

ILLINOIS POLLUTION CONTROL BOARD

January 24, 2008

WASTE MANAGEMENT OF ILLINOIS,	)	
INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 04-186
	)	(Pollution Control Facility
COUNTY BOARD OF KANKAKEE	)	Siting Appeal)
COUNTY,	)	
	)	
Respondent.	)	

DONALD J. MORAN AND NANCY RICHARDSON OF PEDERSEN & HOUP T APPEARED ON BEHALF OF WASTE MANAGEMENT OF ILLINOIS, INC; and

RICHARD S. PORTER AND CHARLES F. HELSTEN OF HINSHAW & CULBERTSON APPEARED ON BEHALF OF THE COUNTY BOARD OF KANKAKEE COUNTY.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

Waste Management of Illinois, Inc. (Waste Management) appealed a 2004 decision of the County Board of Kankakee County (County) denying siting for expansion of a pollution control facility, known as the Kankakee Landfill. Waste Management challenges the decision asserting that the proceedings were fundamentally unfair and that the decision was against the manifest weight of the evidence on three of the nine criteria found in Section 39.2(a) of the Environmental Protection Act (Act) (415 ILCS 5/39.2(a) (2006)). The Board finds that the proceedings before the County were fundamentally fair. The Board further finds that the County's decision relating to the need for the facility (415 ILCS 5/39.2(a)(i) (2006)), the facility's design to minimize the impact on surrounding property (415 ILCS 5/39.2(a)(iii) (2006)), and the traffic patterns (415 ILCS 5/39.2(a)(vi) (2006)) is not against the manifest weight of the evidence. The Board therefore affirms the County's decision to deny siting.

The opinion that follows will first delineate the history of this case and then discuss and summarize the facts. The next portion of the opinion will set forth the statutory and case law relevant to the Board's review of a landfill siting appeal. Then, the Board will set forth the issues. The Board will proceed with a discussion of the parties' arguments on each issue and then make the Board's findings.

**PROCEDURAL BACKGROUND**

On April 22, 2004, Waste Management timely filed a petition (Pet.) asking the Board to review a March 25, 2004 decision of the County denying siting approval. Pet. at 1-3. The County voted to deny the application for failure to establish that criteria (i), (iii), and (vi) of

Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (i), (iii), and (vi) (2006)) were met. The County found that Waste Management failed to establish that the facility was necessary to accommodate the waste needs of the area it is intended to serve (415 ILCS 5/39.2(a)(i) (2006)). The County also found that Waste Management failed to establish that the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property (415 ILCS 5/39.2(a)(iii) (2006)). Finally, the County found that Waste Management failed to establish that the traffic patterns to and from the facility are so designed as to minimize the impacts on existing traffic flow (415 ILCS 5/39.2(a)(vi) (2006)).

On June 30, 2004, the County timely filed the record (C) in this proceeding. At that time, the County also filed a motion seeking to provide only a single copy of two items in the record and that motion is granted.

After Waste Management filed the petition for review, on June 22, 2004, Michael Watson (Watson) filed a motion to intervene in the proceeding and on July 1, 2004, Merlin Karlock (Karlock) also filed a motion to intervene. On July 22, 2004, the Board denied those motions. Also, on July 23, 2004, Keith Runyon (Runyon) filed a motion to intervene in the proceeding. On August 19, 2004, the Board denied Runyon's motion to intervene. Runyon filed a second motion to intervene on June 24, 2005, which the Board also denied on July 21, 2005. All the parties were granted leave to file *amicus curiae* briefs.

Hearings were held on April 6 (4/6 Tr.) and April 7, 2005 (4/7 Tr.) before Board Hearing Officer Bradley Halloran. The hearings were held in Kankakee, Kankakee County. The hearing officer found all witnesses credible. *See* Hearing Officer Order at 1 (May 4, 2005).

On May 13, 2005, Waste Management filed the opening brief (WMI Br.). On May 20, 2005, Watson filed his *amicus curiae* brief (W.Br.) and on May 23, 2005, Runyon filed his *amicus curiae* brief (R.Br.). Karlock filed his *amicus curiae* brief on May 24, 2005 (K.Br.). There were several motions regarding the briefs and the briefing schedule, which will not be set forth here. The hearing officer has addressed all the outstanding motions regarding the briefs. Pursuant to the revised briefing schedule, on November 20, 2007, the County filed the response brief (C. Br.) and on December 13, 2007, Waste Management filed the reply brief (Reply).

## **FACTS**

On September 26, 2003, Waste Management filed an application seeking approval for expansion of a pollution control facility known as the Kankakee Landfill located in Kankakee County (2003 Application) with the County. C1-C10. The application was "essentially the same as the siting request" filed by Waste Management on August 16, 2002 (2002 Application). C1 at 1. The County approved the 2002 Application; however, the Board reversed that decision due to lack of jurisdiction. City of Kankakee v. County of Kankakee and Waste Management of Illinois, Inc., PCB 03-125, 03-133, 03-134, and 03-135 (consol.) (Aug. 7, 2007), *aff'd sub nom. Waste Management of Illinois, Inc. v. PCB*, 356 Ill. App. 3d 229, 826 N.E.2d 586 (3rd Dist. 2005).

Waste Management seeks approval to expand the existing landfill located at 6259 South U.S. Route 45/52, Kankakee County. C1 at Criterion 2, 1-1. The existing facility consists of a total area of approximately 179 acres, 51 acres of which is solid waste landfill. *Id.* The remaining 128 acres are used for buffer, surface water management, borrow sources, support facilities and access areas. *Id.* The 2003 Application proposes horizontal expansion of approximately 296 acres, an approximate 6-acre overlay to the existing facility. *Id.*

In accordance with the Kankakee County ordinances, the 2003 Application was referred to the “Regional Planning Commission” (RPC). Public hearings were conducted from January 12, 2004 through January 21, 2004. C2604-2616. At those hearings, the testimony and documentary evidence from the 2002 Application were admitted as Waste Management Exhibits. *See* C1898-2603<sup>1</sup>. Waste Management provided testimony from eight witnesses, all of who testified concerning the 2002 Application as well. C2604-2616; C2576-2603.

Watson, Karlock, and Keller participated in the county siting hearings as opponents to the landfill. 4/6 Tr. at 109-10; 114. In addition, Mr. Bruce Harrison appeared in opposition to the landfills. *Id.* Mr. Harrison did not give his address to the County during the hearings. *See* C2613 at 86; C2616 at 250. For at least a portion of time during the landfill siting proceedings, Mr. Harrison lived on Mr. Keller’s property and then Mr. Watson’s property. *See* 4/6 Tr. at 111.

On March 9, 2004, the RPC filed recommendations on the siting application. C4100-4125. The RPC found that all nine statutory criteria had been met and recommended several conditions for each of the criteria. *Id.* On March 14, 2004, the County voted to deny the siting application on the following votes: criterion (i), 12 in favor and 16 opposed; criterion (ii), 22 in favor and six opposed; criterion (iii), 10 in favor and 18 opposed; criterion (iv), passed on a voice vote; criterion (v) 20 in favor and six opposed; criterion (vi), 12 in favor and 16 opposed; criterion (vii) was found inapplicable; criterion (viii), 25 in favor and 3 opposed; criterion (ix) 27 in favor and one opposed. C4115-25

### **Criterion (i) - Need**

Ms. Sheryl Smith testified and prepared a report on behalf of Waste Management concerning criterion (i). C1 at Criterion 1 p. 36; C2607-08; 2583-85. The report in the 2003 Application was the same report as the one prepared for the 2002 Application except the report “was updated for additional information on waste receipts and landfills [sic] disposal capacity and other information that might impact waste generation.” C2607 at 49. The service area for both applications was identical and included Kankakee, Cook, DuPage, Kane, Kendall, Grundy, and Will counties in Illinois and Lake, Newton, Porter, and Jasper counties in Indiana. C1 at Criterion 1 p. 4; C2583 at 12. The capacity for the expansion is 30 million tons. C2607 at 90.

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<sup>1</sup> The Board notes that Waste Management in its brief cites to the 2002 application on numerous occasions; however, a review of the County record and the Board’s proceedings nowhere indicate that the 2002 Application was incorporated into this record. Therefore, the Board relies on its opinion and order in City of Kankakee, PCB 03-125, 03-133, 03-134, and 03- 135 (consol.), where necessary.

Ms. Smith described her methodology in evaluating the need for the expansion. Ms. Smith began with the defined service area and collected information on the population for each county over the 27-year operating life of the proposed facility. C2583 at 10; *see also* C2607 at 49-51. Ms. Smith reviewed solid waste management plans for counties in the service area to identify individual or per person waste generation rates and then estimated net waste requiring disposal over the 27 years. C2583 at 10-11; *see also* C2607 at 49-51. Ms. Smith also applied recycling goals from county solid waste plans. C2583 at 12; *see also* C2607 at 49-51. These steps allowed her to develop total waste generation from the service area and estimate that net disposal requirements totaled between 123.6 to 219.8 million tons. C2583 at 12-13. During the 2003 Application process, Ms. Smith testified the net disposal requirements are projected between 105 million tons and 188 million tons. C2607 at 49-51; C1 at Criterion 1 p. 30.

After identifying net disposal requirements, Ms. Smith identified solid waste facilities providing disposal to the service area and determined whether there was sufficient capacity for disposal. C2583 at 11; *see also* C2607 at 49-51. Ms. Smith collected information on waste disposal facilities in Wisconsin, Indiana, Michigan, and Illinois to identify: 1) facilities that were currently permitted; 2) how much waste each facility receives each year; 3) the remaining capacity at each facility; and 4) whether each facility received waste from the service area. C2483 at 14. Based on the information gathered, Ms. Smith estimated the available disposal capacity to the service area to be 56 million tons. C1 at Criterion 1 p. 30; C2607 at 74-75. Ms. Smith opined that this available capacity will run out in 2009. C2607 at 74.

In performing her calculations, Ms. Smith used recycling rates from the county solid waste management plans she reviewed. C2607 at 55. However, Ms. Smith admitted that those rates are substantially below the current recycling rates for many communities. C2607 at 55-56. Ms. Smith agreed that if the recycling goals of several communities were met in the service area, landfill capacity would be sufficient until 2015. C2607 at 76.

Ms. Smith also testified that her report did not include capacity from facilities in or near the service area that were in the siting or permitting process, including the proposed facility in the city of Kankakee. C2607 at 58. Ms. Smith did not consider certain permitted facilities for a variety of reasons including the fact that the Spoon Ridge landfill is currently not accepting waste. C2607 at 76-87.

Ms. Smith further opined that the expansion is necessary to accommodate the waste needs of the service area because there is a substantial shortfall in capacity. C2607 at 51. Ms. Smith testified that there would be a 49 million ton minimum capacity shortfall over the 27-year operating life of the proposed facility. C2607 at 71. Ms. Smith had calculated the minimum capacity shortfall when testifying on the 2002 Application as 59 million tons over the 27-year operating life of the proposed facility. C2607 70-72. Ms. Smith also testified to errors in certain calculations. *Id.* Ms. Smith noted that the expansion will give Kankakee County another 20 years of disposal capacity. *Id.*

### **Criterion (iii) - Minimize Effect on Surrounding Property**

#### **Compatibility**

Mr. J. Christopher Lannert testified on behalf of Waste Management concerning criterion (iii). C1 at Criterion 3 (land use planning); C2607; 2577 and 2578. Mr. Lannert's group prepared the report on criterion (iii) for Waste Management. *Id.* Mr. Lannert testified that the reports prepared for the 2002 Application and the 2003 Application were identical. C2607 at 10. Mr. Lannert stated that he had driven around and checked the area and also refreshed his memory by looking at his prior testimony. *Id.*

Mr. Lannert's group evaluated the compatibility of the existing land uses within one and one-half miles of the existing landfill site. C1 at Criterion 3 (land use planning) p. 6. The supporting documentation for the report includes aerial photographs, the local development codes, zoning map, and comprehensive land use plan. C1 at Criterion 3 (land use planning) p. 4. The documentation includes the Kankakee County zoning ordinance and map and the Kankakee County comprehensive plan and map. *Id.* Field surveys were also performed during January and March 2002. *Id.*

According to Mr. Lannert, the predominant land use within the one and one half mile study area is agricultural and/or open spaces with some scattered homes. C2577 at 60; C1 at Criterion 3 (land use planning) p. 6. Immediately north of the site is a KOA campground and adjacent residential uses while the area to the east is dominated by agricultural use and the Iroquois River Valley. C1 at Criterion 3 (land use planning) p. 6. South and west of the site agriculture and open space dominate, with scattered single-family homes and a small grouping of residences to the west. *Id.* Mr. Lannert testified that agricultural fields and/or open spaces, along with the Iroquois River and the drainage creeks, account for approximately 94% of the land uses. C2577 at 60; C1 at Criterion 3 (land use planning) p. 7.

The remaining 6% of the area around the site is residential, industrial, or commercial. C1 at Criterion 3 (land use planning) p. 7. Residential uses constitute 3.8% of the land uses and have coexisted with the current landfill. *Id.* The immediately adjacent land uses and physical improvements serve as land use buffers or transitions to the surrounding land uses in the area. C1 at Criterion 3 (land use planning) p. 6. The site is within Kankakee County's jurisdiction and is zoned agricultural, which allows sanitary landfills as a special use with the zoning district. C1 at Criterion 3 (land use planning) p. 10.

A landscape-screening plan is proposed for the expansion. C2577 at 69; C1 at Criterion 3 (land use planning) p. 12. The landscape-screening plan will use existing in-place vegetation next to existing homes and will add additional screening berms around the expansion. C2577 at 69-70. The screening berms will be a variety of heights between 16 and 18 feet and will include ornamental and deciduous trees planted along the top. *Id.*

Mr. Lannert did not consider a new convention center and aquatic center under construction near the expansion when considering compatibility. C2607 at 11-12. Mr. Lannert

also did not review the City of Kankakee's comprehensive plan or talk to developers and bankers in the area. C 2607 at 12. Mr. Lannert agreed that additional growth could occur around the Iroquois River, but he did not perform any numerical analysis to determine if the expansion would retard growth. C2607 at 18.

Mr. Lannert opined that the expansion is compatible with the surrounding area. C2607 at 21; C2577 at 72.

### **Property Values**

**General.** Ms. Patricia McGarr from Integra Realty Resources testified on behalf of Waste Management concerning property values. C2580-82; C2605-06. Integra Realty Resources prepared the Real Estate Impact Study included in the application. C1 at Criterion 3 (real estate). Ms. McGarr testified that she received a diploma from Richard J. Daley College (C2580 at 6-7; C1907-12); however, Ms. McGarr was unable to provide a copy of that diploma. The degree was not necessary to receive her real estate appraiser's license or the MAI designation<sup>2</sup>. C2605 at 43-44. Richard J. Daley College did issue a degree to Ms. McGarr in January 2004. C2605 at 100-03.

Ms. McGarr performed a comparable property analysis and prepared the written report included in both the 2002 Application and the 2003 Application. C2580 at 10; C2605 at 32-33. The fundamental principal of comparable property analysis is that, if there is an impact on surrounding property values, the impact will be reflected by a comparison of sale prices and appreciation. C2580 at 10-11. Ms. McGarr accomplished the analysis by comparing a target area with a control area. *Id.* The control area is generally an area located in a similar location or general location but removed from the landfill. The target area is the area closest to the landfill. *Id.*

The target area chosen was one mile around the existing facility. C2580 at 12, 49. The control area was an area one mile away from the existing facility. *Id.* The control area is in Kankakee County to ensure that the tax rate is the same and also is located in the same school district. C2580 at 51. Both areas do include different townships. *Id.* The control area includes features that could also negatively impact property values such as an interstate highway and a railway. C2606 at 48, 50. In addition, the target area has more river frontage. C2606 at 52-53, 66.

The 2003 Application contains additional data that is reflected in that report. C2605 at 33. Specifically, there was a new farmland sale in the target area and residential sales in both the target and control areas. *Id.* Ms. McGarr collected data for her study from the township assessment offices and reviewed information for the Multiple Listings Service of Northern Illinois (MLS). C2580 at 11. Using this information she developed the analysis and findings filed with the application. C1 at Criterion 3 (real estate). For this expansion, Ms. McGarr

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<sup>2</sup> MAI designation is a Member of the Appraisal Institute that is earned after completing a graduate-level curriculum, a two-day comprehensive exam, a written demonstration appraisal report and obtaining 3,000 hours of certified experience. C2580 at 9.

examined 472 agricultural sales over 13 years and 225 single-family home sales over five years. C1 at Criterion 3 (real estate) p. 4. Ms. McGarr did not interview homeowners specifically, nor did she perform any actual appraisals in developing her findings. C2605 at 114-15.

