

In its motion for leave to file an *amicus curiae* response to the motions for reconsideration, CCOC states that it received the Board's leave to file an *amicus curiae* brief, which it filed on December 10, 2007. CCOC Mot. at 1. CCOC characterizes itself as "an active participant in the local siting proceedings." *Id.* at 2. CCOC argues that, as the only participant before the Board that is seeking to affirm the contested special conditions, it is "the only participant capable and qualified to continue to defend the imposition of the various conditions at issue in the Motions for Reconsideration." *Id.* CCOC claims that, although the Board's procedural rules do not normally allow response briefs to *amicus curiae* briefs, those procedural rules allow responses to motions to reconsider. *Id.*, citing 35 Ill. Adm. Code 101.110(c), 101.520(b). CCOC further claims that, because it filed its response within the deadline for responding to a motion to reconsider, considering that response "should not delay the decision-making of the Board." CCOC Mot. at 3, citing 35 Ill. Adm. Code 101.110(c), 101.520(b).

The Board's procedural rules provide that, "[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion." 35 Ill. Adm. Code 101.500(d). In the absence of objection from any of the parties and under the circumstances of this proceeding, the Board grants CCOC's motion for leave to file an *amicus curiae* response to the motions for reconsideration, accepts its response, and below briefly summarizes the arguments made in that response.

CONTESTED CONDITIONS

Special Condition 13

Special Condition 13 requires that

[t]he Operator shall complete the exhumation and redisposal of waste from Unit 1 as soon as practicable, but in no event later than six (6) years from the date an IEPA permit is issued for the expansion, except as otherwise provided by the City Council for good cause shown. The waste exhumation and redisposal shall be restricted to the months of November, December, January, February and March unless it is demonstrated to the City Council that the process can occur in other months without off-site odor migration or other impacts associated with the process. C-1655-56, C-1659 (Rochelle City Council Resolution R07-10 approving expansion).

On May 8, 2007, the City Council convened a special meeting to address a motion for reconsideration filed by RWD. C23 at 2-4. The City Council voted with six in favor and one opposed to grant RWD's motion for reconsideration. C23 at 5-6; *see* C1664 (Resolution 07-18). With six voting in favor and one opposed, the City Council upon reconsideration voted to affirm Special Condition 13 as imposed. C23 at 31-32; *see* C1664.

Special Condition 23

Special Condition 23 requires that

[p]erimeter berms shall be built in advance of the cells in order to screen operations to a reasonable extent. It is recommended to require the berms to be built at least 500 feet in advance of the Easternmost edge of the cell being constructed. By way of example, prior to completion of Cell 3's liner, the Southern berm along Creston Road shall be constructed from E 4,200 to E 6,500, which extends approximately 600 feet East of the cell. The vegetation shall be established (with at least a one-year growing period) prior to waste being placed within 400 feet of a cell with active waste placement. The berm shall be at least 14 feet in height, placed between the waste footprint and Creston Road, and located between E 4,500 and E 7,500. C1660.

At its May 8, 2007 meeting convened to address RWD's motion for reconsideration, the City Council voted with six in favor and one opposed to affirm Special Condition 23 as imposed. C23 at 52-53; *see* C1664.

CITY'S MOTION

While the City states its belief that the Board erroneously affirmed Special Conditions 8, 13, 22, 23, 26, and 28, it specifically moves the Board to reconsider special conditions 13 and 23 while professing to reserve its right to appeal the Board's ruling on each of the six conditions. City Mot. at 2. The City claims that the Board affirmed Special Conditions 13 and 23 based upon errors in applying the existing law. *Id.* The City seeks to have the Board either strike or modify those conditions. *Id.*

Special Condition 23

The City states that its motion to reconsider Special Condition 23 is based not on newly-discovered evidence or a change in the law, but on error in the application of existing law. City Mot. at 2-3. The City states that Special Condition 23 requires a 14-foot perimeter berm. *Id.* at 3. The City states that its response brief argued that there was no testimony or other evidence demonstrating that a 14-foot berm was necessary to satisfy any of the Environmental Protection Act's siting criteria. *Id.*; *see* 415 ILCS 5/39.2 (2006). The City claims that the Board found that Special Condition 23 was not against the manifest weight of the evidence based in part upon a report to the City Council by Patrick Engineering and the recommendations of the hearing officer. *Id.* at 3-4. The City argues that, because the Patrick Engineering Report and the hearing officer's recommendations were issued after the close of the hearing, they do not constitute evidence in the record of this proceeding and cannot serve as the basis for affirming the requirement of a 14-foot perimeter berm. *Id.* at 4, citing 415 ILCS 5/41 (2006).

