go to breakfast with Mr. Harrison as a family friend but explicitly told Mr. Harrison that he was not going to talk about the proposed expansion. (*Id.* at pp. 312-13, 321). Mr. Meents invited another board member, Duane Bertrand, to attend the breakfast so that Mr. Meents "wouldn't be trapped into talking about the landfill." (*Id.* at p. 314). Whenever Mr. Harrison tried to talk about the proposed landfill, Mr. Meents cut him off. (*Id.*) Mr. Meents reminded Mr. Harrison approximately seven or eight times that he could not listen to what Mr. Harrison had to say about the landfill. (*Id.* at p. 317). Mr. Meents never discussed the substance of Waste Management's application with Mr. Harrison. (*Id.* at p. 322). Nothing that Mr. Harrison said during breakfast was anything different than what was said at the siting hearings. (*Id.* at p. 323).

Mr. Meents received letters regarding Waste Management's 2003 Application. (*Id.* at pp. 308, 310). Mr. Meents could not say whether or not those letters were in opposition to the proposed expansion because he did not read or even open them but simply brought them to the County Clerk. (*Id.* at pp. 310, 322).

Ann Bernard

Board Member Bernard voted against certain criteria in both Waste Management's 2002 and 2003 Applications. (IPCB Hrg. 4/6/05, pp. 328-29). Ms. Bernard believes that Mr. Harrison attempted to contact her prior to March 17, 2004, but she made it very clear that she was basing

her decision on the evidence that was presented at the siting hearings. (*Id.* at p. 335). Ms. Bernard specifically testified that she made her decision based on the evidence at the hearings. (*Id.* at pp. 338-39).

Leonard Martin

Board Member Martin voted to find certain criteria were not met in both Waste Management's 2002 and 2003 Applications. (IPCB Hrg. 4/7/05, pp. 10-12). Mr. Martin did not have any discussions with Mr. Harrison about the proposed expansion. (*Id.* at pp. 20, 27). He believes that he received some telephone calls regarding the proposed expansion prior to the March 17, 2004 vote. (*Id.* at p. 12). Some of the callers were in favor of the expansion. (*Id.*) Mr. Martin received letters regarding the proposed expansion, which he read. (*Id.* at pp. 13-14). Not all of those letters were opposed to the expansion. (*Id.* at p. 14). He threw those letters away. (*Id.* at pp.14, 16). Nothing in those letters was different than what he heard at the siting hearings. (*Id.* at pp. 40-41).

Ralph Marcotte

Board Member Marcotte voted to find that all of the criteria were met as to Waste Management's 2002 Application and voted that three criteria were not met in the 2003 Application, finding that three criteria were not met. (IPCB Hrg. 4/7/05, pp. 48, 51). Prior to his vote on March 17, 2004, Mr. Marcotte did not receive any telephone calls regarding the proposed expansion. (*Id.* at pp. 53-54). He did receive letters, which he read and threw away. (*Id.* at p. 54). The opinions contained in the letters were the same type of opinions expressed at the siting hearings. (*Id.* at p. 58). Mr. Marcotte saw picketers prior to the vote on March 17, 2004, but he was not intimidated by them. (*Id.* at pp. 56-57).

Jim Stauffenberg

Board Member Stauffenberg did not vote on Waste Management's 2002 application and voted to find that two criteria were not met by the 2003 Application. (IPCB Hrg. 4/7/05, pp. 62, 64). Prior to the County Board's vote on Waste Management's 2003 siting Application, Mr. Harrison came to Mr. Stauffenberg's place of work and asked to set up an appointment with him to discuss "county business." (*Id.* at pp. 68-69). Mr. Stauffeberg agreed, but when he learned that Mr. Harrison wanted to discuss Waste Management's proposed expansion, Mr. Stauffenberg cancelled the appointment. (*Id.* at p. 69). Aside from that one brief encounter with Mr. Harrison, Mr. Stauffenberg has not had any other contact with Mr. Harrison. (*Id.* at p. 70). Prior to the March 17, 2004 vote, Mr. Stauffenberg did not receive any telephone calls regarding the proposed expansion but was mailed seven or eight letters regarding the expansion. (*Id.* at pp. 66-67, 68). Mr. Stauffenberg did not know if those letters were in favor of or opposed to the expansion because he did not read them. (*Id.* at p. 67). When he saw the return addresses were from areas near the landfill, he simply threw the letters away without opening them. (*Id.* at pp. 67-68, 77).