In addition to the study for this expansion, Ms. McGarr has performed a study for the existing Settler's Hill Recycling and Disposal Facility located in Kane County. C1 at Criterion 3 (real estate) p. 4. For that study, 922 sales were reviewed. *Id.*

**Residential Sales.** The study indicates that the trend over the past ten years is to divide large farmsteads into one-to-ten acre home sites. C1 at Criterion 3 (real estate) p. 6. In the target area over a four-year period (1999 to 2003) 13 homes were sold with an average home site of 3.62 acres. *Id.* The sales prices ranged from \$40,000 to \$260,000. *Id.* Two homes within 5,000 feet of the existing facility were sold and the prices were \$223,000 and \$260,000. *Id.*

In the control area, during that same period of time, 12 homes have been sold. C1 at Criterion 3 (real estate) p. 6. The lot sizes in the control period were smaller, ranging from 0.10 acres to 2.65 acres and averaging 0.77 acres. *Id.* The sale prices ranged from \$660,000 to \$139,000. *Id.*

In order to compare the prices between the target and control areas, the prices were adjusted to compensate for the different lot sizes. C1 at Criterion 3 (real estate) p. 8. This resulted in a negative adjustment for the target area and the resulting average price for home sale became \$95,890. *Id.* The control areas average price is \$93,573. *Id.* Ms. McGarr also used the MLS database to explore market value of homes in the Kankakee area. *Id.* The prices ranged from \$11,000 to 252,500, with an average sale price of \$79,942. *Id.*

**Farm Land Sales.** Ms. McGarr researched sale prices for farmland located within the target area over the past ten years. C1 at Criterion 3 (real estate) p. 9. Between the period of 1990-1994, five sales occurred within the target area with the average sale containing 40 acres and an average sale price of \$1,931 per acre. *Id.* Between 1995 and 2003, there were three sales containing an average of 23 acres with an average sale price of \$3,089 per acre. *Id.*

In the control area there were three sales between 1990-1994, averaging 93 acres and averaging \$2,018 per acre. C1 at Criterion 3 (real estate) p. 9. From 1995-2003, there were three additional sales. *Id.* The average size was 18 acres and the average price was \$2,359 per acre. *Id.* Ms. McGarr also examined sales in Kankakee County for the same periods. *Id.* For 1990-1994, the average size was 68 acres with an average price of \$2,207 per acre. From 1995-2002, the average size was 76 acres with and average cost of \$3,189 per acre. *Id.*

**Settler's Hill.** Ms. McGarr chose Settler's Hill because of similarities between the expansion and Settler's Hill. C2580 at 19-20. For example, Waste Management has operated the facility for over 20 years; at the inception the landfill was in a rural area and was located near the Fox River. *Id.* Settler's Hill is also similar in size and daily volumes of the expansion. *Id.*

Ms. McGarr evaluated 922 sales to study the impact of Settler's Hill on real estate values. C1 at Criterion 3 (real estate) pp. 12-13. Ms. McGarr opined that the data does not reflect a negative or measurable discernible impact on property values. C2580 at 22.

### **Public Comment**

Mr. Watson presented a public comment at the close of the hearing which was a report prepared by Peter E. Hopkins of Hopkins Appraisal Service. C2859-76. The comment takes issue with the methods used by Waste Management, specifically because the prices for property were averaged. C2866-67. Another shortcoming in Mr. Hopkins opinion is the failure to account for the "nature of farmland prices" in making comparison. C2867. Mr. Hopkins opined that the inclusion of Settler's Hill was an inappropriate comparison and the property value guarantee offered by Waste Management was inadequate. C2870-72.

### **Criterion (vi) - Traffic Patterns**

#### **Stephen Corcoran**

Mr. Stephen Corcoran, with Metro Transportation Group, Inc., testified on behalf of Waste Management concerning criterion (vi). C2579; C2610. In addition, Metro Transportation Group provided a report that was included in the application. C1 at Criterion 6. Mr. Corcoran testified that the report filed with the 2003 Application is essentially identical to the report filed with the 2002 Application. C2610 at 8.

Mr. Corcoran testified that a traffic impact study consists of three main components. C2579 at 19. The first is to identify the existing conditions in the study area including traffic volume and roadway conditions. *Id.* Second, the proposed changes to the roadway system must be examined in terms of character, the development, the amount of traffic, and getting in and out of the site. *Id.* The third step is to combine the first two and see how the changes impact the existing roadway. C2579 at 20.

In this instance, Mr. Corcoran evaluated the existing road conditions by examining the road and noting that the roadway is a two-lane north-south highway with a 55 mph speed limit. C1 at Criterion 6 p. 3. The existing facility access drives are located on US 45/52 with an inbound lane that is 25 feet in width. *Id.* Under future conditions, these access drives are proposed to be removed and a single full access drive located on US 45/52. *Id.* Mr. Corcoran also performed manual traffic counts in January 2002. *Id.*; C2579 at 21.

Next, Mr. Corcoran indicated that the traffic from the proposed expansion was examined to determine where the traffic would come from and go to. C2579 at 22. The number of vehicles was looked at as well as the volume of traffic and when that traffic volume would be the highest. *Id.*



Finally, the two sets of information were combined and several additional factors were considered. C2579 at 30-34. The additional factors included an analysis of the roadway capacity, a gap study<sup>3</sup> and a sight distance analysis. C1 at Criterion 6 pp. 13-14.

Mr. Corcoran's study indicated that US 45/52 has an existing two-way volume of approximately 5,200 vehicles per day. C1 at Criterion 6 p. 5. The peak hours of traffic flow are during the morning between 7:00 a.m. and 8:00 a.m. and the evening between 4:30 p.m. and 5:30 p.m. *Id.* During those peak hours traffic volumes were found to be 368 vehicles and 435 vehicles, respectively. C2579 at 24. Mr. Corcoran testified that based on calculations, there are approximately 1,200 cars an hour that go by the site and US 45/52 is operating at about 37% capacity. C2579 at 24-25. Mr. Corcoran further testified that the peak traffic for the expansion should occur between noon and 1:00 p.m., so that the peak hours of the expansion will not coincide with the peak hours of the traffic on US 45/52. C2579 at 27-28.

School buses travel along US 45/52, with peak hours between 7:00 and 8:00 in the morning and between 3:00 and 5:00 p.m. in the mid-afternoon. C2610 at 44-45; C2613 at 12. Mr. Corcoran counted 12 school buses during the morning hours and approximately six in the afternoon. C2610 at 44-45.

Mr. Corcoran and Metro Transportation Group, Inc. found that there are adequate gaps to serve the expansion traffic. C2610 at 57-60. Mr. Corcoran noted that the Illinois Department of Transportation (IDOT) gap requirement is 11.5 seconds and adjusting for semi-trailers results in a gap requirement of 15.5 seconds. C2610 at 57. In addition, Mr. Corcoran indicated that the sight distance exceeded recommended distances. C1 at Criterion 6 p. 14. Mr. Corcoran opined that the traffic patterns for the expansion have been designed to minimize the impact on existing traffic patterns. C1 at Criterion 6 p. 18; C2579 at 34.

### **Brent Coulter**

Mr. Brent Coulter testified on behalf of Watson on the issue of criterion (vi). C2613. Mr. Coulter opined that the expansion had not been designed to minimize the impact on existing traffic patterns. C2613 at 8. Mr. Coulter arrived at his conclusion based on three categories. C2613 at 9-10. The first is the impact of the expansion on proposed school bus operations. *Id.* Second, Mr. Coulter has concerns about the intersection improvements at the site. *Id.* And third, Mr. Coulter is concerned with what is considered "existing traffic flow" in this context. *Id.*

More specifically concerning school buses, Mr. Coulter contacted the local school districts and was informed that there are three buses making multiple stops on the section of the roadway between 6000 South and 5000 South on US 45/52. C2613 at 12. Mr. Coulter indicated that there was a lot of stopping to pick up and drop off students during the hours of 7:00 a.m. and 7:45 a.m. and 3:00 p.m. and 3:45 p.m. *Id.* Mr. Coulter opined that those times have the potential to overlap with significant truck traffic on U.S. 45/52. *Id.* Mr. Coulter expressed concerns about

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<sup>3</sup> A gap study is a measure of the interval between vehicles traveling up and down the roadway, which allows for a determination of whether sufficient time exists for turning or pulling on to the roadway. C2579 at 30-31.

potentially inattentive truck drivers on the road during those periods when school buses will be stopping. C2613 at 13.

Mr. Coulter also had concerns with the proposed design of the intersection improvements. C2613 at 14. Mr. Coulter agreed with the recommendation to add northbound and southbound turn lanes at the site access. *Id.* However, the proposed design included a 12-foot median and IDOT guidelines recommend a 14-foot median. *Id.* Further, Mr. Coulter indicated that the dimensions of the storage and taper for the southbound turn lane do not meet IDOT guidelines either, according to Mr. Coulter. C2613 at 15. Mr. Coulter also believes that the shoulder should be improved consistent with IDOT guidelines. C2613 at 15-16. Mr. Coulter was not aware if the intersection design study prepared by Metro Transportation Group had been submitted to IDOT and approved. C2613 at 33-34. Mr. Coulter noted that IDOT approval may not address his concerns. C2613 at 37. Mr. Coulter also expressed concerns about the sight distance and opines that 570 feet may not be sufficient. C2613 at 17. Mr. Coulter did concede that the sight distance was over 1,100 feet southbound and even farther northbound while standing on the expansion access road. C2613 at 36.

### **Testimony**

Mr. Darrel Bruck testified at the hearing before the Board concerning the two applications. 4/6 Tr. at 29-30. Mr. Bruck is a lifelong resident of Kankakee County and he testified that he noticed some “inconsistencies” in statements made at the Board’s hearing. *Id.*

### **Fundamental Fairness Testimony**

At the Board’s hearing, testimony was provided by 22 individuals addressing issues relating to the fundamental fairness of the proceedings before the County. The following Kankakee County Board Members testified:

Karen Hertzberger  
 Larry Gibbs  
 Jamie Romein  
 Elmer E. Wilson  
 Bob Scholl  
 Edwin Meents  
 Ann Bernard  
 Leonard Martin  
 Ralph Marcotte  
 Jim Stauffenberg  
 Michael LaGesse  
 Linda Faber  
 Stanley James  
 Culver Vickery  
 Ruth Barber  
 Kelley McLaren  
 Frances P. Jackson

George Washington Jr.

In addition, the following individuals testified:

Debbie Jane Bates  
Robert Keller  
Keith Runyon  
John Skimerhorn Jr.

The Board will summarize the testimony below, beginning with the Kankakee County Board members and then the other individuals.

**Karen Hertzberger**

Ms. Hertzberger voted on both the 2002 Application and the 2003 Application. 4/6 Tr. at 42, 46. Ms. Hertzberger supported the 2002 Application, but voted to disapprove the 2003 Application on five of the nine criteria. 4/6 Tr. at 42, 46-47. Ms. Hertzberger voted against the application on criteria (i), (ii), (iii), (v), and (vi). 4/6 Tr. at 46-47. Ms. Hertzberger did not attend any of the hearings on the 2003 Application. 4/6 Tr. at 45.

Ms. Hertzberger acknowledged that she knows who Bruce Harrison is and that she had met him. 4/6 Tr. at 48. She met Mr. Harrison between the two votes on the two applications. 4/6 Tr. at 49. Ms. Hertzberger testified that Mr. Harrison approached her at her place of business, prior to March 17, 2004 (the date the vote was taken on the 2003 Application). *Id.* Ms. Hertzberger allowed him into her place of business as it is open to the public and she “couldn’t stop him.” 4/6 Tr. at 50. She believed he was a client with a complaint and took him into a conference room and Mr. Harrison then told her he was there to talk about the siting application. *Id.* Ms. Hertzberger informed Mr. Harrison that she could not speak to him about the siting application; however, Mr. Harrison made additional attempts and told Ms. Hertzberger he was opposed to the siting application. 4/6 Tr. at 51. Ms. Hertzberger described the encounter stating: “I wouldn’t just listen. I would try to just politely tell him that I couldn’t talk to him.” *Id.* The encounter lasted only a couple minutes and ultimately Mr. Harrison left her office. 4/6 Tr. at 52.

Ms. Hertzberger stated that Mr. Harrison told her he had talked to other board members and he tried to contact her three or four more times. 4/6 Tr. at 52-53. The additional attempts were both in person and by phone. *Id.* Ms. Hertzberger has heard rumors that Mr. Harrison works for United Disposal Company, which is owned by Watson. 4/6 Tr. at 56-57.

Ms. Hertzberger did not invite Mr. Harrison to her office or solicit a conversation with him. 4/6 Tr. at 74-75. His appearance did make her uncomfortable because anyone wanting to discuss the siting application would have made her uncomfortable. 4/6 Tr. at 75-76. Ms. Hertzberger did not consider anything Mr. Harrison said to her as evidence in the siting proceeding. 4/6 Tr. at 74. Mr. Harrison did not intimidate her. 4/6 Tr. at 79.

Ms. Hertzberger acknowledged the presence of several picketers on March 17, 2004. 4/6 Tr. at 54. She could not recall what the signs said. *Id.* Ms. Hertzberger also saw signs around

Kankakee County, with the slogan “no dump, no Chicago garbage” on the signs. 4/6 Tr. at 54-55.

Ms. Hertzberger indicated that she had not received any phone calls other than those from Mr. Harrison; however she did receive many letters. 4/6 Tr. at 57-58. She read one of the letters and determined that the letter was about the siting application; Ms. Hertzberger quit reading the letter. 4/6 Tr. at 58. Ms. Hertzberger believes the letter was in opposition to the siting application and she does not have any information that any letter she received supported the landfill. 4/6 Tr. at 57-58. Ms. Hertzberger did not give the letters to anyone. 4/6 Tr. at 60. Ms. Hertzberger received several letters after the March 17, 2004 vote, one of which she opened and it was a thank you note for her vote on the siting application. 4/6 Tr. at 62-63.

### **Larry Gibbs**

Mr. Gibbs did not vote on the 2002 Application, as he was ill. 4/6 Tr. at 208. He voted to disapprove the 2003 Application. 4/6 Tr. at 210-11. Mr. Gibbs attended some of the hearings on the 2003 Application. 4/6 Tr. at 208.

Mr. Gibbs received a phone call at home from Mr. Harrison before the March 17, 2004 vote. 4/6 Tr. at 212, 213. Mr. Gibbs indicated that Mr. Harrison spoke generally and when it became clear that Mr. Harrison was going to discuss the landfill, Mr. Gibbs stopped the conversation. *Id.* The conversation lasted less than a minute. 4/6 Tr. at 213. Mr. Gibbs did not solicit contact with Mr. Harrison. 4/6 Tr. at 222.

Mr. Gibbs received less than 50 letters at his home and read only one. 4/6 Tr. 214. Mr. Gibbs opened that one letter, scanned the letter, and when he discovered that the letter concerned the siting application he resealed the letter. *Id.* Mr. Gibbs gave all the letters to the Clerk. *Id.* Mr. Gibbs did not know if the letter was in support or opposition of siting, once he determined the letter was about the landfill he closed the letter. 4/6 Tr. at 214-15.

Mr. Gibbs did have additional residents approach him in passing about the landfill. 4/6 Tr. at 215. Three separate people at three different times approached Mr. Gibbs as a county board member to express opposition to the landfill. 4/6 Tr. at 216-17. Mr. Gibbs told each of these people he could not discuss the landfill after they had expressed their opinions. 4/6 Tr. at 222.

### **Jamie Romein**

Mr. Romein voted on both the 2002 Application and the 2003 Application. 4/6 Tr. at 225, 227. Mr. Romein voted to approve the 2002 Application, but voted to disapprove the 2003 Application on three of the nine criteria. 4/6 Tr. at 227. Specifically, Mr. Romein voted to deny siting on criteria (i), (iii), and (vi). *Id.* Mr. Romein did not attend the hearings on the 2003 Application. 4/6 Tr. at 226.

Mr. Romein indicated that he knows Bruce Harrison and that Mr. Harrison called his residence prior to the March 17, 2004 vote. 4/6 Tr. at 239. Mr. Romein stated that Mr. Harrison

spoke to him about “no dump, no Chicago garbage” and Mr. Romein informed Mr. Harrison that the conversation would be *ex parte*. *Id.* Mr. Romein told Mr. Harrison that he could not speak to Mr. Harrison and that Mr. Harrison would have to see how Mr. Romein voted. *Id.* The conversation lasted no more than two minutes, and based on Mr. Harrison’s statements, Mr. Romein assumed Mr. Harrison opposed the expansion. 4/6 Tr. at 239-40.

Mr. Romein also had personal encounters with Mr. Harrison at a job site after the March 17, 2004 vote. 4/6 Tr. at 241-43. Mr. Harrison was with Mr. Watson in a United Disposal truck. *Id.* Mr. Harrison attempted to speak to Mr. Romein about the reconsideration of the siting vote and Mr. Romein informed Mr. Harrison he would vote the way he wanted to. 4/6 Tr. at 243. A second encounter occurred at a stoplight when Mr. Harrison came from a truck driven by Mr. Watson and got into the vehicle. 4/6 Tr. 244-46. Mr. Romein stated that Mr. Harrison asserted he had the power to run someone against Mr. Romein in the election. 4/6 Tr. at 246. Mr. Romein again told Mr. Harrison that Mr. Romein would vote the way he wanted to vote. *Id.* Mr. Romein did not seek out Mr. Harrison and did not feel threatened by Mr. Harrison’s conduct. 4/6 Tr. at 253-54.

Mr. Romein received between 20 and 25 letters, which he read. 4/6 Tr. at 229-30. Mr. Romein read all of the letters and took them to the county clerk. 4/6 Tr. at 230; 253. All the letters were opposed to siting. *Id.* A letter was sent to Mr. Romein that indicated that Mr. Romein should vote against the siting application or the author would work against Mr. Romein’s reelection. 4/6 Tr. at 233-36. Mr. Romein did not feel threatened by that letter. 4/6 Tr. at 236-37. That same letter was sent to the county clerk and is in the county record. 4/6 Tr. at 250-51; C2720. Mr. Harrison received thank you notes for his vote after March 17, 2004. 4/6 Tr. at 233.