In addition, the City states that the Board relied upon testimony by Mr. Devin Moose in determining that Special Condition 23 was not against the manifest weight of the evidence. City Mot. at 4. The City argues that Mr. Moose testified with regard to operational screening berms, which are addressed by Special Condition 22, and did not testify in support of a 14-foot perimeter berm. *Id.*

The City further states that the Board also relied upon RWD's operating history in concluding that Special Condition 23 was not against the manifest weight of the evidence. City Mot. at 5. The City argues that this operating history is no more than general support for a perimeter berm and "does not substitute for direct testimony regarding the required height of the berm." *Id.* The City also argues that the requirement of a 14-foot berm originated with the report to the City Council from Patrick Engineering, leaving the City without an opportunity to provide evidence or to cross-examine on that issue. *Id.* at 5-6.

Special Condition 13

The City claims that the Board's finding that Special Condition 13 was not against the manifest weight of the evidence was based in part upon a report to the City Council by Patrick Engineering and the recommendations of the hearing officer. City Mot. at 6. The City restates its argument that, because those were issued after the close of the hearing, they do not constitute evidence in the record and cannot serve as the basis for affirming Special Condition 13. *Id.* at 4, *see* 415 ILCS 5/41 (2006).

The City notes that the City Council has with this special condition required exhumation of waste in six years "absent a showing of good cause." City Mot. at 6. The City argues that this deadline is not consistent with the Host Agreement's requirement of accomplishing exhumation in a "commercially reasonable" time and does not reflect testimony that the process may take as long as ten years. *Id.* at 6-7. Also, the City states that it would be reluctant to depend upon a future City Council's determination of what constitutes "good cause" for an extended deadline, suggesting that "commercial reasonableness" is a superior standard. *Id.* at 7.

CITY COUNCIL'S MOTION

The City Council argues that it now concludes that the record contains no support for Special Condition 23, which requires a 14-foot perimeter berm. City Council Mot. at 2, citing 415 ILCS 5/39.2(a) (2006). The City Council also argues that the City agrees with this conclusion. *Id.* at 1-2. The City Council argues that "Mr. Moose specifically testified that he did not see the need for berms surrounding the entire perimeter of the facility, and that where they are necessary, the 8-foot undulating berms proposed by the applicant's expert, Mr. J. Christopher Lannert, were sufficient." *Id.* at 2. The City Council seeks to have the Board reconsider whether its order affirming Special Condition 23 erred in its application of the law. *Id.* Should the Board reconsider, the City Council claims that "the record does support the modification of Special Condition 23 to require an undulating perimeter berm 8 to 10 feet in height with plant material on the top of the berm, including plant material in excess of 6 feet in height." *Id.* at 3.

RWD'S MOTION

RWD "joins in and adopts" the City's and the City Council's motions for reconsideration and incorporates those motions into its own by reference. RWD Mot. at 2. RWD presents additional reasons as the basis for its motion for reconsideration.

First, RWD argues that the City Council in its post-hearing response brief concluded that the record does not contain factual support for Special Condition 13 as originally imposed. RWD Mot. at 2. RWD further argues that the City Council also concluded in its response brief that the record would support modification of the special condition. *Id.* RWD states that “[n]o party has challenged this finding by the local siting authority.” *Id.* (emphasis in original).

Second, RWD argues that the City Council in its post-hearing response brief stated that the record does not contain testimony supporting imposition of Special Condition 23. RWD Mot. at 2. RWD further argues that the City Council also concluded in its response brief that the record would support modification of the special condition. *Id.* at 2-3. RWD states that “[n]o party has challenged this finding by the local siting authority.” *Id.* at 3 (emphasis in original).