Michael LaGesse

Board Member LaGesse voted to find that all criteria were met by Waste Management's 2002 Application and voted that some criteria were not met by Waste Management's 2003 Application. (IPCB Hrg. 4/7/05, pp. 80, 83). Prior to the March 17, 2004 vote on the 2003 Application, Mr. LaGesse received a telephone call from Mr. Harrison at his place of employment. (*Id.* at p. 84). During that telephone conversation, Mr. Harrison told Mr. LaGesse that State's Attorney Ed Smith gave him approval to meet with County Board members to discuss the proposed expansion. (*Id.* at pp. 84-86). Mr. LaGesse agreed to meet with Mr.

Harrison because he thought that Mr. Harrison was telling him the truth and that State's Attorney Ed Smith had approved the meeting. (*Id.* at p. 86). Later, Mr. LaGesse contacted Mr. Smith and learned that Mr. Harrison did not have approval to meet with Mr. LaGesse. (*Id.* at pp. 89-90). As a result, Mr. LaGesse cancelled his meeting with Mr. Harrison. (*Id.* at p. 90). After that, Mr. Harrison came to Mr. LaGesse's office uninvited and unannounced. (*Id.* at p. 91). On that occasion, Mr. Harrison handed Mr. LaGesse a petition, but Mr. LaGesse did not allow Mr. Harrison to explain what it was and abruptly ended the conversation. (*Id.* at pp. 92-93). Mr. LaGesse was not threatened or intimidated by Mr. Harrison. (*Id.* at p. 105).

Mr. LaGesse did not receive any telephone calls regarding the proposed expansion but was mailed letters regarding the expansion prior to March 17, 2004. (*Id.* at p. 94). Mr. LaGesse read only one of those letters and threw the rest away unopened. (*Id.* at p. 94). Mr. LaGesse was not threatened or intimidated by those letters. (*Id.* at p. 102).

Linda Faber

Board Member Faber voted to find that all of the criteria were met by Waste Management's 2002 siting Application and voted that some criteria were not met by the 2003 Application. (IPCB Hrg. 4/7/05, pp. 120, 122). Ms. Faber received one telephone call prior to March 17, 2004, regarding the proposed expansion from a family friend of her husband. (*Id.* at pp. 126-28). Ms. Faber terminated that phone conversation as soon as it was polite for her to do so. (*Id.* at p. 133). She did not feel threatened or intimidated by that telephone call. (*Id.* at p. 141).

Ms. Faber was mailed between 15 and 20 letters regarding the proposed expansion. (*Id.* at p. 128). Ms. Faber read one or two of those, and as soon as she discovered they were about the landfill, she threw them away along with the rest she received. (*Id.* at pp. 128-29, 133-34).

Ms. Faber testified that she did not discuss the substance of the application with anyone outside of the hearing process and ignored all outside communications. (*Id.* at pp. 134, 140-41). Ms. Faber did not feel threatened or intimidated by yard signs opposing the proposed expansion or picketers. (*Id.* at pp. 141-42).

Stanley James

Board Member James testified that he voted to find that some of the criteria were not met by both Waste Management's 2002 and 2003 siting Applications. (IPCB Hrg. 4/7/05, pp. 149, 153). Prior to the March 17, 2004 vote, Mr. James received several telephone calls regarding the proposed expansion. (*Id.* at pp. 153-54). Two of those callers supported the expansion. (*Id.* at p. 155). Prior to the March 17, 2004 vote, Mr. James also received letters regarding the proposed expansion. (*Id.* at pp. 158-59). He read those letters, gave some to the county clerk and threw away the letters that he thought all of the county board members had received. (*Id.* at pp. 159-61). During a break in the siting hearings, one individual told him that he was opposed to the expansion, and Mr. James explained that he could not talk about it. (*Id.* at pp. 161-62). Mr. Harrison approached Mr. James at his office during the siting hearings to discuss the proposed expansion, but Mr. James told him that he could not talk about it. (*Id.* at p. 166). Mr. James was not threatened or intimidated by Mr. Harrison. (*Id.* at p. 177). Whenever someone tried to talk to him about the proposed expansion, Mr. James said that he could not discuss it. (*Id.* at p. 177). Mr. Runyon expressed his opposition to the proposed expansion to Mr. James, but Mr. James did not respond to him. (*Id.* at pp. 171-73). Mr. James disregarded all statements that were made to him outside of the siting hearings. (*Id.* at p. 178).