### **Elmer E. Wilson**

Mr. Wilson voted on both the 2002 Application and the 2003 Application. 4/6 Tr. at 259-261. Mr. Wilson supported both applications. *Id.* Mr. Wilson received maybe half a dozen phone calls from individuals who identified themselves. 4/6 Tr. at 260-61. Mr. Wilson ended the conversations when they attempted to discuss the expansion. *Id.*

Mr. Wilson was approached by Mr. Harrison at a local restaurant prior to the filing of the 2002 Application about a spiritual matter. 4/6 Tr. at 262-63. Mr. Harrison subsequently attempted to approach Mr. Wilson about the 2003 Application. 4/6 Tr. at 263. Mr. Harrison called and scheduled a meeting with Mr. Wilson about spiritual matters; however the conversation drifted to the proposed expansion. 4/6 Tr. at 264. Mr. Harrison sought Mr. Wilson’s position and Mr. Wilson told Mr. Harrison he could not talk about the expansion. *Id.* Mr. Harrison continued to discuss the expansion, but Mr. Wilson continued to indicate he could not discuss the matter. 4/6 Tr. at 264-65.

Mr. Harrison indicated that he had talked to people about support and Mr. Wilson took that to mean Mr. Harrison had other people who opposed the landfill. 4/6 Tr. at 264-65. Mr. Wilson knew Mr. Harrison opposed the landfill because Mr. Harrison was attempting to get Mr. Wilson to oppose the landfill. 4/6 Tr. at 265. Mr. Harrison approached Mr. Wilson a few more

times and before the vote on March 17, 2004, Mr. Harrison handed Mr. Wilson some petitions. 4/6 Tr. at 266-67. Mr. Wilson threw away the petitions. 4/6 Tr. at 267. Mr. Wilson never approached Mr. Harrison and at no time did Mr. Wilson feel threatened. 4/6 Tr. at 269-70.

### **Bob Scholl**

Mr. Scholl was not a county board member when the 2002 application was considered. 4/6 Tr. at 4/6 Tr. at 272-73. He did vote on the 2003 Application and voted to disapprove on three of the nine criteria. 4/6 Tr. at 273-74. Mr. Scholl voted against the siting application on criteria (i), (iii), and (vi). 4/6 Tr. at 274.

Mr. Scholl was a former teacher of Mr. Harrison's and Mr. Harrison approached Mr. Scholl and made statements in opposition to the landfill. 4/6 Tr. at 275. Mr. Harrison made these statements before the beginning of the siting hearings. *Id.* Mr. Harrison mentioned the clutter at the current site to Mr. Scholl. 4/6 Tr. at 276. Mr. Scholl's recollection is that Mr. Harrison said nothing to him that was not reflected in the record. 4/6 Tr. at 295. Mr. Scholl did not approach Mr. Harrison and did not feel threatened or intimidated by Mr. Harrison. 4/6 Tr. at 295-96.

Mr. Scholl received several letters that he glanced at and placed in a manila envelope. 4/6 Tr. at 279. Mr. Scholl took the letters to the county clerk. *Id.* The letters that he noticed were opposed to the expansion. *Id.* Mr. Scholl did not feel threatened or intimidated by the letters. 4/6 Tr. at 296. Mr. Scholl received thank you notes for his vote on the expansion. 4/6 Tr. at 280.

Mr. Scholl noticed the picketers outside of the public hearing on March 17, 2004. 4/6 Tr. at 281. He noticed that the picketers were carrying a variety of signs, all opposed to the expansion. *Id.*

Mr. Scholl indicated that he had seen signs in Kankakee County between January and March 17, 2004. 4/6 Tr. at 276. The signs said "no dump, no Chicago garbage" and appeared throughout Kankakee County. *Id.*

Mr. Scholl received one phone call at home. 4/6 Tr. at 275. The phone call was from a trucking company that supported the siting application. *Id.* Mr. Scholl also received a visitor to his home; Mr. Scholl informed the visitor he could not discuss the landfill. 4/6 Tr. at 282-83. The individual returned with literature about landfills generally. 4/6 Tr. at 285-86. Mr. Scholl assumed the individual opposed the landfill. 4/6 Tr. at 287.

### **Edwin Meents**

Mr. Meents voted on both the 2002 Application and the 2003 Application. 4/6 Tr. at 302. Mr. Meents voted to approve the 2002 Application; but voted to oppose the 2003 Application on three of the nine criteria. *Id.* Mr. Meents specifically opposed siting on criteria (i), (iii), and (v). *Id.*

Mr. Meents indicated that Mr. Harrison contacted him and invited him to breakfast, prior to the March 17, 2004 vote. 4/6 Tr. at 312. Mr. Harrison did not say what he wanted to talk about, but Mr. Meents knew of Mr. Harrison's interest in the 2003 Application. 4/6 Tr. at 313. Mr. Meents agreed to go to breakfast because their children had common schooling and friendships and Mr. Harrison had been a neighbor. 4/6 Tr. at 313. Mr. Meents took Duane Bertram, another county board member with him to breakfast with Mr. Harrison. 4/6 Tr. at 314. When Mr. Harrison attempted to discuss the expansion, Mr. Meents cut him off. *Id.* Mr. Meents told Mr. Harrison he could not discuss the expansion seven or eight times. 4/6 Tr. at 317. The meeting lasted about 45 minutes and Mr. Meents paid for breakfast. 4/6 Tr. at 315.

Mr. Meents received a number of letters, but did not open any of them. 4/6 Tr. at 310. Mr. Meents took all the letters to the county clerk. *Id.* Mr. Meents did not open the letters because he recognized that they were not the type of letters he would normally receive, based on return addresses. 4/6 Tr. at 311. Mr. Meents had never received this many letters in his 12 years on the county board. *Id.*

Mr. Meents saw the picketers outside the building before the March 17, 2004 vote. 4/6 Tr. at 306. Mr. Meents believes there were 40 to 50 picketers carrying signs. *Id.* Mr. Meents determined they opposed the expansion based on the signs. 4/6 Tr. at 307.

Mr. Meents had contact with Mr. Ron Thompson prior to the March 17, 2004 vote. 4/6 Tr. at 318-19. Mr. Thompson offered a public comment on the record at the county hearing and sought Mr. Meents input on that comment. 4/6 Tr. at 320. Mr. Thompson also approached Mr. Meents at church to inquire about the date for the vote on the application. *Id.* Mr. Meents and Mr. Thompson did not discuss the substance of the application. 4/6 Tr. at 323.

### **Ann Bernard**

Ms. Bernard voted on both the 2002 Application and the 2003 Application. 4/6 Tr. at 327, 328. Ms. Bernard voted to deny both applications. *Id.* Ms. Bernard has concerns about the placement of the expansion over the aquifer. 4/6 Tr. at 336. Mr. Runyon had provided Ms. Bernard with information on closed loop gasification. 4/6 Tr. at 329-33. Ms. Bernard believes that the closed loop gasification may be an alternative to landfills. 4/6 Tr. at 333.

Ms. Bernard had conversations with Mr. Runyon prior March 17, 2004; although Ms. Runyon testified the conversations did not relate to the expansion. 4/6 Tr. at 334-35.

Mr. Harrison also contacted Ms. Bernard prior to the March 17, 2004 vote; however she indicated her decision was based on the evidence presented at hearing. 4/6 Tr. at 335; 339.

### **Leonard Martin**

Mr. Martin voted on both the 2002 Application and the 2003 Application. 4/7 Tr. at 10-12. Mr. Martin voted to disapprove both applications though he changed votes on the specific criteria. 4/7 Tr. at 10-12. Mr. Martin attended most of the hearings on the 2003 Application. 4/7 Tr. at 11.

Mr. Martin first met Mr. Harrison in 2003, but has not had any discussions with Mr. Harrison regarding the siting application. 4/7 Tr. at 20-21. Mr. Martin recalls that he met Mr. Harrison working primary election campaigns including elections for county board members. *Id.* Mr. Martin assumed that Mr. Harrison was working for Democratic candidates including Mr. Watson. 4/7 Tr. at 25-27. Mr. Martin did not however know the specifics of Mr. Harrison's activities for the candidates. 4/7 Tr. at 24. Mr. Martin remembers Mr. Harrison at the public hearing on the siting application and his refusal to give his address, but did not know why Mr. Harrison was reluctant to give his address. 4/7 Tr. at 25. Mr. Wilson was in contact with Mr. Harrison until November 2004. 4/7 Tr. at 26. Mr. Martin did not know where Mr. Harrison might be at the time of the hearing. 4/7 Tr. at 28.

Mr. Martin received less than 20 letters concerning the proposed expansion. 4/7 Tr. at 14. Mr. Martin read the letters and most opposed the landfill expansion. *Id.* Mr. Martin indicated that a "couple" letters were in support of the expansion. *Id.* Mr. Martin threw the letters away and did not submit them to the county clerk. 4/7 Tr. at 14-15. Mr. Martin discussed one letter concerning the Momence Transfer Station with other members of the county board. 4/7 Tr. at 15.

Mr. Martin did receive phone calls concerning the pending siting application at his home. 4/7 Tr. at 12. A majority of the phone calls opposed the application. *Id.* The phone calls were brief lasting only a couple minutes. 4/7 Tr. at 13. The calls that were opposed to the landfill, expressed support for Mr. Martin's vote on the 2002 Application. *Id.*

### **Ralph Marcotte**

Mr. Marcotte voted on both the 2002 Application and the 2003 Application. 4/7 Tr. at 48, 51. Mr. Marcotte supported the 2002 Application, but voted against the 2003 Application on three of the nine criteria. *Id.* Specifically, Mr. Marcotte voted against the 2003 Application on criteria (i), (iii), and (vi). 4/7 Tr. at 51.

Mr. Marcotte noticed the picketers outside the meeting on March 17, 2004, carrying signs with a slogan saying "no Chicago dump." 4/7 Tr. at 50. Mr. Marcotte did not receive any phone calls concerning the expansion prior to the March 17, 2004 vote; however he did receive approximately 55 letters. 4/7 Tr. at 54. Mr. Marcotte threw away the letters. However the letters were generically addressed to "Kankakee County Board Members" and were in the county record. 4/7 Tr. at 54-55. Mr. Marcotte conceded he did not compare every letter to the ones in the record. 4/7 Tr. at 57. Mr. Marcotte was not threatened or intimidated by the letters or picketers. *Id.*



### **Jim Stauffenberg**

Mr. Stauffenberg did not vote on the 2002 Application because he was on vacation. 4/7 Tr. at 62. Mr. Stauffenberg voted against the 2003 Application on three of the nine criteria. 4/7 Tr. at 64. Mr. Stauffenberg voted against criteria (i), (ii), (vi). *Id.* Mr. Stauffenberg attended some of the hearings on the 2003 Application. 4/7 Tr. at 63.

Mr. Stauffenberg was contacted by Mr. Harrison who pulled into Mr. Stauffenberg's parking lot as Mr. Stauffenberg was leaving one afternoon. 4/7 Tr. at 68-69. They spoke through the window and set a lunch appointment. 4/7 Tr. at 69. Mr. Stauffenberg later asked someone about Mr. Harrison and was told not to talk to Mr. Harrison about the landfill. *Id.* Mr. Stauffenberg cancelled the appointment after tracking down a phone number for Mr. Harrison. *Id.* Mr. Harrison did not call Mr. Stauffenberg back. *Id.*

Mr. Stauffenberg received seven or eight letters at his home, which he did not read. 4/7 Tr. at 66-67. Mr. Stauffenberg threw away the letters, which had return addresses in the area of the landfill. 4/7 Tr. at 67.

### **Michael LaGessee**

Mr. LaGessee voted on both the 2002 Application and the 2003 Application. 4/7 Tr. at 80, 83. Mr. LaGessee supported the 2002 Application; but voted against the 2003 Application on two of the nine criteria. *Id.* Mr. LaGessee voted against criteria (iii) and (vi). 4/7 Tr. at 83.

Mr. LaGessee received a phone call from Mr. Harrison at Mr. LaGessee's place of employment. 4/7 Tr. at 84. Mr. Harrison asked to meet with Mr. LaGessee and indicated that the State's Attorney had said the Mr. Harrison could talk to the county board members. 4/7 Tr. at 84-85. Mr. LaGessee assumed, based on the "way he talked," that Mr. Harrison was opposed to the landfill expansion. 4/7 Tr. at 85. Mr. LaGessee made an appointment for later the same afternoon. 4/7 Tr. at 86. Mr. LaGessee discovered before meeting with Mr. Harrison, that Mr. Harrison had misinformed Mr. LaGessee. 4/7 Tr. at 86-90. Mr. LaGessee discovered the State's Attorney had not granted permission to Mr. Harrison to discuss the landfill expansion. *Id.* Mr. LaGessee cancelled the meeting. *Id.*

Mr. Harrison returned another time to Mr. LaGessee's place of employment, unannounced and uninvited. 4/7 Tr. at 91. Mr. LaGessee testified that Mr. Harrison was passing a petition and gave a copy to Mr. LaGessee who simply passed it back. 4/7 Tr. at 92.

Mr. LaGessee received 10 to 20 letters and read one of those. 4/7 Tr. at 94. The letter opposed the landfill expansion and the remaining letters were thrown away. *Id.* The one letter Mr. LaGessee opened was from Karen Mallaney who is a distant relative. 4/7 Tr. at 95. However, the letter was addressed to the Kankakee county board. 4/7 Tr. at 103.

Mr. LaGessee noted the picketers outside before the March 17, 2004 vote. 4/7 Tr. at 82. Mr. LaGessee believed there were less than 20 picketers. *Id.* Mr. LaGessee testified that he also saw lawn signs saying "no dump, no Chicago garbage" in three or four locations. *Id.*

Mr. LaGesse was contacted by Doug Flageole at a Knights of Columbus fish fry, prior to the March 14, 2004 vote. 4/7 Tr. at 95-99. Mr. Flageole lives near the existing facility and Mr. LaGesse went out to the area. *Id.* Mr. Flageole opposed the expansion. *Id.*

### **Linda Faber**

Ms. Faber voted on both the 2002 Application and the 2003 Application. 4/7 Tr. at 120, 122. Ms. Faber supported the 2002 Application, but voted against the 2003 Application on five of the nine criteria. *Id.*; 4/7 Tr. at 123. Specifically, Ms. Faber voted no on criteria (i), (iii), (v), (vi), and (viii). *Id.*

Ms. Faber received 15 to 20 letters regarding the landfill expansion; however she only opened the first one or two. 4/7 Tr. at 128-29. Ms. Faber “got the impression” that the letters were opposed to the expansion. *Id.* Ms. Faber threw away the letters. *Id.* Ms. Faber noticed the return addresses and assumed the letters were regarding the landfill. *Id.* Ms. Faber mentioned the letters to the county clerk’s office and was told the letters were similar to letters being received by others. *Id.* Ms. Faber was told the letters were already on file, so she just threw them away. 4/7 Tr. at 134.

Ms. Faber testified that there were 10 to 12 picketers outside on March 17, 2004. 4/7 Tr. at 122-23. Ms. Faber also testified that she saw lawn signs stating “no dump, no Chicago garbage” around town. 4/7 Tr. at 130.

Ms. Faber received a phone call at home from a family friend, Mr. Bennoitt, who mentioned the landfill. 4/7 Tr. at 126-27. Ms. Faber informed Mr. Bennoitt that she could not discuss the landfill expansion and ended the conversation. *Id.* Before ending the conversation, Mr. Bennoitt made statements about the expansion, including that the expansion would impact the quality of life. 4/7 Tr. at 127-28.

### **Stanley James**

Mr. James voted on both the 2002 Application and the 2003 Application. 4/7 Tr. at 149, 153. Mr. James voted against both applications. *Id.* Mr. James attended some of the hearings on the 2003 Application. 4/7 Tr. at 150.

Mr. James was approached at his office by Mr. Harrison. 4/7 Tr. at 166. Mr. James told Mr. Harrison “there was nothing I could talk about.” *Id.* Mr. Harrison asked Mr. James what his position on the expansion was and wrote something in a book. 4/7 Tr. at 165-69. Mr. James did not feel threatened or intimidated by Mr. Harrison. 4/7 Tr. at 177.

Mr. James received 15 to 20 letters and read every one of them. 4/7 Tr. at 159. Mr. James’ recollection is that the letters all opposed the landfill. *Id.* Mr. James threw away the letters because there were preprinted and he assumed everyone got them. 4/7 Tr. at 160-61. Mr. James received thank you notes after the vote. *Id.*

Mr. James received a number of phone calls prior to the March 17, 2004 vote, some supporting the expansion, some opposed. 4/7 Tr. at 153-55. Mr. James listened to the people who called and indicated he would take into consideration what they said. 4/7 Tr. at 155-58.

Mr. James saw several picketers on March 17, 2004, with signs. 4/7 Tr. at 152. The signs were identical to the lawn signs around town, with the slogan “no dump, no Chicago garbage”. *Id.*

Mr. James had communications about the proposed landfill with Mr. Runyon. 4/7 Tr. at 170-72. Mr. Runyon expressed his opposition to the landfill. *Id.*

Mr. Ron Thompson spoke to Mr. James at a break during one of the hearings. 4/7 Tr. at 161. Mr. Thompson expressed his opposition to the landfill to Mr. James, but Mr. Thompson did not ask Mr. James to vote against the application. *Id.* Some of Mr. James’ constituents did ask him to vote against the expansion. 4/7 Tr. at 164.

### **Culver Vickery**

Mr. Vickery voted on both the 2002 Application and the 2003 Application. 4/7 Tr. at 187, 191. Mr. Vickery supported the 2002 Application, but voted against the 2003 Application on one of the nine criteria. *Id.* Specifically, Mr. Vickery voted not to approve criterion (i). 4/7 Tr. at 191. Mr. Vickery did attend some of the hearings on the 2003 Application. 4/7 Tr. at 188.