RWD argues that the Board has explained that “it may not reweigh the evidence on the siting criteria to substitute its judgment for that of the local siting authority.” RWD Mot. at 3 (emphasis in original), citing Waste Management of Illinois, Inc. v. County Board of Kankakee County, PCB 04-186, slip op. at 25 (Jan. 24, 2008) (citations omitted). RWD further argues that “[t]his doctrine of deference to the siting authority’s findings is in keeping with the well-established principle that it is up to the local siting authority to weigh the evidence presented.” RWD Mot. at 3-4, citing Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 53, 743 N.E.2d 188, 197 (3rd Dist. 2000). RWD claims that the Board’s January 24, 2008 opinion and order erred by reweighing evidence and abrogating the City Council’s unchallenged findings. RWD Mot. at 4. RWD requests that the Board reconsider that opinion and order and revise it with respect to Special Conditions 13 and 23. *Id.*

CCOC’S RESPONSE

CCOC argues that the Board reviews the siting determinations made by the City Council on April 11, 2007, and affirmed on May 8, 2007 in the City Council’s consideration of RWD’s motion to reconsider. CCOC Resp. at 2-3, citing Rochelle Waste Disposal, L.L.C. v. City of Rochelle, PCB 07-113, slip op. at 5-6 (Jan. 24, 2008); 415 ILCS 5/39.2(e), 40.1(a) (2006). CCOC further argues that “RWD mistakenly asserts that the positions taken by the local siting authority *during* the instant appeal constitute the “findings” and “decision” of the local authority subject to review by this Board.” *Id.* at 2 (emphasis in original).

CCOC responds to RWD’s claim that no party has challenged the City Council’s position on appeal before the Board. CCOC Resp. at 3. While acknowledging that it is not a party to this appeal, CCOC notes that the Board granted it leave to file an *amicus curiae* brief and that its brief supported conditions originally imposed by the City Council. *Id.* at 3-4.

CCOC notes RWD’s argument that the Board “may not reweigh the evidence on the siting criteria or substitute its judgment for that of the local siting authority.” CCOC Resp. at 4, citing Waste Management of Illinois v. County Board of Kankakee County, PCB 04-186, slip op. at 25 (Jan. 24, 2008). CCOC states that, in its January 24, 2008 opinion and order, “the Board actually *affirmed* the decision of the City Council.” CCOC Resp. at 4 (emphasis in original). CCOC argues that it is the City Council that has reweighed evidence by taking a position in this appeal that differs from its April 11, 2007, siting decision. *Id.*

CCOC claims that RWD has indicated in this appeal that the special conditions imposed by the City Council are “materially more restrictive or costly than those specified in the Restatement [Host Agreement].” CCOC Resp. at 4. CCOC further claims that, under the terms of that restated host agreement, RWD will not be obligated to develop and construct the landfill expansion without modifying the agreement to address such “materially more restrictive or costly” special conditions. *Id.* at 4-5. CCOC argues that the restated host agreement preceded the local siting hearing and the City Council’s determination to impose special conditions. *Id.* at 5. CCOC suggests that any inconsistency between the special conditions and the restated host agreement “should not and cannot undo the April 11, 2007 decision which rested not on cost, but on being protective of the public health, safety and welfare.” *Id.*

Special Condition 23

CCOC states that, under Section 39.2 of the Act, the City Council “may also consider *as evidence* the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent corporation) in the field of solid waste management when considering criteria (ii) and (v) under this Section.” CCOC Resp. at 5-6 (emphasis in original), citing 415 ILCS 5/39.2(e) (2006). CCOC states that, “[a]lthough no witness expressly testified that a fourteen (14) foot perimeter berm was required, both Mr. Moose and Mr. Hilbert testified as to the poor operating history of RWD.” CCOC Resp. at 6. CCOC further states the City Council’s technical consultant and its hearing officer considered this testimony in making their recommendations and that the Board also weighed this record in making its decision. *Id.* Arguing that the operating record is evidence, CCOC claims that a 14-foot perimeter fence is “well justified” and that the Board properly applied the Act in upholding Special Condition 23. *Id.*

Special Condition 13

CCOC notes that the City Council has not moved for reconsideration of the Board’s determination with regard to Special Condition 13. CCOC Resp. at 3, 7; *see* Council Mot. at 1, 3. CCOC argues that “[t]he City Council now apparently agrees with its original ‘decision,’ and finds the Board’s Order regarding the exhumation schedule for Unit 1 to be sound.” CCOC Resp. at 3.