Culver (James) Vickery

Board Member Vickery voted to find all of the criteria were met by Waste Management's 2002 Application and voted to find that one criterion was not met by the 2003 Application. (IPCB Hr. 4/7/05, pp. 187-88, 191). Prior to the March 17, 2004 vote, Mr. Vickery did not directly receive any telephone calls regarding the proposed expansion. (*Id.* at p. 191). He did receive a message from his wife that "Bruce" called. (*Id.* at p. 192). Mr. Vickery assumed that the call came from Bruce Clark, the County Clerk, but when he checked the telephone number, he saw that it was not from Mr. Clark and chose not to return the phone call. (*Id.*) He now assumes that the phone call came from Bruce Harrison. (*Id.*) Mr. Vickery was mailed numerous letters at his home regarding the proposed expansion. (*Id.* at p. 193). Mr. Harrison opened one or two of those letters and turned them all into the County Clerk shortly after the March 17, 2004 vote. (*Id.* at pp. 193-94). Mr. Vickery testified that he was not intimidated or threatened by the picketers, the phone call that his wife received or the letters he was sent. (*Id.* at pp. 197-99).

Ruth Barber

Board Member Barber voted to find that all of the criteria were met by Waste Management's 2002 Application and voted that some criteria were not met by the 2003 Application. (IPCB Hrg. 4/7/05, pp. 209, 212). Prior to March 17, 2004, Mr. Harrison came uninvited and unannounced to her office. (*Id.* at pp. 218-19). At that time, Mr. Harrison began rambling, and Ms. Barber started walking toward Mr. Harrison's vehicle to encourage Mr. Harrison to leave. (*Id.* at pp. 220-21). Prior to March 17, 2004, one voice mail message was left on her machine at home regarding the proposed expansion, but her husband erased the message, and Ms. Barber never heard it. (*Id.* at pp. 212-14). Ms. Barber was mailed approximately 30 or 40 letters regarding the proposed expansion, of which she read only two. (*Id.* at p. 215). Once

she discovered that the letters concerned the landfill, she threw them in her recycling bin along with the other letters that she threw away unread. (*Id.* at pp. 215-16, 226). Ms. Barber did not speak to anyone outside of the siting hearings regarding the substance of the application because she was instructed not to do so. (*Id.* at pp. 225-26). The letters that Ms. Barber received did not threaten or intimidate her. (*Id.* at p. 227).

Kelly McLaren

Board Member McLaren did not vote on Waste Management's 2002 Application and voted fo find that one criterion was not met by the 2003 Application. (IPCB Hrg. 4/7/05, pp. 230, 233-34). Prior to March 17, 2004, Mr. Harrison came to Mr. McLaren's business and began discussing his objections to the proposed expansion. (*Id.* at p. 236). Mr. McLaren told Mr. Harrison to leave. (*Id.* at pp. 238-39). Approximately one month later, Mr. Harrison returned to Mr. McLaren's business, again unannounced and uninvited. (*Id.* at p. 239). At that time, Mr. Harrison brought some petitions with him. (*Id.* at p. 240). Mr. McLaren glanced at the petitions but did not respond to Mr. Harrison. (*Id.* at p. 241). Mr. Harrison's actions offended and infuriated Mr. McLaren but did not threaten or intimidate him. (*Id.* at 246-48). Mr. McLaren was also not threatened or intimidated by the petition that Mr. Harrison showed him. (*Id.* at 252).

Prior to the March 17, 2004 vote, Mr. McLaren did not receive any phone calls regarding the proposed expansion but was mailed approximately 15 to 25 letters. (*Id.* at p. 234). His daughter opened one letter, saw that it was about the proposed expansion and stopped reading it. (*Id.*) His daughter gave him all of the letters, and Mr. McLaren turned them in to the County Clerk. (*Id.* at pp. 235, 248).

Frances Jackson

Ms. Jackson does not know Bruce Harrison and never had any conversations with him. (*Id.* at p. 280). Prior to March 17, 2004, Ms. Jackson received approximately five to six telephone calls regarding the proposed expansion. (*Id.* at p. 269). Ms. Jackson relied on the testimony provided at the siting hearings, not on the phone calls she received. (*Id.* at pp. 275-76). Ms. Jackson received many letters regarding the proposed expansion prior to the 2004 vote. (*Id.* at p. 278). Ms. Jackson opened those letters to see who they were from, but she did not read them in detail. (*Id.* at p. 279). The telephone calls she received did not threaten or intimidate her in any way. (*Id.* at pp. 292-93). She was also not threatened by the picketers or the letters she received. (*Id.* at p. 294).

George Washington, Jr.