Mr. Vickery’s wife passed on a message about a phone call from “Bruce” and Mr. Vickery assumes that was Mr. Harrison. 4/7 Tr. at 192. Mr. Vickery did not return the call. *Id.*

Mr. Vickery estimates that he received about 25 letters and he opened one or two. 4/7 Tr. at 193. The opening line indicated opposition to the expansion, so Mr. Vickery kept a file and turned them over to the county clerk. 4/7 Tr. at 194.

Mr. Vickery noticed picketers on March 17, 2004, carrying signs with the slogan “no dump, no Chicago garbage”. 4/7 Tr. at 190. Mr. Vickery noticed a similar message on signs throughout the area. *Id.*

### **Ruth Barber**

Ms. Barber voted on both the 2002 Application and the 2003 Application. 4/7 Tr. at 209, 212. Ms. Barber supported the 2002 Application, but opposed the 2003 Application on three of the nine criteria. *Id.* Specifically, Ms. Barber voted against the 2003 Application on criteria (i), (iii), (vi). *Id.*

Mr. Harrison approached Ms. Barber’s office prior to March 17, 2004. 4/7 Tr. at 218. Ms. Barber escorted Mr. Harrison out of his office, while Mr. Harrison “rambled on” about the proposed expansion. 4/7 Tr. at 220-21. The encounter was approximately ten minutes long. 4/7 Tr. at 222.

Ms. Barber received 30 or 40 letters and she opened the first couple letters. 4/7 Tr. at 214-15. She read a few lines and ascertained who sent the letter and what it was about and threw away the letters. *Id.* Ms. Barber did not read the letters carefully and she was able to tell by return addresses that the unopened letters were about the landfill. 4/7 Tr. at 215-16.

Ms. Barber testified that a telephone voice message was left on her home phone. 4/7 Tr. at 213. Her husband played the message then erased it. *Id.* Ms. Barber's husband told her about the message, but no details about the content of the message. 4/7 Tr. at 213-14.

### **Kelley McLaren**

Mr. McLaren did not vote on the 2002 Application as he was on vacation. 4/7 Tr. at 230. Mr. McLaren opposed the 2003 Application on a single criterion, (vi). 4/7 Tr. at 233-34.

Mr. McLaren was approached by Mr. Harrison while working as a bartender. 4/7 Tr. at 236. Mr. Harrison indicated his opposition to the expansion, but not in great detail. 4/7 Tr. at 236-37. Mr. Harrison commented on Mr. McLaren's re-election status and indicated that Mr. Harrison could "work it to where" Mr. McLaren would not have an opponent. 4/7 Tr. at 237. Mr. McLaren understood Mr. Harrison's comment to be a threat, but Mr. McLaren was not threatened; instead he was angered by the comment. 4/7 Tr. at 237, 248.

Mr. Harrison returned to see Mr. McLaren at a later date and showed Mr. McLaren petitions. 4/7 Tr. at 240-41. Mr. Harrison told Mr. McLaren he hoped to see Mr. McLaren at the county board meeting. *Id.*

Mr. McLaren noticed both the picketers and the signs in the area. 4/7 Tr. at 233.

### **Frances P. Jackson**

Ms. Jackson is a county board member who opposed the 2003 Application. 4/7 Tr. at 268. Ms. Jackson noticed the picketers on March 17, 2004, and received phone calls and letters about the expansion. 4/7 Tr. at 268-281.

### **George Washington Jr.**

Mr. Washington voted to approve both the 2002 Application and the 2003 Application. 4/7 Tr. at 301, 304. Mr. Washington attended the hearings on the 2003 Application and is chairman of the RPC. 4/7 Tr. at 301.

Mr. Harrison attempted to discuss the landfill with Mr. Washington at the county building, but Mr. Washington declined to discuss the matter with him. 4/7 Tr. at 306-07. Mr. Washington "got from Mr. Harrison was that there would be active participation in the election to try and influence whomever voted in support of the landfill." 4/7 Tr. at 307. Mr. Washington was not threatened or intimidated by Mr. Harrison's comments. 4/7 Tr. at 308.

Mr. Washington noticed the picketer and saw the yard signs. 4/7 Tr. at 302. Mr. Washington received letters, which he did not open and turned over to the county clerk. 4/7 Tr. at 303

### **Debbie Jane Bates**

Ms. Bates was subpoenaed to appear at the hearing. 4/6 Tr. at 80. Ms. Bates is a friend of Bruce Harrison. 4/6 Tr. at 81. Ms. Bates does not know what Mr. Harrison's position on the landfill expansion. 4/6 Tr. at 83. Ms. Bates does not know where Mr. Harrison is located. Tr. at 85. Ms. Bates did attend a meeting about the expansion because she was opposed to the expansion. 4/6 Tr. at 88-89.

### **Robert Keller**

Mr. Keller became aware of the proposed expansion and received notice of the expansion for both the 2002 Application and the 2003 Application. 4/6 Tr. at 95-97, 109. Mr. Keller testified about his relationship with both Mr. Watson and Mr. Harrison. Mr. Keller considers Mr. Watson a friend and Mr. Watson provided an affidavit to Mr. Keller concerning service of a prior application for expansion. 4/6 Tr. at 97, 107. Mr. Keller has driven trucks for Mr. Watson and not received any compensation. 4/6 Tr. at 98-99. Mr. Keller and Mr. Watson speak three to four times a week. 4/6 Tr. at 101. Mr. Keller and Mr. Watson discussed the service of the 2003 Application and the hearings. 4/6 Tr. at 109-10. Mr. Keller indicated that he knows Mr. Watson opposes the landfill and Mr. Watson knows he does too. *Id.*

Mr. Harrison moved a trailer on to Mr. Keller's property and stayed for a period of time. 4/6 Tr. at 110-12. Mr. Keller eventually told Mr. Harrison to move and Mr. Harrison moved the trailer across the street to Mr. Watson's property. *Id.*; 4/6 Tr. at 130. Mr. Harrison occasionally used Mr. Keller's phone and Mr. Keller and Mr. Harrison spoke three to four times a week until Mr. Harrison moved. 4/6 Tr. at 118-19. Mr. Harrison had been with Mr. Keller when Mr. Keller assisted Mr. Watson, but Mr. Keller does not know if Mr. Harrison has performed work for Mr. Watson. 4/6 Tr. at 113. Mr. Keller testified that Mr. Harrison did not discuss his actions and efforts in opposing the expansion with Mr. Keller. 4/6 Tr. at 116. Mr. Keller did see Mr. Harrison at the hearings so Mr. Keller was aware Mr. Harrison opposed the expansion. 4/6 Tr. at 112-13.

Mr. Keller testified that within three or four days of the Board hearing he had a conversation with Mr. Harrison. 4/6 Tr. at 120. Mr. Keller stated that Mr. Harrison believed he was in danger so he left. 4/6 Tr. at 121. Mr. Keller asserts he too has concerns about his safety. 4/6 Tr. at 124.

Mr. Keller received a list of county board members; however he could not recall if the list came from Mr. Harrison, Mr. Watson or someone else. 4/6 Tr. at 132-33. Mr. Keller used the list during the siting process. *Id.* Mr. Keller prepared a letter to send to the county board members and Mr. Watson proofread the letter. 4/6 Tr. at 133-35. Mr. Keller sent the letter to the county board members both at home and sent a copy to the County. *Id.*; C2743. Mr. Keller also

prepared thank you notes for county board members who voted in opposition to the expansion. 4/6 Tr. at 147-48.

### **Keith Runyon**

Mr. Runyon testified that he lives about seven miles upgradient from the proposed expansion. 4/6 Tr. at 165. He attended the hearings on the 2002 Application and the 2003 Application and first became aware of the potential for a siting application in 2001. 4/6 Tr. at 165-66. Mr. Runyon was informed that he could not participate in the proceeding that began in 2001 to amend the Kankakee County solid waste management plan. 4/6 Tr. at 166-67. The amendment of the solid waste management plan to allow for a site to accept out-of-county waste “alarmed” several people, including some county board members and Mr. Runyon. 4/6 Tr. at 168.

Mr. Runyon is a proponent of closed loop gasification and other technologies that are alternatives to landfilling. 4/6 Tr. at 169-71. Mr. Runyon has talked about closed loop gasification at public meetings but Mr. Runyon does not recall providing documentation to county board members. 4/6 Tr. at 172. Mr. Runyon did not have communications with county board members concerning closed loop gasification or the siting application prior to the March 17, 2004 vote. 4/6 Tr. at 173-74.

Mr. Runyon knows Mr. Harrison and that he opposes the expansion based on public hearings. 4/6 Tr. at 176-77. Mr. Runyon did not hear of Mr. Harrison contacting county board members; however he was aware that Mr. Harrison was circulating petitions and putting up signs. 4/6 Tr. at 177-81. Mr. Runyon signed the petition that opposed accepting out-of-county waste. 4/6 Tr. at 183.

### **John Skimerhorn Jr.**

Mr. Skimerhorn is a private investigator hired by Waste Management to serve subpoenas for depositions and the Board’s hearing on Mr. Harrison. 4/7 Tr. at 199-200. Mr. Skimerhorn described his attempts to find and serve Mr. Harrison. 4/7 Tr. 200-06. Mr. Skimerhorn was unable to locate Mr. Harrison. *Id.*

## **ISSUES**

Waste Management presents three issues for the Board’s consideration. Waste Management asserts that:

1. The decision by the Board’s hearing officer not to allow questions of the county board members about their deliberative process was incorrect;
2. *Ex parte* contacts with county board members and actions taken by participants in the proceeding outside the record rendered the proceedings fundamentally unfair;

3. The County's decision that criteria (i), (iii), and (vi) of Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (i), (iii), (vi) (2006)) have not been met is against the manifest weight of the evidence.

### **LEGAL BACKGROUND**

The following section delineates the specific statutory provisions at issue in this proceeding and then discusses the legal standards to be applied by the Board when deciding the issues.

#### **Statutory Provisions**

Section 3.330(a) of the Act defines a "pollution control facility" as "any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator." 415 ILCS 5/3.330(a) (2006). Section 3.330(b) defines a new pollution control facility to include "the area of expansion beyond the boundary of a currently permitted pollution control facility. 415 ILCS 5/330(b) (2006).

Section 39.2(a) of the Act requires that an applicant seeking approval for siting a pollution control facility must provide evidence demonstrating that the nine criteria listed in subsections (i) through (ix) are met. 415 ILCS 5/39.2(a) (2006). The specific criteria at issue in this proceeding are criteria (i), (iii), and (vi), which provide:

- (i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;  
\* \* \*
- (iii) the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;  
\* \* \*
- (vi) the traffic patterns to and from the facility are so designed to minimize the impacts on existing traffic flow. 415 ILCS 5/39.2(a)(i), (iii), (vi) (2006).

Section 40.1(a) of the Act provides:

If the county board . . . refuses to grant or grants with conditions approval under section 39.2 of this Act, the applicant may, within 35 days after the date on which the local siting authority disapproved . . . petition for a hearing before the Board to contest the decision of the county board . . . . In making its orders and determinations under this Section the Board shall include in its consideration the written decision and reasons for the decision of the county board or the governing body of the municipality, the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision. 415 ILCS 5/40.1(a) (2006).

Siting approval is to be granted only if a proposed facility meets all nine of the criteria set forth in Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2006)). See Town & Country Utilities, Inc. v. PCB, 225 Ill. 2d 103, 117, 866 N.E.2d 227, 235 (2007); see also Concerned Adjoining Owners v. PCB, 288 Ill. App. 3d 565, 680 N.E.2d 810 (5th Dist. 1997); Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E.2d 188, 194 (3rd Dist. 2000).

### **Fundamental Fairness**

The Board must review the proceedings before the local siting authority to determine if the proceedings were fundamentally fair. The courts have given the Board some guidance on this issue. In E & E Hauling v. PCB, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2nd Dist. 1983) *aff'd*, 107 Ill.2d 33, 481 N.E.2d 664 (1985), the court indicated that fundamental fairness refers to the principles of adjudicative due process and a conflict of interest itself could be a disqualifying factor in a local siting proceeding if the bias violates standards of adjudicative due process. E & E Hauling, 116 Ill. App. 3d at 596, 451 N.E.2d at 564. Further, in E & E Hauling, the appellate court found that although citizens before a local decisionmaker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. See also Industrial Fuels & Resources v. PCB, 227 Ill. App. 3d 533, 592 N.E.2d 148 (1st Dist. 1992); Tate v. Macon County Board, 188 Ill. App. 3d 994, 544 N.E.2d 1176 (4th Dist. 1989). Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. Waste Management of Illinois Inc. v. PCB, 175 Ill. App. 3d 1023, 530 N.E.2d 682 (2nd Dist. 1989).

The courts have indicated that the public hearing before the local governing body is the most critical stage of the site approval process. Land and Lakes Co. v. PCB, 245 Ill. App. 3d 631, 616 N.E.2d 349, 356 (3rd Dist. 1993). The manner in which the hearing is conducted, the opportunity to be heard, the existence of *ex parte* contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. Hediger v. D & L Landfill, Inc., PCB 90-163 (Dec. 20, 1990). The courts have also indicated that fundamental fairness must include the opportunity to be heard and impartial rulings on evidence. Daly v. PCB, 264 Ill. App. 3d 968, 637 N.E.2d 1153, 1155 (1st Dist. 1994).

### **Legal Standards for Review of Criteria**

In reviewing the decision of a local government disapproving siting based on the nine statutory criteria, the Board must apply the "manifest weight of the evidence" standard of review. Land and Lakes, 319 Ill. App. 3d at 48, 743 N.E. 2d at 194; Waste Management of Illinois, Inc. v. PCB, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2nd Dist. 1987); City of Rockford v. PCB, 125 Ill. App. 3d 384, 465 N.E.2d 996 (2nd Dist. 1984). A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Harris v. Day, 115 Ill. App. 3d 762, 451 N.E.2d 262 (4th Dist. 1983). The province of the hearing body is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses. Merely



because the Board could reach a different conclusion, is not sufficient to warrant reversal. City of Rockford, 125 Ill. App. 3d 384, 465 N.E.2d 996; Waste Management of Illinois, Inc. v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d 542 (3rd Dist. 1984); Steinberg v. Petta, 139 Ill. App. 3d 503, 487 N.E.2d 1064 (1st Dist. 1985); Willowbrook Motel v. PCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985).

The Board will not disturb a local siting authority's decision regarding the applicant's compliance with the statutory siting criteria unless the decision is contrary to the manifest weight of the evidence. See Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818; see also Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197. "That a different conclusion may be reasonable is insufficient; the opposite conclusion must be clearly evident, plain or indisputable." Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818, quoting Turlek v. PCB, 274 Ill. App. 3d 244, 249, 653 N.E.2d 1288, 1292 (1st Dist. 1995). The Board may not reweigh the evidence on the siting criteria to substitute its judgment for that of the local siting authority. See Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3d Dist. 1990); Waste Management of Illinois, Inc. v. PCB, 187 Ill. App. 3d 79, 81-82, 543 N.E.2d 505, 507 (2d Dist. 1989); Tate v. PCB, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989). "[T]he manifest weight of the evidence standard is to be applied to each and every criteria on review." See Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818.

It is for the local siting authority to weigh the evidence, assess witness credibility, and resolve conflicts in the evidence. See Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818; see also Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Fairview, 198 Ill. App. 3d at 550, 555 N.E.2d at 1184; Tate, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195. Where there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits one group of witnesses and does not credit the other. See Waste Management, 187 Ill. App. 3d at 82, 543 N.E.2d at 507. "[M]erely because the [local siting authority] could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the [local siting authority's] finding." File v. D & L Landfill, Inc., 219 Ill. App. 3d 897, 905-906, 579 N.E.2d 1228, 1235 (5th Dist. 1991).

## **DISCUSSION**

The Board's discussion will begin by addressing Waste Management's allegation that the Board's hearing officer erred in not allowing Waste Management to question the decision making process of the County. Next, the Board will discuss whether the proceedings were fundamentally fair. Then, the Board will discuss whether the County's decision was against the manifest weight of the evidence.

### **Decision Making Process**

The Board will summarize the opening arguments by Waste Management and then the arguments by the County and conclude with Waste Management's reply on this issue. There were no arguments made in the *amici* briefs on this issue. The Board will conclude this section with an analysis and findings by the Board.

## **Waste Management**

Waste Management asserts that eight county board members who voted to approve the 2002 Application voted to deny the 2003 Application and did not explain their votes. WMI Br. at 27. Waste Management sought to discover reasons for this change by some members of the county board and the County opposed this discovery. *Id.* The County opposed this discovery on the grounds that Waste Management was seeking to invade the mental processes of the decision maker. *Id.* Waste Management argues that the inquiry is appropriate here as there are no factual findings to explain the decision. *Id.* Waste Management cites Citizens to Preserve Overton Park, Inc. v. Volpe, 41 U.S. 402, 420 (1971) to support this proposition. *Id.*

Waste Management maintains that the Board's hearing officer's ruling to deny Waste Management's motion to compel and precluding Waste Management from pursuing the line questioning was erroneous. WMI Br. at 28. Waste Management relies on City of Rockford v. Winnebago County, PCB 87-92 (Nov. 19, 1987) and argues that the hearing officer's rulings prevented a determination whether the March 17, 2004 decision was proper. *Id.* Waste Management placed on the record at hearing the questions Waste Management would ask each of the eight county board members as an offer of proof. *See* 4/6 Tr. at 65-73. However, those questions were not answered by any of the testifiers.

