BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C., Petitioner,	)	
	)	
vs.	)	**PCB 03-218**
	)	**(Pollution Control Facility**
CITY COUNCIL OF THE CITY OF ROCHELLE, ILLINOIS, Respondent.	)	**Siting Appeal)**

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on February 6, 2004 there caused to be filed with the Illinois Pollution Control Board an original and 9 copies of the following document, a copy of which is attached hereto:

AMICUS BRIEF OF CONCERNED CITIZENS OF OGLE COUNTY
MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

BY: _____
Attorney at Law

****

PROOF OF SERVICE

STATE OF ILLINOIS)
)**SS.**
COUNTY OF LASALLE)

The undersigned, being first duly sworn, state that I served a true and correct copy of the foregoing Notice, together with a copy of each document referred to therein, upon the person(s) indicated via e-mail and/or regular mail as indicated in the Service List on the 6th Day of February, 2004.

Pat Wheeler
Legal Assistant

SUBSCRIBED and **SWORN TO** Before Me This 6tht Day of February, 2004.

Notary Public

"OFFICIAL SEAL"
GENIA FOX
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 1/3/08

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C.,	)	
Petitioner,	)	
	)	
vs.	)	**PCB 03-218**
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Respondent.	)	

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE BRIEF*

Now comes the Concerned Citizens of Ogle County, (hereinafter "CCOC"), by and through its attorney, George Mueller, P.C., and for its Motion For Leave To File Amicus Curiae Brief, states and alleges as follows:

1. That on June 19, 2003 the CCOC filed a Petition To Intervene in this matter, and on June 30, 2003 Petitioner, Rochelle Waste Disposal, L.L.C., filed an Objection to said Petition. The Board, in its July 10, 2003 Order, denied CCOC's Petition To Intervene and further indicated that the CCOC could participate in this matter either through statements at hearing, public comments or the filing of an *Amicus Curiae Brief.*

2. That, pursuant to Section 101.110(c) , and in accordance with Section 101.628(c) of the General Rules of the Illinois Pollution Control Board, an *Amicus Curiae Brief* can be filed in any adjudicatory proceeding by any interested person, provided permission is granted by the Board.

3. That the CCOC is an interested party as set forth in Section 101.628(c) of the Board Rules, and, accordingly, permission should be granted allowing it to file an *Amicus Curiae Brief.*

4. That in further support of CCOC's Motion For Leave To File An *Amicus Curiae Brief,* CCOC repeats, realleges, and incorporates each and every argument made in its previous Petition To Intervene as if said arguments had been set forth in their entirety herein.

WHEREFORE, the Concerned Citizens of Ogle County respectfully pray that the Illinois Pollution Control Board grant their Motion thereby giving CCOC permission to file an *Amicus Curiae Brief* in this matter.

Respectfully Submitted,
Concerned Citizens of Ogle County,

BY: _____
Their Attorney

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AMICUS BRIEF OF CONCERNED CITIZENS OF OGLE COUNTY

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INTRODUCTION

In 2000, Rochelle Waste Disposal, (hereinafter "RWD"), filed an Application seeking local siting approval for a vertical and horizontal expansion of its existing landfill in Rochelle, Illinois. Concerned Citizens Of Ogle County, (hereinafter "CCOC"), participated as an Objector at the local siting hearing and, on the eve of the City Council's decision, RWD voluntarily withdrew the Siting Application. After an intense two-year lobbying and public relations campaign, RWD filed another Application for expansion seeking a somewhat scaled back version of the expansion sought in 2000. Once again, CCOC, which had also maintained a presence in the community between the withdrawal of the original Application and the filing of the second Application, participated actively as an Objector.

As RWD has pointed out in its Brief, Counsel for the City of Rochelle recommended conditional siting approval in the "staff" report to the City Council. Moreover, RWD has put the City Council on written notice that its denial of the Siting Application constitutes a material breach of the Host Agreement thereby releasing RWD from its performance obligations regarding closure, post-closure care, and potential remediation of the existing facility.[1] CCOC believes that as the only consistent opponent of both RWD's siting attempts, its view in the form of an Amicus Brief would be of benefit to this Board.