Board Member Washington voted to find all of the criteria were met by Waste Management's 2002 and 2003 Applications. (IPCB Hrg. 4/7/05, pp. 301, 304). Prior to the March 17, 2004 vote, Mr. Washington did not have any telephone conversations regarding the proposed expansion but was mailed letters regarding the expansion. (*Id.* at p. 303). Mr. Washington returned those letters unopened to the County Clerk. (*Id.*) Mr. Washington had one conversation with Mr. Harrison, during which Mr. Harrison tried to discuss the proposed expansion. (*Id.* at p. 306). That conversation lasted approximately two minutes, and consisted of Mr. Harrison explaining that he would work to oppose county board members who voted in favor of the proposed expansion. (*Id.* at pp. 307-08). Mr. Harrison's statements did not intimidate or threaten Mr. Washington. (*Id.* at p. 308).

Lisa Latham Waskowsky

Board Member Waskowsky's evidence deposition taken on July 20, 2004 was admitted as evidence at the IPCB Hearing. (IPCB Hrg. Officer Ex. 2). Ms. Waskowsky voted to find that the criteria were met by Waste Management's 2002 Application and voted to find two criteria were not met by the 2003 Application. (IPCB Ex. 2, pp. 7, 82). Ms. Waskowsky spoke with Mr. Harrison on the telephone on February 14, 2004, when Mr. Harrison called Ms. Waskowsky at her home. (*Id.* at pp. 34-35). Mr. Harrison told her that he wanted to meet to discuss some legal papers that allegedly showed that it was illegal for the County Board to be instructed not to speak to the public about the proposed expansion, but she refused to meet with him. (*Id.* at pp. 35-38). Two days later, Mr. Harrison called her home again insisting that she meet with him. (*Id.* at p. 40). Ms. Waskowsky again refused Mr. Harrison's request. (*Id.* at p. 41). Shortly before March 17, 2004, Mr. Harrison came to Ms. Waskowsky's house trying to give her the legal documents he had mentioned in the previous phone conversations. (*Id.* at pp. 50-51). Ms. Waskowsky told Mr. Harrison never to come back to her house. (*Id.*) Mr. Harrison left the legal documents with Ms. Waskowsky, and she shredded them. (*Id.* at p. 52).

Prior to the March 17, 2004 vote, Ms. Waskowsky was mailed approximately 25 to 30 letters regarding the proposed expansion, which she turned into the county clerk, Bruce Clark. (*Id.* at pp. 78-79). She opened a few letters, but when she realized they were about the landfill, she stopped reading them, placed them in an envelope and turned them over to Bruce Clark. (*Id.* at p. 79).

Douglas Graves

The deposition of Douglas Graves taken on June 29, 2005 was admitted as Hearing Officer Exhibit 3 at the IPCB Hearing. Board Member Graves did not vote on Waste

Management's 2002 siting Application and voted to find that all criteria were met by the 2003 siting Application. (IPCB Hrg. Officer Exhibit 3, pp. 5, 9). Mr. Graves received a telephone call from Mr. Harrison prior to the March 17, 2004 vote. (*Id.* at pp. 18-20). Mr. Graves' wife answered the telephone, took Mr. Harrison's telephone number, and gave the message to Mr. Graves. (*Id.*) Mr. Graves never called Mr. Harrison back because he thought that Mr. Harrison was calling about the landfill. (*Id.* at p. 20). Mr. Graves did not receive any other telephone calls regarding the proposed expansion. (*Id.* at p. 24). Mr. Graves received a number of letters regarding the proposed expansion. (*Id.* at pp. 23-24). The letters that Mr. Graves received during the public comment period were delivered unopened to the county clerk. (*Id.*) Mr. Graves threw away and did not read any letters that he received after that. (*Id.*)

Pamela Lee

The deposition of Pamela Lee, Vice Chairman of the County Board, taken on August 2, 2004, was admitted into evidence at the IPCB Hearing, as Hearing Officer Exhibit 3. Board Member Lee voted in favor of Waste Management's Applications in 2003 and 2004. (IPCB Hrg. Petitioner's Exs. 7-8). Pamela Lee was contacted by Mr. Harrison prior to March 17, 2004 to discuss the proposed expansion, and she told him that she could not speak to him about it. (IPCB Hrg. Officer Ex. 3, pp. 8-9). The conversation lasted less than one minute, and Ms. Lee never heard from Mr. Harrison again. (*Id.* at p. 9). She received one or two telephone calls from other people regarding the proposed expansion, but she does not remember who called her. (*Id.* at p. 10). Ms. Lee told those individuals that she was not at liberty to speak about the landfill. (*Id.*) Ms. Lee was mailed many letters prior to March 17, 2004. (*Id.* at pp. 10-11). Ms. Lee opened the letters to see what they said and then turned them over to the County Clerk's office. (*Id.* at p. 11).