Waste Management argues that because the County objected to providing a basis for the March 17, 2004 decision and in the absence of competent evidence to support the decision, "one may reasonably conclude" that the County's decision was affected by the *ex parte* contacts of Mr. Harrison and others. 4/6 Tr. at 65-73.

## **County**

The County maintains that the Board's hearing officer properly denied the motion by Waste Management to inquire into the deliberative process of the County. C. Br. at 50. The County asserts that the County properly examined and voted on each and every one of the Section 39.2 criteria. *Id.* The County argues that before an inquiry into the decisionmaker's mental process would be allowed the applicant must "present a strong showing of bad faith or improper behavior." C. Br. at 50, citing Land and Lakes v. Village of Romeoville, PCB 92-25 (June 4, 1992). Thus, the County claims that Waste Management's argument is misplaced that the hearing officer's decision prevented a determination of whether the decision was properly made and fundamentally fair. *Id.*

## **Waste Management's Reply**

Waste Management argues that county board members were allowed to answer questions by the County's attorneys about the decision in connection with the 2003 Application but were not allowed to answer the questions by Waste Management. Reply at 10. Waste Management argues that the hearing officer's ruling was incorrect and prevented a determination on whether the decision was properly made. Reply at 10, citing Rockford, PCB 87-92. Waste Management asserts that the record is completely devoid of any competent evidence to support the denial of

siting on criteria (i), (iii), and (vi) and these were the criteria on which Mr. Harrison focused his *ex parte* comments. Reply at 10. Waste Management maintains that under the facts of this proceeding, allowing access to the mental process of the decisionmaker was appropriate. *Id.*

### **Board Analysis and Findings**

On appeal of a county's decision to grant or deny a siting application, the Board is generally confined to the record developed by the county. 415 ILCS 5/40.1(a) (2006). However, the Board will hear new evidence relevant to the fundamental fairness of the proceedings where such evidence lies outside the record. Land and Lakes Co. v. PCB, 319 Ill. App. 3d at 48, 743 N.E.2d at 194. The Board has previously held that the integrity of the decision making process requires that the mental processes of the decisionmakers be safeguarded, and that a strong showing of bad faith or improper behavior is required before any inquiry into the decision making process can be made. Rochelle Waste Disposal L.L.C. v. City Council of the City of Rochelle, Illinois, PCB 03-218 (Apr. 15, 2004). Public officials, however, should be considered to act without bias. E & E Hauling, 107 Ill 2d at 42, 481 N.E.2d at 688. The presumption of the impartiality of the actions of a public official will be overcome only where it is shown by clear and convincing evidence that the official has an unalterably closed mind in critical matters. See A.R.F. Landfill, Inc. v. Lake County, PCB 87-51 (Oct. 1, 1987).

The Board has reviewed the hearing officer's order and the arguments presented in this proceeding. The Board has consistently held that decisionmakers are entitled to protection of their internal thought processes in their adjudicative roles. DiMaggio v. Solid Waste Agency of Northern Illinois, PCB 89-138 (Oct. 27, 1989). The Board is convinced that the hearing officer's ruling was correct. Waste Management has provided testimony to indicate that there were *ex parte* contacts in this proceeding and that at least one opponent to expansion was forceful and persistent in his attempts to generate *ex parte* contacts. The record is also clear that the county board members generally tried to limit those *ex parte* contacts when it became apparent that the subject of the discussion would be the proposed landfill expansion. However, nothing in this record, either now or when the hearing officer ruled, constitutes a showing of bad faith or improper behavior strong enough to allow the invasion of the decision making deliberative process in this case. Therefore, the Board affirms the hearing officer's order and finds that Waste Management was properly denied the opportunity to inquire into the decisionmakers thought processes.

### **Fundamental Fairness**

The Board will first summarize the opening arguments by Waste Management and the County on the fundamental fairness issue. Then, the Board will delineate the arguments made in the *amici* brief. Next, the Board will summarize Waste Management's reply. Finally, the Board will conclude this section with analysis and findings by the Board.

### **Waste Management**

Waste Management asserts that the County denied the 2003 Application because the proceedings before the County were tainted by improper *ex parte* communications between Mr.

Harrison and county board members. WMI Br. at 37. Waste Management maintains that Mr. Harrison and other opponents to the expansion initiated *ex parte* communications with county board members urging the county board members to deny the application. *Id.* Waste Management claims that the opponents communicated three specific concerns to county board members. *Id.* Those three concerns were: 1) Kankakee County did not need a landfill for Chicago's waste; 2) the expansion would contaminate the environment and depress property values; and 3) the additional truck traffic bringing Chicago waste would create congestion and increase the risk of accidents. *Id.* Waste Management argues that these concerns relate directly to the three criteria on which the County voted to deny siting. *Id.*

Waste Management argues that reversal of a local siting decision is required where fundamental fairness has tainted the outcome. WMI Br. at 37, citing E & E Hauling 116 Ill. App. 3d at 598, 606, 451 N.E.2d at 566, 571. Waste Management asserts that a proceeding is fundamentally unfair if a disinterested observer might conclude that the decisionmaker had made a decision based on matters outside the record or where *ex parte* contacts have influenced a decision. WMI Br. at 37, citing Concerned Adjoining Owners 288 Ill. App. 3d at 573, 680 N.E.2d at 816; and Fairview Area Citizens Task Force, 198 Ill. App. 3d 541, 555 N.E. 2d 1178.

Waste Management argues that the standard is an objective one and asks whether a disinterested observer can conclude that unfairness or the appearance of impropriety tainted the process. WMI Br. at 37-38 (citations omitted). Furthermore, Waste Management points out that the appearance of impropriety may be inherently unfair because of the possibilities of actual prejudice. WMI Br. at 38, citing Southwest Energy Corporation v. PCB, 275 Ill. App. 3d 84, 96, 655 N.E.2d 304 (4th Dist. 1995). Waste Management asserts that the siting process requires both the facts and the appearance of improper influence be proscribed because the actual or potential prejudice caused by either taints the process. *Id.*

Waste Management asserts that the *ex parte* advocacy of Mr. Harrison was intended to "persuade, threaten, and cajole" county board members into voting against the 2003 Application. WMI Br. at 38. Waste Management maintains that the contacts were improper attempts to secure the vote of a decisionmaker on a pending adjudicative matter by "wielding threat and bombast in face-to-face unannounced meetings." *Id.* Waste Management claims the advocacy included lies, misrepresentations, misinformation and threats, outside the hearing process and the sole purpose was to obtain a vote to deny siting. *Id.*

Waste Management argues that eight county board members who supported the 2002 Application did not support the 2003 Application a mere one-year later. WMI Br. at 38. Waste Management asserts that the 2003 Application was for the same facility, same location and the information on the nine criteria was the same. *Id.* The only difference between the two applications was the advocacy by Mr. Harrison, according to Waste Management. *Id.*

Waste Management notes that the advocacy was also directed to county board members who did not vote on the first application. WMI Br. at 38. Waste Management opines that this advocacy was particularly effective as the new county board members voted to deny siting on the criteria argued by Mr. Harrison. WMI Br. at 38-39.

Waste Management maintains that by any objective standard, the actions of Mr. Harrison were improper and prejudicial and at a minimum created an appearance of impropriety. WMI Br. at 39. Waste Management asserts that in addition his actions had a direct effect as county board members with no evidence reversed their positions on expansion. *Id.* Waste Management argues these actions tainted the process and caused actual prejudice resulting in a fundamentally unfair proceeding. *Id.*

### **County**

The County argues that the proceedings were fundamentally fair and that there is a presumption that county board members engaged in landfill siting hearings are objective and capable of fairly judging the controversy. C. Br. at 34, citing Waste Management, 175 Ill. App. 3d at 1040, 530 N.E.2d at 695. The County maintains that the presumption may only be overcome if a disinterested observer could find some prejudgment. *Id.* The County asserts that *ex parte* contacts alone do not require reversal; rather, the complaining party must show that the *ex parte* contacts caused harm. C. Br. at 34, citing Residents Against a Polluted Environment v. County of LaSalle, PCB 96-243 (Sept. 19, 1996). The County argues that a decision will only be reversed due to *ex parte* contacts if the contacts “irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or the public interest that the agency was obliged to protect.” C. Br. at 34-35, citing E & E Hauling, 116 Ill. App. 3d at 606, 451 N.E.2d at 571.

The County notes that to determine if the *ex parte* contacts warrant reversal, the Board should consider:

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. C. Br. at 35, citing E & E Hauling, 116 Ill. App. 3d at 607, 541 N.E.2d at 571.

**Gravity of Communications.** The County argues that the *ex parte* communications in this case were nonsubstantive contacts consisting of members of the public expressing opinions about the expansion to county board members. C. Br. at 35. The County notes that the Board has previously ruled that nonsubstantive contacts are not grave, citing Gallatin National Bank v. Fulton County, PCB 91-256 (June 15, 1992). *Id.* The County asserts that Waste Management has failed to demonstrate that Waste Management was prejudiced by the contacts because the contacts were nonsubstantive. C. Br. at 36. The County argues that the *ex parte* contacts

consisted of members of the public and in particular Mr. Harrison expressing opinions but not discussing the substance or merits of the application. *Id.* The County relies on the county board members' testimony that they did not consider anything said as evidence. C. Br. at 34, citing 4/6 Tr. at 74, 322; 4/7 Tr. at 178.

The County argues that Waste Management exaggerates the contacts the county board members had with Mr. Harrison and claims that they had little to no contact with Mr. Harrison. C. Br. at 36. Furthermore, the County maintains that the county board members did not initiate the contacts with Mr. Harrison and advised him that the county board members could not speak about the expansion. C. Br. at 37. The County asserts that based on the testimony, the *ex parte* communications do not warrant reversal; and that Waste Management "greatly overestimates" the nature of Mr. Harrison's contacts to justify Waste Management's position. C. Br. at 38.

The County argues that the county board members unanimously agreed that they were not threatened or intimidated by Mr. Harrison. C. Br. at 38, citing 4/6 Tr. at 79, 253-54, 269-70, 295-96; 4/7 Tr. at 105, 177, 246-48. The County points out that in 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 proceeding. C. Br. at 38. The County notes that in that case the county board chairman was subjected to numerous "pranks" that included tires being flattened on construction equipment, receiving packages of what appeared to be garbage and having food, flower, and furniture orders placed in his or his wife's names. *Id.* In that case, the County notes the Board found that the contacts did not warrant reversal. *Id.*

**Influence on Ultimate Decision.** The County concedes that through the motion in limine, the county board members were not able to discuss what factor influenced their votes; however, their testimony reveals that Mr. Harrison did not influence the county board members. C. Br. at 40. The County argues that the county board members unanimously testified that they were not intimidated or threatened by Mr. Harrison and they did not consider anything he said as evidence. *Id.* Based on this testimony, the County asserts that Waste Management's claim that the county board members were threatened into voting against the 2003 Application is "wholly untrue and must be disregarded." *Id.*

The County maintains that Waste Management's argument that county board members who supported the 2002 Application and then did not support the 2003 Application were influenced by Mr. Harrison is not supported by the facts. C. Br. at 41. However, of the eight members who changed their votes, four denied having any contact with Mr. Harrison, according to the County. C. Br. at 41, citing 4/7 Tr. at 53-54, 126-28, 191, 280. Furthermore, the County argues several county board members contacted by Mr. Harrison supported the siting application. C. Br. at 41.

The County takes issue with Waste Management's argument that the 2002 Application and 2003 Application were nearly identical and that the only significant difference were the contacts by Mr. Harrison. C. Br. at 41. The County argues that the 2002 Application and 2003 Application were different and the testimony and evidence presented at the siting hearing was also different. *Id.* The County claims that Waste Management admitted differences existed and several witnesses for Waste Management updated materials for the 2003 Application. *Id.* The

County maintains that because the two applications were different, the decision of the County was reasonable. C. Br. at 42.

The County maintains that even if the 2002 Application and the 2003 Application were completely identical, that does not establish that the County's decision was against the manifest weight of the evidence. C. Br. at 42. The County argues that the courts have repeatedly stated that the public hearing is the most critical stage of the siting process. C. Br. at 42, citing Land and Lakes, 245 Ill. App. 3d at 642, 616 N.E.2d at 356; McLean County Disposal v. County of McLean, 207 Ill. App. 3d 477, 480, 566 N.E.2d 26, 28 (4th Dist. 1991); Kane County Defenders, Inc. v. PCB, 139 Ill. App. 3d 588, 593, 487 N.E.2d 743, 746 (2nd Dist. 1985). The County asserts that one county board member specifically indicated that he believed there was new information at the hearing. C. Br. at 42.

The County argues that the evidence and the testimony at the siting hearing on the 2003 Application was not the same as the information presented during the hearings on the 2002 Application. C. Br. at 43. As a result the County properly relied on information provided at the hearing, which included new and additional testimony. *Id.* The County points out that Mr. Coulter did not testify on the 2002 Application and additional public comment was filed. *Id.* The County claims that the circumstances in Kankakee had changed "drastically" between the filing of the two applications. *Id.* The County relies on the fact that the City of Kankakee had already approved another applicant's landfill siting application when the County voted on the 2003 Application. C. Br. at 43-44. Thus, the County maintains that the finding that there was no longer a need for a landfill is more than reasonable. C. Br. at 44.

The County argues that, even if the two applications were identical and the hearings were substantially the same, Waste Management has failed to establish that Mr. Harrison's activities influenced the county board members to vote against the 2003 Application so as to render the proceedings fundamentally unfair. C. Br. at 44. The County relies on three Board cases to support this argument, Moore v. Wayne County Board, PCB 86-197 (June 2, 1986), Land and Lakes, PCB 92-25 and DiMaggio v. Solid Waste Agency of Northern Cook County, PCB 89-138 (Oct. 27, 1989). *Id.* The County maintains that in Moore, the Board indicated that the mere changing of one's vote is not evidence of an improper decision. *Id.* The County argues that there is even less reason in this proceeding to find fundamental unfairness because there was a new and different application under consideration. C. Br. at 45.

The County notes that in Land and Lakes, the Board again determined that a decisionmaker changing his or her mind does not establish that the proceeding was fundamentally unfair. C. Br. at 45. And in DiMaggio, the County asserts that the Board refused to find the proceedings fundamentally unfair when there was a strong inference of *ex parte* contacts and the vote changed. *Id.*

**Benefits to "Party" Making Contacts.** The County argues that because the contacts did not influence the county board members, the *ex parte* contacts did not benefit anyone. C. Br. at 46. The County claims that the contacts were not made by a "party" to the proceeding; rather, the communications were unsolicited and made by various members of the general public. *Id.* The County asserts that the contacts are exactly those types, which Illinois courts have

acknowledged are inevitable given the perceived legislative positions of the county board members. C. Br. at 46, citing Waste Management, 175 Ill. App. 3d at 1043, 530 N.E.2d at 697. The County maintains since there is no evidence of any benefit to any “party”, this factor should be weighed in favor of the County. C. Br. at 46.

The County claims that Waste Management “asserts” a Harrison-Watson-Keller connection in an attempt to allege that a party benefited from the *ex parte* contacts. C. Br. at 47. The County maintains that Waste Management repeatedly misstates Mr. Keller’s testimony at the hearing before the Board. *Id.* The County concedes that Mr. Keller admits there is a friendship between the three men; however, Mr. Keller never indicated that he was in “continuous communication” with either Mr. Watson or Mr. Harrison. *Id.* The County also claims that, contrary to Waste Management’s characterization, Mr. Keller never testified that he worked together with Mr. Watson and Mr. Harrison in opposition to the expansion. *Id.* The County also points out that Mr. Keller did not know of Mr. Harrison’s contact with county board members, that he did not know where he got his yard sign, and finally, that Mr. Keller did not testify that the three men appeared together at the county board siting hearing. *Id.*

The County argues that whether Mr. Harrison is somehow “affiliated” with a party, there is no evidence that an attempted communication by Mr. Harrison benefited any party. C. Br. at 47. Therefore, the County maintains that the proceedings were fundamentally fair. *Id.*

**Waste Management was aware of contacts.** The County states that in determining if the applicant has been prejudiced by *ex parte* communications the courts are particularly concerned with whether or not the applicant had notice of the communications. C. Br. at 48, citing Rockford, PCB 87-92. The County argues that in this case, the letters were made a part of the record as public comments and encompasses over 600 pages of the record. C. Br. at 48, citing C2618-2807, 3408-3721, 3277-3384. The County asserts that the comments made by Mr. Harrison and other members of the public were known by Waste Management because the county board members testified that the comments from Mr. Harrison were no different than those being heard at the public hearings. C. Br. at 48. The County maintains that as a result, Waste Management had plenty of opportunity to respond. *Id.*

**No need to vacate and remand.** The County argues that remand would serve no useful purpose because the *ex parte* comments were placed in the record and are no longer *ex parte* but rather public comment. C. Br. at 48. Furthermore, the County maintains that Waste Management has shown no prejudice and therefore reversing and remanding would be neither appropriate nor productive. C. Br. at 48-49. Also, the County argues that there has been no alleged wrongdoing by any member of the county board; rather, all the alleged contacts were unsolicited and when approached the county board members refused to discuss the application. C. Br. at 49.