THE SITING PROCEEDINGS WERE FUNDAMENTALLY FAIR

RWD initially argues that the City Council's denial of the Siting Application was a politically motivated, legislative decision rather than an adjudicatory decision. It supports the argument with two statements of City Council members allegedly made to the local newspaper immediately after the vote. Interestingly, neither council member states that he disregarded the evidence in order to conform to the overwhelming public opinion against the landfill siting. To the extent that a "no" vote based upon the evidence is also consistent with the expressed public will, the Aldermen who correctly performed their duty

[1] The RWD Notice of Breach to the City Council dated _____, 2003 was included as an exhibit with CCOC's unsuccessful Petition To Intervene in this matter. It is included here again as Appendix A for easy reference by the Board.

are also entitled to claim their political reward. The statements of these two City Council members to the press are nothing more than that and do not overcome the presumption that they acted without bias in their adjudicatory capacity. *E&E Hauling vs. Pollution Control Board, 115 Ill.App.3d 898, 451 N.E.2d 555 (2nd Dist. 1983). See also Concerned Adjoining Landowners vs. Pollution Control Board, 288 Ill.App.3d 565, 680 N.E.2d 810 (June, 1997).*

In further support of its position that the siting decision was legislative, RWD claims that the City Council did not "deliberate," mistakenly confusing the concept of public debate with deliberation. There is no requirement anywhere that a City Council or County Board must debate a siting decision, and the fact that this City Council did not publically debate does not justify the inference that the individual Council members' votes were not well thought out and deliberated.

Thirdly, RWD argues that the City Council's decision was legislative because that decision rejected the recommendations of the Hearing Officer and the City staff. This is the opposite of the typical argument that a City Council or County Board improperly relied on the biased or incorrect recommendations of its staff or consultants. In cases assessing those arguments, the Board has consistently held that such reliance is not error because a Board is free to reject the findings of its consultants. *Sierra Club, et al. vs. Will County Board, et al., PCB 99-136 (August 5, 1999, Slip Opinion at Page 12).* This is an important point because RWD's Brief, particularly in its discussion of the weight to be given to the testimony of its hydrogeologist and CCOC's hydrogeologist, incorrectly elevates the City staff's report and the Hearing Officer's report to the level of definitive findings which ought to be given some weight by the Board.

Without conceding that the City Council's decision was in any way legislative (and the burden of proof on this issue lies squarely on RWD), it is clear that a legislatively based denial of the Siting Application is authorized by existing Illinois law. "A local governing body may find the applicant has met the statutory criteria and properly deny the application based upon legislative type considerations." *Southwest Energy Corp. vs. Pollution Control Board, 275 Ill.App.3d 84, 655 N.E.2d 304 (4th Dist. 1995).* While RWD acknowledges *Southwest Energy*, it incorrectly argues that authority on the issue is split, citing *Industrial Fuels and Resources vs. Pollution Control Board, 227 Ill.App.3d 533, 592 N.E.2d 148 (1st Dist.*

1992). In fact, *Southwest Energy* post-dated *Industrial Fuels*, and the standard announced therein has been followed without criticism by the Board and Appellate Courts in other Districts. *Land & Lakes Company vs. PCB, 309 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000).* "A local siting authority's role in the siting approval process is both quasi-legislative and quasi-adjudicative." *(See also Waste Management of Illinois vs. Kane County Board, PCB 03-104 (June 19, 2003)).*

RWD argues for a change in the law, suggesting that our Supreme Court's recent ruling in *People ex. rel. Klaeren vs. Village of Lisle, 202 IL2d 164, 781 N.E.2d 223 (2002),* can be interpreted as standing for the proposition that hearings involving property rights of interested parties should be classified as administrative or quasi-judicial and not legislative. RWD's reliance on *Klaren* is misplaced because the Supreme Court was very careful to restrict its holding only to proceedings regarding the issuance of special use permits. The Supreme Court left undisturbed the principle that municipal bodies act in a legislative capacity when they conduct zoning hearings, citing with approval the holding in *LaSalle National Bank of Chicago vs. County of Cook, 12 IL2d 40, 145 N.E.2d 65 (1957),* that "it is well established that it is primarily the province of the municipal body to determine the use and purpose to which property may be devoted..." Moreover, the purpose of the Supreme Court's consideration in *Klaeren* was to determine whether or not a proceeding was adjudicatory or legislative in the context of whether minimal due process requirements attached to the hearing. The Court was not asked to, nor did it consider, whether a proceeding could have both quasi-adjudicatory and quasi-legislative characteristics as Section 39.2 siting proceedings have.

The position of RWD that a siting proceeding should be strictly adjudicatory and not legislative is inconsistent with its position at the local siting hearing. Applicant's counsel argued in his opening statement that the facility will bring $120,000,000 in direct economic benefits to the community. (TR. 2-24, Page 20)[2] He also presented a Trial Brief arguing that economic benefits are a legislative type consideration which should be received by the City Council. (TR. 2-26, Page 114).