Duane Bertrand

The deposition of Duane Bertrand, taken on June 29, 2004, was admitted into evidence at the IPCB Hearing as Hearing Officer Exhibit 5. Board Member Bertrand voted to find all of the criteria were met by Waste Management's 2002 and 2003 Application. (IPCB Ex. 5, pp. 6, 7). Mr. Bertrand met with Mr. Harrison on one occasion with Board Member Meents because Mr. Meents was not comfortable talking to Mr. Harrison by himself. (*Id.* at p. 25). During the meeting, Mr. Bertrand and Mr. Meents both told Mr. Harrison that they could not discuss the landfill. (*Id.* at pp. 25-26). Mr. Bertrand did not consider any statements that he heard outside of the siting hearings as evidence. (*Id.* at pp. 36-37).

Mr. Bertrand was mailed letters regarding the proposed expansion, which he turned in to the County Clerk. (*Id.* at p. 9). He also received approximately half a dozen phone calls prior to the March 17, 2004 vote. (*Id.* at pp. 9-10). He does not remember who any of those calls were from, except for one, which was from Doug Flageole. (*Id.* at p. 10). Mr. Flageole asked Mr. Bertrand how he intended to vote, and Mr. Bertrand refused to respond. (*Id.*) One of the callers was in favor of the expansion. (*Id.* at p. 11). Mr. Bertrand told each of the callers that he could not discuss the landfill with them and told them to submit their opinions in writing to the County Board. (*Id.* at pp. 13-14).

William Olthoff

The deposition of Board Member Olthoff was admitted as evidence at the IPCB Hearing as Hearing Officer Exhibit 6. Mr. Olthoff did not vote on Waste Management's 2002 siting Application. (IPCB Hrg. Officer Ex. 6, pp. 9-10). Mr. Olthoff voted against Waste Management's 2003 siting Application based on three criteria that he believed were not met. (*Id.* at p. 12). Mr. Olthoff first had an encounter with Mr. Harrison after Mr. Harrison asked the

pastor of Mr. Olthoff's church, Bob Guilford, if he could speak to the congregation about the landfill. (*Id.* at pp. 17-18). Pastor Guilford told Mr. Olthoff about his conversation with Mr. Harrison and asked Mr. Olthoff to speak with Mr. Harrison in his capacity as an elder and moderator of the church. (*Id.* at pp. 18-20, 38-39). Mr. Olthoff had a meeting with Mr. Harrison, during which he explained that the landfill was a political issue and that it was not appropriate to discuss in church. (*Id.* at p. 22). At the end of the meeting, Mr. Harrison simply left. (*Id.* at p. 25).

Prior to March 17, 2004, Mr. Olthoff did not receive any phone calls regarding the proposed expansion, but he was mailed letters regarding the landfill. (*Id.* at pp. 31-32). Mr. Olthoff opened one of the letters, but when he realized it was about the landfill, he stopped reading it. (*Id.* at pp. 32-33). He turned the letters in to the County Clerk. (*Id.* at p. 33).

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 November 20, 2007, a copy of the foregoing was served upon:

(Via Electronic Filing) Mr. John T. Therriault Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601	**(Via E-Mail)** Jamie Boyd Brenda Gorski Kankakee County State's Attorney 450 East Court Street Kankakee, IL 60901
(Via E-Mail) George Mueller George Mueller, P.C. 609 Etna Road Ottawa, IL 61350	**(Via U.S. Mail)** Christopher Bohlen Barmann, Kramer & Bohlen, P.C. 300 East Court Street, Suite 502 P.O. Box 1787 Kankakee, IL 60901
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(Via E-Mail) Brad Halloran Hearing Officer Illinois Pollution Control Board 100 West Randolph, 11th Floor Chicago, IL 60601	**(Via E-Mail)** Don Moran Pedersen & Houpt 161 N. Clark Street Suite 3100 Chicago, IL 60601-3224
(Via E-Mail) Karl Kruse Kankakee County Board 189 E. Court Street Kankakee, IL 60901	**(Via U.S. Mail)** Bruce Clark Kankakee County Board 189 E. Court Street Kankakee, IL 60901

Via E-Mail or By depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford,, Illinois, proper postage prepaid, before the hour of 5:00 P.M., addressed as above.

/s/ Joan Lane

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