### **Watson**

Watson asserts that Waste Management makes claims of conspiracies, perjury and intimidation that never occurred in this proceeding. W.Br. at 21. Specifically, Watson maintains that Waste Management alludes to a conspiracy between Watson, Keller, and Harrison; however



there is no evidence in the record of such a conspiracy. *Id.* Watson claims that even if there had been a conspiracy, there is nothing illegal in three people joining in opposition to a landfill. *Id.* Watson asserts the record does not support Waste Management's claim that the three men were continually in contact and there is no evidence in the record that Mr. Watson and Mr. Harrison ever communicated about the expansion. W.Br. at 21-22. Finally, Watson claims that the contacts were not even *ex parte* contacts as they were made a part of the record. *Id.*

### **Karloack**

Karloack argues that no county board member admitted being improperly influenced by the *ex parte* contacts, and the arguments of Waste Management are undermined by Waste Management's misconception regarding the significance of the County's approval of siting under the 2002 Application. K.Br. at 7. Karloack asserts that Waste Management's arguments rely on the prior approval and the similarities of the two applications. K.Br. at 7-8. However, Karloack maintains that the fundamental fairness and manifest weight of the evidence issues were never addressed under the 2002 Application. K.Br. at 8, citing PCB 03-125. Therefore, Karloack argues the fundamental fairness arguments issues raised in this case cannot be buttressed by the prior County approval. *Id.*

Karloack argues that Waste Management must show actual prejudice by the *ex parte* contacts and the decisionmaker can also deny an application based on legislative type considerations. K.Br. at 9, citing Southwest Energy, 275 Ill. App. 3d 84, 655 N.E.2d 304. Karloack asserts that there were differences in the two applications including different witnesses and testimony at the hearing. K.Br. at 10.

### **Runyon**

Runyon argues that the proceedings were fundamentally fair. Runyon maintains that most county board members did not even speak with Mr. Harrison and those members that did testified that Mr. Harrison did not influence their vote. R.Br. at 1. Runyon also argues that Waste Management would have this Board believe that Mr. Harrison's comments were more persuasive than all of Waste Management's experts. *Id.* Runyon claims that Waste Management also communicated with the certain county board members outside the record of the proceedings. R.Br. at 1-2. Runyon also relies on Land and Lakes, PCB 99-69 in support his argument. R.Br. at 6. Runyon points to several places in the record where the county board members testified that they were not influenced by the letters, signs and contacts with the public. R.Br. at 3-28.

### **Waste Management's Reply**

In the reply, Waste Management reiterates that the only difference between the 2002 Application and the 2003 Application "was the onslaught of threats, harassment and argument" by Mr. Harrison. Reply at 1. Waste Management argues that despite the best efforts of county board members to avoid or rebuff Mr. Harrison the county board members were subject to harassment, political threats and false claims about the impropriety of *ex parte* communications. Reply at 2. Waste Management claims that the evidence demonstrates that some county board members changed their votes as a result of Mr. Harrison's tactics. *Id.* Waste Management

asserts that in the circumstances of this case, the proceedings were fundamentally unfair because the nature and extent of the *ex parte* contacts created “the unavailing appearance of impropriety.” *Id.*

**Similar Applications.** Waste Management maintains that the county does not deny the two applications were identical in all material respects and there is no question that the 2003 Application contained updated information on criteria (i), (iii), and (vi) and new information relating to prefiling notice. Reply at 3. Waste Management asserts that the methodology and analysis for all nine criteria was the same and the updated information did not contradict or undermine the conclusions that the criteria were met. *Id.* Waste Management claims that the additional information was not new evidence that rebutted or disproved the conclusions of the 2002 Application. *Id.*

**Multitude of Improper Contacts and E& E Hauling.** Waste Management asserts that the law is clear, where *ex parte* contacts have tainted the outcome, either by actual or potential prejudice, the proceedings are rendered fundamentally unfair. Reply at 3. Waste Management maintains that the County’s claims that the contacts were not grave is incorrect as Mr. Harrison engaged in serious and strategic *ex parte* advocacy. Reply at 4. Waste Management argues that Mr. Harrison made repeated attempts to secure or influence decisionmakers by means of threats and harassment, and the short-term nature of the contacts does not determine the gravity of the comments. *Id.* Waste Management opines that the content of the communication should dominate a determination on the gravity of the contacts and the method of contact. Reply at 4-5. Both the content and the method establish these contacts as grave, argues Waste Management. *Id.*

Waste Management maintains that the County, rather than focusing on the content and manner of the comments, focuses on the fact that the comments were unsolicited. Reply at 5. Waste Management acknowledges that the comments were unsolicited; nevertheless, the contacts were repeated and contained sufficient information to have influenced the vote in an adjudicative matter. *Id.* Furthermore, Waste Management argues that the County’s reliance on several past cases is misplaced, as the facts in this proceeding are not analogous. *Id.*

Waste Management argues that the County misstates the second factor from E & E Hauling and the correct analysis is whether the *ex parte* contacts *may* have influenced the ultimate decision. Reply at 6. Waste Management claims the County argues that the contacts did not influence the decision. *Id.* Waste Management asserts that it is clear that the E & E Hauling court intended the analysis to consider the *possibility* of influence rather than the *fact* of influence. *Id.* Waste Management argues that this is significant given the applicant’s inability to probe the minds of the decisionmaker. *Id.* In this case, Waste Management claims there is indirect evidence that the *ex parte* contacts influenced the ultimate decision. *Id.* According to Waste Management, the evidence is the fact that given the similarities in the two applications, the County voted to disapprove the expansion on exactly the criteria that Mr. Harrison advocated for disapproval in his contacts with county board members. Reply at 6-7.

Waste Management argues that there is no question that the party making the improper contacts benefited from the ultimate decision. Reply at 7. Waste Management notes

that the County argues that Mr. Harrison is not a party and thus a party could not have benefited from the contacts. *Id.* Waste Management asserts that such a view of “party” is incorrect and the benefited party need not have an appearance in the proceeding. Reply at 7-8. Waste Management asserts that clearly Mr. Harrison participated in the hearings and the Board has found that a nonparty can make an *ex parte* contact. Reply at 8, citing Land and Lakes, PCB 99-69. Therefore, Waste Management argues that to limit the remedy only to those who file an appearance is illogical. *Id.*

Waste Management claims that Waste Management had no knowledge of Mr. Harrison’s actions and communications during the pendency of the 2003 Application. Reply at 8. Furthermore, Waste Management maintains that not all communications were made a part of the record. *Id.* As a result, Waste Management asserts that Waste Management could not respond to the comments. Reply at 8-9.

Waste Management asserts that the Board should reverse and remand not just because Waste Management is entitled to a fundamentally fair proceeding but doing so would place landfill opponents on notice that there is a limit to how far one can go in opposition to siting. Reply at 9. Waste Management argues that before this case there was no precedent for conduct such as Mr. Harrison’s and if the Board affirms the denial there is nothing to stop opponents from such behavior in the future. *Id.* Waste Management argues that by any objective standard, Mr. Harrison’s actions were improper and prejudicial and at a minimum created an appearance of impropriety. *Id.*

### **Board Analysis and Findings**

The first step in our discussion is to determine whether the contacts that occurred in this proceeding were *ex parte* contacts. If the answer is yes, then the Board must decide if Waste Management was prejudiced by those contacts. If the contacts are not *ex parte* then the Board need not examine the issue of prejudice. In this proceeding the alleged improper contacts fall into three categories. The first category is the letters received by county board members. The second is the picketers at the county board meeting on March 17, 2004, and the yard signs throughout Kankakee County. The third is the oral comments made to county board members and particularly those by Mr. Harrison. The Board will discuss each of these in turn below.

**Letters.** Several county board members received letters concerning the proposed expansion. However, the testimony and the record establish that the content of those letters, and in some cases the actual letters were placed in the County record. Furthermore only one county board member read all the letters and failed to file them with the county clerk. Many of the county board members glanced at the letters, realized what the letters were about and stopped reading. Further, many of the letters were generically addressed to “Kankakee County Board Members” and appeared to be form letters. Therefore, the Board agrees with the arguments by the parties that the letters are not *ex parte* and the Board will not consider the letters in the Board’s review of fundamental fairness.

Even if the letters were *ex parte* contacts, the Board finds that these types of letters are merely expressions of public sentiment to county board members on the issue of Waste

Management's landfill application. Waste Management, 175 Ill. App. 3d at 1041, 530 N.E.2d at 697-698, citing Waste Management, 160 Ill. App. 3d 434, 513 N.E.2d 592. As the courts have previously stated, *ex 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. Waste Management, 175 Ill. App. 3d at 1041, 530 N.E.2d at 697-698, citing E & E Hauling, 116 Ill. App. 3d at 607, 451 N.E.3d at 571. In this case, the Board finds that even if the letters were *ex parte* contacts, the letters did not prejudice Waste Management.

**Pickers and Lawn Signs.** The Board agrees that by definition, the signs carried by those picketing the March 17, 2004 meeting and the lawn signs displayed in the community are *ex parte*. However, like the letters discussed above, yard signs are a common form of communication used by constituents to express personal views to a county board member, so there must be a showing of prejudice. Waste Management, 175 Ill. App. 3d at 1041, 530 N.E.2d at 697-698, citing Waste Management, 160 Ill. App. 3d 434, 513 N.E.2d 592. The Board can find no prejudice to Waste Management in this instance. The signs and pickets were not commenting on the substance of the application, but were an open display of public sentiment. Waste Management was or should have been aware of the pickets and lawn signs. Therefore, the Board finds that the presence of the picketers and the lawn signs did not render the proceedings fundamentally unfair.

**Oral Comments to County Board Members.** As indicated above, the first step in this inquiry is whether the oral comments to county board members by Mr. Harrison and others are in fact *ex parte* contacts. The Board finds that the comments were *ex parte* contacts as they occurred outside the record. The law is well settled in siting proceedings, contacts between nonparties with board members can be *ex parte* communications. Waste Management, 175 Ill. App. 3d at 1041, 530 N.E.2d at 697-698, citing E & E Hauling, 116 Ill. App. 3d 606-07, 451 N.E.3d at 571; Fairview Area Citizens Taskforce, 198 Ill. App. 3d 541, 555 N.E.2d 1178; Citizens Opposed to Additional Landfills and Harvey Pitt v. Greater Egypt Regional Environmental Complex, PCB 97-29 (Dec. 5, 1996); and Residents Against a Polluted Environment, PCB 96-243. Therefore, the Board next examines the factors delineated in E & E Hauling to determine if the *ex parte* contacts resulted in a fundamentally unfair proceeding.

**Gravity of Communications.** Waste Management characterizes the contact by Mr. Harrison as intended to "persuade, threaten, and cajole" the county board members into voting against the 2003 Application. WMI Br. at 38. By contrast, the County characterizes the comments as nonsubstantive opinions about the expansion made by members of the public. C. Br. at 35.

The record reflects that Mr. Harrison contacted several county board members; however he did not contact all the county board members whose votes changed on the two application. Mr. Harrison's comments ranged from congenial to veiled threats about elections. However, testimony by the county board members establishes that except for one or two members, Mr. Harrison only contacted the county board member once and those encounters were brief. The

county board members testified that they did not consider the outside comments to be evidence and that they were neither threatened nor intimidated by the contacts. None of the county board members testified that there was a substantive discussion with Mr. Harrison or the other members of the public during the pendency of the expansion application. Therefore, although inappropriate, the Board finds that the contacts were not of sufficient gravity to warrant a finding of fundamental unfairness. The Board notes that this ruling is consistent with prior determinations by the Board that even “pranks” perpetrated on county board members do not render the proceedings fundamentally unfair. See Land and Lakes, PCB 99-69 and Daly, 264 Ill. App. 3d 968, 637 N.E.2d 1153.

**Influence Ultimate Decision.** Waste Management argues that the contacts clearly influenced the outcome as the County voted to deny the application for expansion, which was substantially similar to the prior application, on precisely the criteria advocated by Mr. Harrison. Reply at 3. Waste Management also reiterates the argument that Waste Management should have been allowed to inquire into the county board members’ thought process, especially as the County was able to ask questions. The County argues that the contacts did not influence the county board members and the county board members can change their minds without rendering the proceeding fundamentally unfair. C. Br. at 40, 44.

**Board Analysis.** To determine if the ultimate decision was influenced by *ex parte* contacts, the Board will examine several factors. First, the Board will examine the argument that the 2002 Application and 2003 Application were substantially similar. The Board agrees with Waste Management and finds that the 2002 Application was substantially similar, although not identical, to the 2003 Application. However, the courts have held, and the Board agrees, that the public hearing before the local governing body is the most critical stage of the site approval process. Rochelle, PCB 03-218, citing Land and Lakes, 245 Ill. App. 3d at 642, 616 N.E.2d at 356. The hearing held before the County on the 2003 Application included cross-examination of witnesses presented by Waste Management as well as testimony that was not a part of the 2002 Application. Therefore, the Board finds that the two applications may have been substantially similar, but the overall proceedings included significant differences. Thus, the fact that some county board members changed their votes on the two applications does not establish that the *ex parte* contacts influenced the County’s decision.

The next factor the Board will examine is the contacts themselves. As indicated previously, the contacts by Mr. Harrison were limited and generally the county board members discouraged his discussion of the expansion. Very few of the encounters lasted more than a minute and some of those that were longer included discussions of other matters. The county board members testified that they did not consider the outside comments to be evidence and that they were neither threatened nor intimidated by the contacts. None of the county board members testified that there was a substantive discussion with Mr. Harrison or the other members of the public during the pendency of the expansion application. Therefore, the Board finds that the actual content of the contacts also does not establish that the county board members were influenced by the contacts.

The final factor is the eight county board members who changed their votes. First the Board notes that the Board has previously found that a decisionmaker changing votes does not

render the proceedings fundamentally unfair. See Moore, PCB 86-197; Land and Lakes, PCB 92-25; and DiMaggio, PCB 89-138. The Board also finds significant the fact that four of the eight county board members testified that they did not have contact with Mr. Harrison before the March 17, 2004 vote on Waste Management's application, and only one of that four testified to any contact after the vote. Thus, the record establishes that Mr. Harrison's contacts did not influence the votes of the entire county board.

Based on a review of the arguments and the facts in this proceeding, the Board finds that the ultimate decision was not influenced by the *ex parte* contacts.

**Party Making Contacts Benefited.** Waste Management argues that Mr. Harrison, who opposed siting, clearly benefited from the County's decision. The County argues that since the contacts did not influence anyone, there can be no benefit and in any event Mr. Harrison is not a "party". Waste Management argues that the County would have the Board read the word "party" too narrowly.

The record indicates that Mr. Harrison appeared at the siting hearings and asked questions of the witnesses. The Board disagrees with the County; although in the strictest sense the only "party" in a local siting proceeding is the applicant, Mr. Harrison was a person involved in the proceeding. See *Black's Law Dictionary* (Pocket ed. 1996) (definition of "party"). Therefore, the Board finds that Mr. Harrison and the opponents to the landfill could have benefited from the *ex parte* contacts. The Board found previously, however, that the *ex parte* contacts did not influence the proceedings. Therefore, the Board finds that there is no benefit from the *ex parte* contacts.

**Waste Management was Aware of Contacts.** Waste Management asserts that Waste Management was not aware of the contacts by Mr. Harrison. The County asserts that the letters were made a part of the record and the comments made by Mr. Harrison and other members of the public were known to Waste Management.

The Board agrees that the content of the letters were made a part of the record. The Board also agrees that Waste Management was aware of the opposition to the expansion. Even if Mr. Harrison's exact contacts were not known to Waste Management, there was ample opportunity to address concerns from those opposed to the landfill. Mr. Harrison appeared at the hearing and expressed concerns about the siting (4/6 Tr. at 109-10; 114; C C2613 at 86; C2616 at 250). Thus, Waste Management knew there was opposition to the landfill expansion application and could have addressed that opposition either at the hearing or in post-hearing comments.

Furthermore, the substance of the comments and contacts to the county board members is not significant. See Land and Lakes, PCB 99-69. As discussed above, the county board members all testified that they indicated their inability to discuss the expansion and that the substance of the application was not discussed. The Board also notes that the "existence of strong public opposition does not render a hearing fundamentally unfair" where the hearing provides a full and complete opportunity for the applicant to offer evidence that supports the application. Waste Management, 160 Ill. App. 3d 434, 513 N.E.2d 592. Therefore, the Board

finds that even if Waste Management was not aware of the verbatim comments in every contact, the contacts were not of a substantive nature and Waste Management was not prejudiced.

**No Need to Vacate and Remand.** Based on the Board's rulings on the first four factors from E & E Hauling, the Board finds that there is no need to vacate and remand this proceeding. The Board is unconvinced that the *ex parte* contacts prejudiced Waste Management or rendered the proceedings fundamentally unfair.

**Conclusion.** The Board finds that the existence of *ex parte* contacts through letters, picketers, lawn signs, and individuals contacting county board members did not prejudice Waste Management. Therefore, the Board finds that the proceedings were fundamentally fair.

### **Criteria (i), (iii), and (vi)**

The Board will summarize the opening arguments by Waste Management and then the arguments by the County on this issue. Next, the arguments made in the *amici* brief will be summarized. Then the Board will summarize Waste Management's reply. The Board will conclude this section with analysis and findings by the Board.

### **Waste Management**

Waste Management generally addresses arguments to all three of the challenged criteria and then specifically addresses each criteria. The Board will first summarize the general arguments, followed by more specific arguments for each criterion.