CCOC argues that the City’s application estimated that exhumation of Unit 1 would require five to ten years and that a six-year period falls within that range. CCOC Resp. at 7. CCOC further argues that the City Council may extend that deadline “for good cause shown.” *Id.* Claiming that “good cause” is a defined legal term, CCOC argues that, if RWD “presents good cause for an extension of time to the City Council, the City Council must allow RWD additional time for the exhumation.” *Id.*, citing BLACK’S LAW DICTIONARY 213 (7th ed. 1999).

BOARD’S DISCUSSION AND CONCLUSION

In ruling on a motion for reconsideration, the Board considers factors including new evidence or a change in the law, to conclude that the Board’s decision was in error. 35 Ill. Adm.

Code 101.902. In Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (Mar. 11, 1993), the Board observed that “the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law.” Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

The Board grants the parties' motions to reconsider and, for the reasons expressed below, affirms its January 24, 2008 decision.

Under Section 40.1(a) of the Act, RWD's petition for review contests the decision of the City Council conditionally to approve the City's application for siting. *See* 415 ILCS 5/40.1(a) (2006). The City Council granted siting approval, subject to a number of special conditions, on April 11, 2007. At a special meeting convened on May 8, 2007, the City Council granted RWD's motion for reconsideration and, among other actions, voted to affirm Special Conditions 13 and 23 as they had been imposed. While the Board reviews the arguments made and positions taken in the parties' post-hearing briefs and in their motions for reconsideration, those arguments and positions in no way supersede the City Council's April 11, 2007, determination to approve siting subject to special conditions and its May 8, 2007, votes to affirm the special conditions addressed in these motions to reconsider.

The Board also addresses the parties' arguments regarding Patrick Engineering and the local hearing officer. As the Board noted in its January 24, 2008 opinion and order, the City Council retained Patrick Engineering as a technical consultant under the terms of the City's siting ordinance, and Patrick Engineering on March 23, 2007 issued to the City Council a report on the City's application for siting approval. *See* C2 at Appendix A.2 (ordinance); C253. The opinion and order also noted that, in issuing its report, Patrick Engineering had “reviewed the application, the transcripts of the public hearings, and other material submitted into the record.” C253. With regard to criterion (ii), Patrick Engineering's report concluded that “the design, operation and location of the expansion is designed and proposed to be operated to be protective of the public health safety and welfare” subject to 37 special conditions pertaining to design, operation, and location. C262-66.

The Board also noted in its opinion and order that the local hearing officer filed his findings of fact, conclusions of law, and recommendations with the City Council. *See* C206-50; *see also* C2 at Appendix A.2 (City siting ordinance). In that filing, the local hearing officer stated that,

[i]n reaching my decision and recommendation, I have reviewed and considered the application, the engineering reports submitted by the applicant, the transcripts of the public hearing, the exhibits and filings of the participants, the written comments filed with the City Clerk of the City of Rochelle, the applicant's Proposed Findings of Fact and Conclusions of Law, CCOC's Evidentiary Summary and Proposed Findings of Fact and Conclusions of Law,” and Patrick Engineering's Report. C209.

In its opinion and order, the Board noted that the local hearing officer concluded, based on his review of the record, that the application satisfied the siting criteria and recommended that the City Council approve the request for siting subject to special conditions. *See* C210; C243-48. The opinion and order also noted that, in addressing the operator's previous operating experience, the hearing officer found "all of the special conditions recommended by Patrick Engineering, Inc. to be reasonably necessary, supported by the record and necessitated by the previous operating experience." C242-43. In this regard, the Act specifically allows the City Council to "consider as evidence the previous operating experience . . . in the field of solid waste management when considering criteria (ii) and (v) 415 ILCS 5/39.2(a) (2006).

Considering the nature of these two reports and the multiple bases including operating experience on which the Board determined that Special Conditions 13 and 23 were not against the manifest weight of the evidence, the Board is not persuaded that those determinations represent errors in the application of existing law. *See Land and Lakes Co. v. PCB*, 319 Ill. App. 3d 41, 49-50, 743 N.E.2d 188, 194-95 (finding that adoption of findings and recommendations in contractor's report filed after close of public comment period did not render siting proceedings fundamentally unfair); *see generally Fairview Area Citizens Taskforce v. PCB*, 198 Ill. App. 3d 541, 555 N.E.2d 1178, 1182 (3rd Dist. 1990) (stating record supports Board findings on consultant's report). Accordingly, having reconsidered its January 24, 2008 opinion and order, the Board affirms that opinion and order in its entirety.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 3, 2008, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board