**General.** Waste Management argues that the County denied siting by determining that three of the nine criteria had not been demonstrated only 14 months after finding that Waste Management had established all nine criteria were met in the 2002 Application. WMI Br. at 28. Waste Management asserts that there is no evidence in the record that supports the County's decision that the 2003 Application did not establish that criteria (i), (iii), and (vi) had been met. *Id.* Waste Management maintains that the only facts to explain the County's reversal relate to the "improper advocacy and political pressure" from Mr. Harrison and other objectors. WMI Br. at 29. Therefore, Waste Management argues the decision by the County is against the manifest weight of the evidence. *Id.*

Waste Management notes that in reviewing a local siting decision, the Board determines whether the decision is against the manifest weight of the evidence. WMI Br. at 29, citing Land and Lakes, 319 Ill. App. 2d at 48, 743 N.E.2d at 193. Waste Management argues that a decision is against the manifest weight of the evidence if an opposite conclusion is apparent or the decision makers' findings appear to be "unreasonable, arbitrary, or not based upon the evidence." WMI Br. at 29, citing Webb v. Mount Sinai Hospital, 347 Ill. App. 3d 817, 807 N.E.2d 1026, 1034 (1st Dist. 2004). Waste Management continues by noting that the County's decision must be based on competent evidence and supported by substantial proof. WMI Br. at 29, citing Gumma v. White, 345 Ill. App. 3d 610, 803 N.E.2d 130, 135 (1st Dist. 2003). Waste Management concedes that the Board cannot reweigh the evidence but the Board must accept uncontradicted facts as true even if there are contrary allegations without support. WMI Br. at

29, citing Webb, 347 Ill. App. 3d at 826. Waste Management reminds that the Board's sole function is to determine whether the County's decision is just and reasonable based on the evidence in the record. WMI Br. at 29, citing Gumma, 345 Ill. App. 3d at 615.

Waste Management maintains that the mere existence of some evidence that conflicts with the applicant's proof is not sufficient to support the County's denial. WMI Br. at 29, citing A.R.F. Landfill, PCB 87-51 (Oct. 1, 1987). Waste Management argues that the evidence necessary to support the County's decisions must be probative, credible and relevant to the criteria at issue. WMI Br. at 30. Waste Management asserts that here there is no credible evidence that supports the County's denial of siting on criteria (i), (iii), and (vi) and the Board must reverse the decision. *Id.* Waste Management argues that Waste Management presented *prima facie* proof for each of the statutory criteria before the County, and the RPC found the proof sufficient. *Id.* Waste Management asserts the proof was not rebutted; however the County found that compliance was not established. *Id.* Therefore, Waste Management asserts the decision of the County was contrary to the manifest weight of the evidence. *Id.*

**Criterion (i) - Need.** Waste Management asserts that need is established if a proposed facility is reasonably required by the waste needs of the service area identified by the applicant, taking into account the area's waste production and waste disposal capacity. WMI Br. at 31, citing File, 219 Ill. App. 3d 897, 597 N.E.2d 1228. Waste Management argues that objections to the size of the service area or opposition to receipt of out-of-county waste are not proper reasons to deny based on criterion (i). WMI Br. at 31, citing Metropolitan Waste Systems v. PCB, 201 Ill. App. 3d 51, 558 N.E.2d 785, 787 (2nd Dist. 1990).

Waste Management states that it presented the only witness on this criterion and no conflicting data was presented. WMI Br. at 31. Further, Waste Management argues that the witness' methodology was not challenged or impeached and the witness' opinions were not contradicted or disproved. *Id.* Waste Management asserts the County had no competent evidence on which to base a denial on criterion (i) and the decision appears to be based on opposition to the receipt of out-of-county waste. *Id.* Waste Management maintains that such a basis is not relevant or proper and the County's decision was contrary to the unrebutted expert testimony establishing need. *Id.*

**Criterion (iii) - Minimize Effect on Surrounding Property.** Waste Management argues that criterion (iii) is met if the applicant demonstrates that all that is reasonably feasible to minimize incompatibility or effect on surrounding property values has been or will be done. WMI Br. at 31, citing File, 219 Ill. App. 3d at 907, 579 N.E. at 1236. Waste Management asserts that criterion (iii) does not require the effects of the expansion to be eliminated, only that the effects be minimized.. WMI Br. at 31-32, citing Clean Quality Resources, Inc. v. Marion County Board, PCB 91-72 (Aug. 26, 1991). Waste Management maintains that rejection of criterion (iii) cannot occur simply because there might be some reduction in value, and plans to install screening berms, utilize setbacks and provide landscaping is sufficient to meet the requirements of criterion (iii). WMI Br. at 32, citing Watts Trucking Service, Inc. v. City of Rock Island, PCB 83-167 (Mar. 8, 1984); A. R. F. Landfill, PCB 87-51 and Waste Management of Illinois, Inc. v. McHenry County Board, PCB 86-109 (Dec. 5, 1986).



Waste Management argues that testimony from one of Waste Management's witnesses establishes that the area is 94% agricultural and open space and a landfill may be reasonably sited in such an area. WMI Br. at 32, citing McHenry County Board, PCB 86-109. Furthermore, Waste Management maintains that Waste Management has proposed a landscape-screening plan that includes berms and installation of plant material and similar plans have been found to satisfy criterion (iii). *Id.*

Waste Management argues that witnesses testified that the existing landfill has not had a negative impact on property values and has not deterred residential development. WMI Br. at 33. Waste Management asserts that a study of another landfill similarly situated, Settler's Hill in Kane County, also establishes no negative impact from the landfill. *Id.* Waste Management maintains that this testimony was un rebutted and that the findings establish that criterion (iii) is more than met. *Id.* Waste Management notes that criterion (iii) requires that the effect on property value be minimized and Waste Management has shown that there is no measurable negative effect. *Id.* Waste Management argues that where there is no showing of an adverse effect, the criterion has been satisfied and any finding to the contrary is against the manifest weight of the evidence. WMI Br. at 33, citing Clean Quality Resources, PCB 91-72.

Waste Management asserts there is no evidence in this record to support the County's denial of criterion (iii). WMI Br. at 34. Therefore, Waste Management maintains the County's decision is against the manifest weight of the evidence. *Id.*

**Criterion (vi) - Traffic.** Waste Management argues that criterion (vi) is satisfied if the traffic patterns to or from the expansion are proposed to minimize impact on existing traffic flow. WMI Br. at 34, citing CDT Landfill Corporation v. City of Joliet, PCB 98-60 (Mar. 5, 1998). Waste Management maintains that if the traffic patterns or routing proposed in the application are shown to minimize the impact on existing traffic flows, criterion (vi) is met. WMI Br. at 34. Waste Management further maintains that the issue is not whether there will be a negative impact, increased traffic volumes and noise, dust or driver's negligence. Nor, argues Waste Management, is the issue whether there will be future traffic flows or development that may be affected by the expansion. *Id.* Furthermore, Waste Management states that the evidence establishing criterion (vi) need not be unopposed or uncontradicted. WMI Br. at 34, citing Waste Hauling, Inc. v. Macon County Board, PCB 91-223 (May 7, 1992).

Waste Management asserts that the written report by Metro Transportation and the testimony of Mr. Corcoran establish that the traffic patterns designed for the expansion minimize the impact on existing traffic flows. WMI Br. at 35. Waste Management opines that the County's decision was based on no relevant or sufficient evidence and appears to be based on a concern about an increased volume of traffic due to out-of-county waste. *Id.* Waste Management argues such concerns are not proper consideration in determining if criterion (vi) has been met. *Id.*

Waste Management argues that the testimony of Mr. Coulter is insufficient to support the County's denial and his principal concerns do not properly address standards relevant to criterion (vi). WMI Br. at 35. Waste Management alleges that his concerns about the impact of the expansion on school bus operations and possibility of inattentive drivers are not relevant to

criterion (vi). WMI Br. at 35, citing Fairview Area Citizens Taskforce, 198 Ill. App. 3d 541, 555 N.E.2d 1178. Furthermore, Waste Management asserts that Mr. Coulter took issue with criterion (vi) and Mr. Coulter believes Waste Management should have considered future traffic. WMI Br. at 35. Waste Management maintains that criterion (vi) does not refer to future traffic. WMI Br. at 35-36.

Waste Management also takes issue with Mr. Coulter's concerns about the proposed improvements to site access proposed under the application. WMI Br. at 36. Waste Management asserts that Mr. Coulter's testimony was inaccurate and unreliable. *Id.* Waste Management maintains that Mr. Coulter's testimony was based on a schematic and not the actual design submitted to IDOT. *Id.* Waste Management also challenges Mr. Coulter's opinion on sight distances arguing that Mr. Coulter "was unable or unwilling" to confirm that sight distances actually exceed 1,100 feet. *Id.*

Waste Management maintains that the County's decision is not supported by any relevant or credible evidence and a result opposite to the County's decision is plain. WMI Br. at 36. Therefore, Waste Management asserts the County's decision is against the manifest weight of the evidence and the Board should reverse the County. *Id.*

### **County**

The County generally addresses arguments to all three of the challenged criteria and then specifically addresses each criteria. The Board will summarize the general arguments, followed by the more specific arguments for each criterion.

**General.** The County argues that the denial of siting approval should be upheld because the decision is not against the manifest weight of the evidence. C. Br. at 17. The County notes that in order to grant siting approval, the decisionmaker must find that all nine of the statutory criteria of Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2006)) have been met. C. Br. 17, citing Waste Management, 160 Ill. App. 3d at 443, 513 N.E. 2d at 597. The County argues that if any one of the criteria is not met, the application must be denied and in this case the County found that three criteria were not met. *Id.* The County argues that because Waste Management did not satisfy all nine statutory criteria, the County was required to deny siting approval. *Id.*

The County argues that the manifest weight of the evidence standard must be applied to each of the nine criteria and the decision can only be overturned if the decision is against the manifest weight of the evidence. C. Br. at 17. The County asserts that the manifest weight of the evidence standard is consistent with the legislative intent to give local authorities the power to determine site location suitability for the proposed facility. *Id.* Further the County asserts that the hearing body has the sole province to weigh the evidence, resolve conflicts in testimony, and assess the credibility of witnesses. C. Br. at 17-18, citing Tate, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195.

The County asserts that a finding that a different conclusion might be reasonable is not sufficient to find that the decision is against the manifest weight of the evidence. C. Br. at 18, citing Wabash and Lawrence Counties Taxpayers and Water Drinkers Association v. PCB, 198

Ill. App. 3d 388, 392, 555 N.E.2d 1081, 1085 (5th Dist. 1990). The County maintains that a decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, plain or indisputable. C. Br. at 18, citing Worthen v. Roxana, 253 Ill. App. 3d 378, 384, 623 N.E.2d 1058, 1063 (5th Dist. 1993). The County further maintains that the Board cannot reweigh evidence or reassess the credibility of witnesses. *Id.* The County argues that in this case the record clearly establishes that the County's decision on criteria (i), (iii), and (vi) was not against the manifest weight of the evidence. C. Br. at 18.

The County also observes that in the brief, Waste Management gives credence to the fact that the RPC recommended that the County approve the expansion. C. Br. at 32. The County asserts that the RPC recommended 79 conditions that the RPC believed were necessary to meet the nine criteria. *Id.* The County acknowledges the work of the RPC; however, the County argues that the recommended approval is irrelevant because the decision on whether or not to approve the expansion is the County's. *Id.* Furthermore, on the three criteria the County voted to disapprove, the RPC recommended conditions on each of those criteria. *Id.* Those conditions, according to the County, included additional berming and barriers and 14 conditions on criterion (vi) reflecting deficiencies pointed out by Mr. Coulter. C. Br. at 32-33.

**Criterion (i) - need.** The County asserts that under criterion (i), the applicant must show that the facility is reasonably required by the waste needs of the area the facility will serve. C. Br. at 18, citing Waste Management, 122 Ill. App. 3d at 645, 461 N.E.2d at 546. The County further asserts that if other facilities are available and sufficient to meet the future needs of the service area, expansion is not reasonably required. *Id.* Based on the testimony of Waste Management's only witness, the County maintains that the decision by the County that Waste Management failed to meet criterion (i) is clearly correct. C. Br. at 19.

The County states that the decision is correct for several reasons. C. Br. at 19. First, Ms. Smith "admitted" she did not consider capacity available in the service area from landfills that currently exist or may be reasonably expected to exist in the future. C. Br. at 19; C2607 at 76-80. The County asserts that including the capacities of only some of those facilities would result in more than adequate landfill space for a period of over 20 years. C. Br. at 19. The County argues that Ms. Smith also failed to "assume" an appropriate recycling rate and if she had done so there would not be a capacity shortfall for 12 years in the service area. C. Br. at 19; C2607 at 72.

The County argues that not only did Waste Management fail to include facilities such as Prairie River, Spoon Ridge, and Brickyard, but also Waste Management failed to include facilities that have received siting approval. C. Br. at 19. The County maintains that based on case law Waste Management should have appropriately considered proposed facilities. C. Br. at 20, citing Waste Management, 175 Ill. App. 3d at 1033-34, 530 N.E.2d at 691.

In this case, the County claims that Waste Management's witness failed to take into account millions of tons of landfill capacity that is reasonably likely to become available in the near future. C. Br. at 20. The County argues that, because Waste Management failed to even consider the available capacity created by these new facilities that have received siting approval,

the County decision that Waste Management failed to meet criterion (i) is more than reasonable. *Id.*

The County asserts that the decision to deny siting based on a failure to meet criterion (i) is further supported by Waste Management's failure to properly calculate the capacity shortfall. C. Br. at 21. Specifically, the County claims that Waste Management's witness used incorrect recycling rates that were much lower than the actual rates of recycling. *Id.* As a result of using incorrect recycling rates, the County argues that the need for the facility was over-estimated due to improper calculation of capacity. *Id.* The County asserts that proper calculations would demonstrate that there is sufficient capacity for 12 years, so even without the future facilities, the County asserts there will not be a need for expansion until 2015. *Id.*

The County maintains that several courts have found that where there is landfill capacity in the service area for ten or more years, criterion (i) is not met. C. Br. at 21, citing Waste Management, 122 Ill. App. 3d 639, 461 N.E.2d 542; Waste Management of Illinois v. PCB, 123 Ill. App. 3d 1075, 463 N.E.2d 969 (2nd Dist. 1984); Waste Management, 175 Ill. App. 3d 1023, 530 N.E.2d 682. The County cites a Third District Waste Management case from 1984, where the court affirmed decisions of the Board and Will County that found the decisions were not against the manifest weight of the evidence where landfill capacity existed for ten years. C. Br. at 21-22, citing Waste Management, 122 Ill. App. 3d 639, 461 N.E.2d 542. Similarly, in the Second District, a Waste Management case found that where capacity for nine or ten years existed, criterion (i) was not met. C. Br. at 21-22, citing Waste Management, 123 Ill. App. 3d 1075, 463 N.E.2d 969. Based on this case law, the County asserts that the County's decision is not against the manifest weight of the evidence because using the appropriate recycling rates there is more than ten years of capacity available for the service area. C. Br. at 23.

The County claims that even if the Board accepts the calculations by Waste Management, the County's decision is still not against the manifest weight of the evidence. C. Br. at 23. The County asserts that in A.R.F. Landfill, Inc. v. PCB, 174 Ill. App. 3d 82, 528 N.E.2d 390 (2nd Dist. 1988), the court found the decision that criterion (i) had not been met was not against the manifest weight of the evidence where additional landfill space would not be needed for six years. *Id.* The County argues that likewise here even if the shortfall is within six or seven years, the Board must find that the County's decision was not against the manifest weight of the evidence. *Id.*

**Criterion (iii) - Minimize Effect on Surrounding Property.** The County asserts that criterion (iii) requires more than minimal efforts to reduce the proposed landfill's incompatibility and an applicant must demonstrate that the applicant has done or will do all that is reasonably feasible to minimize the incompatibility. C. Br. at 24, citing File, 219 Ill. App. 3d at 907, 579 N.E.2d at 1236 and Waste Management 123 Ill. App. 3d at 1090, 463 N.E.2d at 980. The County concedes that only Waste Management provided testimony on this criterion; however, the County argues that the County was not required to accept Waste Management's witnesses' opinions. C. Br. at 24.

The County argues that as the trier of fact, the County determines what weight should be accorded to expert testimony. C. Br. at 25, In re Glenville, 139 Ill. 2d 242, 251, 565 N.E.2d 623,

627 (1990). The County notes that while the trier of fact cannot arbitrarily reject expert testimony, the trier can disbelieve the testimony. *Id.* In this case, the County asserts that the testimony of Waste Management's witnesses was reviewed and the County still found that criterion (iii) had not been met. *Id.* The County maintains that the decision should be affirmed as the local siting authority, not the Board, weighs the evidence and assesses the credibility of witnesses. C. Br. at 25, citing Fairview Area Citizens Taskforce 198 Ill. App. 3d at 550, 555 N.E.2d at 1184.

The County claims that witness credibility is especially relevant in this proceeding where Ms. McGarr had indicated during the 2002 Application process that she possessed an associate's degree, but her updated resume in the 2003 Application did not include that reference. C. Br. at 25. The County states that Ms. McGarr had to take another class to receive her degree. *Id.* The County argues that furthermore, Ms. McGarr's credibility and expertise were suspect because she did not perform any appraisals herself and relied on conversations with homeowners to determine property values around the landfill and whether those properties were negatively impacted. C. Br. at 25-26.

The County questions Ms. McGarr's expertise because she relied on the Poletti study that was a study for an entirely different landfill with an entirely different target area. C. Br. at 26. The County takes issue with the number of transactions Ms. McGarr referenced and her use of the Settler's Hill landfill information. *Id.* Because of the small number of transactions, the County notes that Ms. McGarr admitted that the removal of one transaction could impact her findings. *Id.* The County argues that Ms. McGarr's comparison of Settler's Hill to the expansion was also suspect because Ms. McGarr did not consider the significant differences between Kane and Kankakee Counties. *Id.*

Additional issues for the County from Ms. McGarr's testimony include the arbitrary size of Ms. McGarr's target area and unconsidered negative impacts on the control area from features such as the interstate and a rail line that were not accounted for by Ms. McGarr. C. Br. at 27. Finally, the County asserts that Ms. McGarr's report and testimony were unreliable as objectors' counsel pointed out many problems. *Id.*

The County argues that the testimony of Waste Management's other witness, Mr. Lannert, was also questionable. C. Br. at 28. Specifically, the County notes that Mr. Lannert admitted he had not reviewed the City of Kankakee Comprehensive Plan A, or speak to banks, developers, businesses, or residents to determine if the plan did minimize the impact on the area. *Id.* The County takes issue with Mr. Lannert's compensation and his failure to determine the impact of the expansion on future growth. *Id.*

The County argues that based on the testimony, the County's decision that Waste Management failed to meet criterion (iii) is not against the manifest weight of the evidence. C. Br. at 28-29.

**Criterion (vi) - Traffic.** The County argues that Mr. Coulter had many criticisms of the testimony by Waste Management's witness. C. Br. at 29. For example, the County points to Mr. Coulter's testimony that Waste Management failed to take into consideration both existing and

committed development. C. Br. at 29; C2613 at 39-40. The County argues that if Waste Management had considered committed development, the traffic from the Town & Country Landfill and the existing convention center and aquatic park would have been considered. C. Br. at 29. The County argues that Mr. Coulter's testimony established that Waste Management failed to consider the impact on school bus operations. C. Br. at 29; C2613 at 13-14.

The County asserts that Mr. Coulter also found the design of the roadway improper and that the shoulder was inadequate. C. Br. at 30; C2613 at 14-16, 32. The County maintains that Mr. Coulter found the southbound turn lane inadequate and the minimum sight distance used was incorrect. C. Br. at 30-31; C2613 at 17-20. The County also points out that Mr. Coulter opined that criterion (vi) was also not met because there was no mandatory procedure for cleaning mud and debris. C. Br. at 31; C2613 at 21.

The County argues that there was conflicting testimony on criterion (vi), and as the trier of fact, the County assesses witnesses and determines credibility. C. Br. at 31 (citations omitted). The County argues that the county board members were also free to use their own knowledge and familiarity with traffic conditions to determine that criterion (vi) was not met. *Id.* The County argues that the Board should affirm the County's decision. *Id.*

### **Watson**

Watson argues that the record supports the County's decision on each of the criteria. W.Br. at 18. The Board will summarize the arguments on each of the criteria.

**Criterion (i) - Need.** Watson agrees that proof of immediate necessity is not required to meet criterion (i); however a 27-year future estimate with actual need not occurring for ten years fails to prove criterion (i). W.Br. at 18. Watson argues that Waste Management's expert did not include all the available capacity in the service area in calculating the need for the expansion. W.Br. at 18-19. If only some of that available capacity is added and recycling is added, Watson claims there is a capacity overage. W.Br. at 19. Watson asserts that considering this example alone, the County could have found Ms. Smith's conclusions were not supported by the record. *Id.*

**Criterion (iii) - Minimize Effect on Surrounding Property.** Watson argues that Waste Management's position that where no contrary evidence was provided, a finding for Waste Management results does not recognize testimony adverse to Waste Management's position. W.Br. at 20. Watson argues that contrary evidence was included in the record through cross-examination and public comment. *Id.* Watson claims that Ms. McGarr's credibility was in question due to the confusion regarding her diploma and this alone is sufficient to find the County's decision was not against the manifest weight of the evidence. *Id.*

**Criterion (vi) - Traffic.** Watson argues that Waste Management's criticisms of Mr. Coulter's testimony, including his being unaware of a submission to IDOT that is not a part of this record, ignores many other deficiencies in Waste Management's submittal on criterion (vi). W.Br. at 20. Watson claims that Waste Management never submitted documentation that the access problems along U. S. 45/52 were corrected. W.Br. at 20-21.

## **Karlock**

Karlock argues that Waste Management's articulated standard of review as to what is against the manifest weight of the evidence is unduly relaxed. K.Br. at 11. Karlock quotes from PCB 03-125 for the standard of review. *Id.* Karlock maintains that with criterion (vi), there was conflicting testimony and the County's decision to assign credibility to Mr. Coulter cannot be disturbed by the Board. K.Br. at 12. Karlock also asserts that Waste Management's reliance on the RPC's recommendation is misplaced as the Board has consistently found that the local decisionmaker can reject the finding or recommendations of consultants. *Id.*

Karlock asserts that Waste Management seems to argue that on criterion (i) and (iii), the County must accept the testimony and evidence of Waste Management as "true uncontradicted facts notwithstanding the existence of contrary unsupported allegations." K.Br. at 13. Karlock maintains that Waste Management is wrong as the whole purpose of cross-examination is for an opposing party to probe testimony for consistency and to determine whether the conclusions are supported by the underlying facts. *Id.* Karlock points to Waste Management of Illinois v. PCB, 234 Ill. App. 3d 65, 600 N.E.2d 55 (1st Dist. 1992) and notes that in that case, the Board affirmed a denial of siting on criterion (i), without contradicting evidence with the applicant's expert failed to take into consideration sufficient facts and circumstances. K.Br. at 12-14.

Karlock takes issue with Waste Management's characterization that the vote on the 2003 Application was a reversal of the County's prior approval. K.Br. at 14. Karlock asserts that this is a misstatement as Waste Management's argument attempts to convey the impression that the evidence at the second hearing was the same and outside forces impacted the decision. *Id.* Karlock reiterates that the second proceeding was a new, separate and different proceeding, with substantially similar applications. *Id.*

## **Runyon**

Runyon's arguments are to the fundamental fairness of the proceedings and not to the specific criteria.

## **Waste Management's Reply**

**Criterion (i) - Need.** Waste Management argues that the County uses misstatements of Ms. Smith's testimony in an attempt to discredit the unrebutted testimony. Reply at 11. Waste Management concedes that the low end of the range of shortfall capacity testified to by Ms. Smith did differ between the two applications; however, given the upper limits of the range, Waste Management asserts the lower limit differences is immaterial. Reply at 12. Waste Management notes that the County takes issue with the recycling rates used by Ms. Smith; however, Ms. Smith used the recycling goals in the county solid waste management plans. *Id.* Furthermore, Waste Management argues that a possible increase in recycling does not invalidate a finding of need. Reply at 12, citing Turlek v. PCB, 274 Ill. App. 3d 244, 653 N.E.2d 1288 (1st Dist 1995).

Waste Management asserts that even if there is sufficient capacity for the service area until 2015, that does not prove a lack of need. Reply at 12. Waste Management discounts the cases relied upon by the County and notes that Illinois courts have also found that need was shown when remaining capacity was ten years or longer. Reply at 13, citing E & E Hauling, 116 Ill. App. 3d 586, 451 N.E.2d 555, American Bottom Conservancy v. City of Madison, PCB 07-84 (Dec. 6, 2007). Waste Management argues that the County's argument should therefore be rejected. Reply at 13.

Waste Management asserts that Illinois case law establishes that the applicant does not have to consider facilities in the siting or permitting process when determining need. Reply at 13, citing Tate v. PCB, 188 Ill. App. 3d at 1019-20, 544 N.E.2d at 1193; Turlek v. Village of Summit, PCB 94-19, 94-21, 94-22 (consol.) (May 5, 1994). Therefore, Waste Management argues that using only currently permitted facilities in her calculations was not improper for Ms. Smith. Reply at 13. Furthermore, Waste Management asserts that the County's claim that Ms. Smith did not consider other permitted facilities is inaccurate because Ms. Smith testified that she did consider them but did not include them for valid reasons. Reply at 14.

Waste Management argues that despite the criticisms of her testimony, Ms. Smith was the only witness to prepare a report, present facts, evaluate data and form an opinion. Reply at 4. Waste Management further argues that Ms. Smith's testimony did not change from the 2002 Application to the 2003 Application and there is nothing in this record to justify the County's decision on criterion (i). *Id.*

**Criterion (iii) - Minimize Effect on Surrounding Property.** Waste Management notes that the County alleges bias on the part of Mr. Lannert due to his compensation; however, the Board has previously ruled similar generic attacks on expert witnesses are not persuasive. Reply at 15, citing Rochelle, PCB 03-218. Also, Waste Management asserts that a compatibility assessment need not consider future development to be reliable. Reply at 15, citing Citizens Against Regional Landfill (CARL) v. Count Board of Whiteside County, PCB 92-156 (Feb. 25, 1993). Further, Waste Management maintains that opinions from residents and businesses are not necessarily determinative in an analysis of the impact on the surrounding area. Reply at 15, citing American Bottom Conservancy v. Village of Fairmont City, PCB 01-159 (Oct. 18, 2001); CARL, PCB 92-156.

Waste Management argues that contrary to the claims by the County, Ms. McGarr determined property values by performing a standard comparable property value analysis for properties surrounding the existing site and the proposed expansion. Reply at 16. Waste Management maintains that Ms. McGarr used the same data for both application in addition to two farmland sales and three residential sales. *Id.* Waste Management argues that Ms. McGarr's findings on property values were unrebutted and Ms. McGarr used her experience to establish the target and control areas. Reply at 17.

**Criterion (vi) - Traffic.** Waste Management first addresses the contention by the County that Waste Management did not consider school bus traffic. Reply at 19. Waste Management disagrees and notes that Mr. Corcoran specifically testified that the expansion's peak travel times will not coincide with school bus traffic. *Id.* Waste Management claims that



“concerns and speculations” are not legitimate basis for a determination that criterion (vi) has not been satisfied. *Id.*

Waste Management asserts that the County’s other contentions are without merit. Reply at 19. Specifically Waste Management argues that future traffic considerations are not a part of the analysis on criterion (vi). *Id.* As to the County’s contention on sight distance, Waste Management asserts that the record demonstrates that, even applying the sight distance advocated by the County, the 2003 Application would meet them. Reply at 20.

### **Board Analysis and Findings**

As stated above, the Board reviews the decision of the County on the landfill siting application by Waste Management to determine if the decision is against the manifest weight of the evidence. The Board is not in a position to reweigh the evidence, but must determine if the decision is against the manifest weight of the evidence. Fairview Area Citizens Taskforce, 198 Ill. App. 3d 541, 555 N.E.2d 1178. Therefore, the Board must determine if the record contains evidence to support the County’s decision that criteria (i), (iii), and (vi) were not satisfied by Waste Management’s 2003 Application. The Board will discuss each of the criteria below.

**Criterion (i) - Need.** Pursuant to Section 39.2(a)(i) of the Act (415 ILCS 5/39.2(a)(i) (2006)), the applicant must establish that the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve. Waste Management argues that the only witness on criterion (i) was provided by Waste Management and the un rebutted testimony establishes that criterion (i) has been met. The County disagrees and points to testimony by Waste Management’s expert on cross-examination as evidence that criterion (i) has not been met. The *amici* briefs also assert that criterion (i) has not been met.

The Board agrees that there is no testimony in the record on criterion (i) other than the testimony from Waste Management. The parties all cite case law from both the Board and the courts to support their position on criterion (i). The County does not find that the evidence and case law establishes that the facility is necessary to accommodate the waste needs of the service area. Waste Management argues that the facility is needed to accommodate the wastes needs of the service area. Although the County can cite cases wherein landfill capacity for ten or more years does not establish need, Waste Management can cite to contrary cases.

Well-established case law states that the Board does not reweigh the evidence or reassess the witnesses’ credibility. *See City of Rockford*, 125 Ill. App. 3d 384, 465 N.E.2d 996; Waste Management, 122 Ill. App. 3d 639, 461 N.E.2d 542; Steinberg, 139 Ill. App. 3d 503, 487 N.E.2d 1064; Willowbrook Motel, 135 Ill. App. 3d 343, 481 N.E.2d 1032. The Board looks only to the record to find support for the County’s decision. In this case, the Board finds that the record supports the County’s decision on criterion (i). Waste Management’s witness used recycling rates from the solid waste management plans, yet evidence in the record indicates that recycling rates may now be higher than the recycling values used for calculation when the solid waste management plans were written. Waste Management’s witness did not consider certain permitted landfills and newly sited landfills in the area. The Board agrees that the applicant does not have to consider unpermitted landfills; however, there is nothing in the statutory language

that prohibits the County from considering that information. “[M]erely because the [local siting authority] could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the [local siting authority’s] finding.” File, 219 Ill. App. 3d at 905-906, 579 N.E.2d at 1235. Thus, the Board finds that there is evidence in the record that supports the County’s decision on criterion (i). The Board finds that the County’s decision on criterion (i) is not against the manifest weight of the evidence.

**Criterion (iii) - Minimize Effect on Surrounding Property.** Pursuant to Section 39.2(a)(iii) of the Act (415 ILCS 5/39.2(a)(iii) (2006)), the applicant must demonstrate that the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property. Waste Management argues that the only evidence in this record is the uncontradicted testimony of Waste Management’s experts. The County disagrees and points to testimony by Waste Management’s experts on cross-examination and a public comment filed as evidence that criterion (iii) has not been met. The *amici* briefs also assert that criterion (iii) has not been met.

The cross-examination of Waste Management’s witnesses, particularly Ms. McGarr, provides sufficient evidence to support the County’s decision. The confusion over Ms. McGarr’s academic degree was cited by the County in determining the credibility of Waste Management’s witness. The County also cited testimony that Ms. McGarr had not performed actual appraisals as evidence that the County considered when finding that criterion (iii) had not been met. Also, the record includes a public comment that disagrees with the report prepared by Waste Management on criterion (iii). Even though this public comment was not subject to cross-examination, the public comment is in the County record. Further, the public comment supports some of the concerns raised in cross-examination about whether criterion (iii) was met in Waste Management’s application.

As stated above, the case law establishes that the Board does not reassess witness credibility or reweigh the evidence. *See City of Rockford*, 125 Ill. App. 3d 384, 465 N.E.2d 996; *Waste Management*, 122 Ill. App. 3d 639, 461 N.E.2d 542; *Steinberg*, 139 Ill. App. 3d 503, 487 N.E.2d 1064; *Willowbrook Motel*, 135 Ill. App. 3d 343, 481 N.E.2d 1032. Further, where there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits one group of witnesses and does not credit the other. *See Waste Management*, 187 Ill. App. 3d at 82, 543 N.E.2d at 507. Thus, the Board finds that there is evidence in the record that supports the County’s decision on criterion (iii). The Board finds that the County’s decision on criterion (iii) is not against the manifest weight of the evidence.

**Criterion (vi) - Traffic.** Pursuant to Section 39.2(a)(vi) of the Act (415 ILCS 5/39.2(a)(vi) (2006)), the applicant must demonstrate that the traffic patterns to and from the facility are so designed to minimize the impacts on existing traffic flow. Waste Management argues that the County’s decision on criterion (vi) is against the manifest weight of the evidence and challenges the testimony of Watson’s witness, Mr. Coulter, who presented evidence that Waste Management’s application did not demonstrate that criterion (vi) had been met. The County argues that the record supports the County’s decision that criterion (vi) was not met and notes that there were two experts testifying on this criterion.

The testimony of Mr. Watson's expert (Mr. Coulter) provided a counter point to Waste Management's expert witness (Mr. Corcoran). The Board agrees with Waste Management that criterion (vi) addresses only existing traffic and there is no need for an applicant to consider future traffic unrelated to the application. However, there is evidence in the record that school buses and trucks from the expansion will be sharing the road, even at non-peak hours. Also there is testimony that minimum sight distances could be insufficient. Finally, although Waste Management indicated that IDOT had approved planned improvements to the intersection of U.S. Router 45/52 and the proposed landfill facility entrance, that evidence is not in the record. Thus, the County could credit the potential problems raised by Mr. Coulter's testimony.

The Board does not reweigh the evidence or reassess the witnesses' credibility. *See City of Rockford*, 125 Ill. App. 3d 384, 465 N.E.2d 996; *Waste Management*, 122 Ill. App. 3d 639, 461 N.E.2d 542; *Steinberg*, 139 Ill. App. 3d 503, 487 N.E.2d 1064; *Willowbrook Motel*, 135 Ill. App. 3d 343, 481 N.E.2d 1032. Further, where there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits one group of witnesses and does not credit the other. *See Waste Management*, 187 Ill. App. 3d at 82, 543 N.E.2d at 507. The Board finds that there is evidence in the record that supports the County's decision on criterion (vi). The Board finds that the County's decision on criterion (vi) is not against the manifest weight of the evidence.

### **CONCLUSION**

The Board finds that the proceedings before the County were fundamentally fair and Waste Management was not prejudiced by the proceedings. The Board further finds that the County's decision relating to the need for the facility (415 ILCS 5/39.2(a)(i) (2006)), the facility's design to minimize the impact on surrounding property (415 ILCS 5/39.2(a)(iii) (2006)), and the traffic patterns (415 ILCS 5/39.2(a)(vi) (2006)) is not against the manifest weight of the evidence. The Board therefore affirms the County's decision to deny siting for the landfill expansion proposed by Waste Management.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter

### **ORDER**

For the reasons presented in the Board's opinion, the Board affirms the March 17, 2004 decision by the County Board of Kankakee County denying siting of an expansion of pollution control facility at the Kankakee Landfill for Waste Management of Illinois, Inc.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final

orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 24, 2008, by a vote of 4-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is fluid and cursive, with a long horizontal stroke at the end.

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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board