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[2] All references to the transcript will be only to the local siting hearing transcript, and will be by date and page number.

In fact, the very language of Section 39.2 of the Act *(415 ILCS 5/39.2)* suggests that the drafters intended City Councils and County Boards with siting jurisdiction to exercise some legislative discretion in passing on siting applications. After listing the substantive siting criteria which an applicant must prove in order to receive siting approval, Section 39.2 states, "The County Board or the governing body of the municipality 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." To the extent that the local decision-maker is not required to, but may consider such evidence, the process changes from adjudicatory fact-finding to legislative policy making. Consider for example, an application on a greenfield site where opponents do not challenge the soundness of the design or geologic conditions, but rather prove that the applicant has constructed and operated sites at other locations in an unsafe manner. Section 39.2(a) clearly contemplates that a decision-maker in such a situation would be free to reject an application even in light of uncontradicted evidence on the substantive siting criteria. This becomes particularly relevant in this case where RWD has a deplorable operating record at the existing facility, and CCOC has argued that this record is a compelling basis to disbelieve RWD's claims regarding hydrogeologic conditions at the proposed expansion site.[3]

RWD next argues that the proceedings were fundamentally unfair because of improper ex parte contacts. Acknowledging that there is no evidence that these contacts and attempted contacts actually influenced anyone's decision, RWD instead urges a change in existing law to require reversal when ex parte contacts by an affiliate or representative of a party create an appearance of impropriety without an actual showing of prejudice. RWD argues that proof of prejudice presents an impossible burden because it cannot inquire into the minds of the decision-makers. The factual centerpiece for these arguments is the attempt of Frank Beardin, an officer of CCOC, to give video tapes of a dramatic television show to some of the City

[3] RWD's operating record with specific citations to the hearing transcript will be discussed in detail in the Section of this Brief dealing with whether the City Council's decision on criterion ii was against the manifest weight of the evidence.

Council members during the hearings.[4]

Beside the obvious fact that the Board is required to follow existing Appellate case law, to the contrary RWD's argument is not well taken because it incorrectly presumes that the parties in a Section 39.2 siting proceeding are entitled to the same procedural and substantive due process safeguards as they would receive in a trial. A local siting authority is not held to the same standard of impartiality as a judge. *Land & Lakes Company vs. PCB, 309 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000).* The participants in the landfill expansion application could insist that the procedures comport with standards of fundamental fairness, but they are not entitled to the constitutional due process elements of a fair trial. *Tate vs. Illinois Pollution Control Board, 188 Ill.App.3d 994, 544 N.E.2d 1176 (4th Dist. 1989).* Fundamental fairness incorporates and requires only "minimal" standards of procedural due process. *Daley vs. Pollution Control Board, 264 Ill.App.3d 968, 637 N.E.2d 1153 (1994).* Even *People ex. rel. Klaeren vs. Village of Lisle* holds that the full array of due process protections are not necessarily available to participants in quasi-judicial proceedings.

Although RWD does not claim that CCOC engaged in any ex parte contacts which were actually prejudicial, its inference that the ex parte contacts during the pendency of the Application were entirely one-sided is not justified by the record. CCOC, in fact, filed a pre-hearing Motion complaining of RWD's paid newspaper advertising during the pendency of the Application, touting the economic benefits of the expansion. (TR. 2-24, Page 16). In addition, CCOC complained of the Applicant maintaining an Internet web page describing the expansion and outlining its proposed economic benefits during the pendency of the proceedings. (TR. 2-24, Pages 13, 14). Whether or not these electronic and print contacts with the decision-makers, although not directly addressed to them, constituted ex parte contacts is probably not as relevant at this point as the fact that these contacts illustrate that RWD was a major contributor in creating the "political" atmosphere which it complains of in its Brief.

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[4] RWD's argument that showing prejudice presents an impossible burden because it cannot inquire into the decision making process is inappropriate in that the City Council members who were approached by Mr. Beardin all testified that they did not watch the *Touched By An Angel* episode.

THE DECISION OF THE CITY COUNCIL ON THE SUBSTANTIVE SITING CRITERIA WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

A. STANDARD OF REVIEW AND OVERVIEW

It has long been established that the decision of the local siting authority in a landfill siting appeal should not be overruled unless it is against the manifest weight of the evidence. *McLean County Disposal, Inc. vs. County of McLean, 207 Ill.App.3d 477, 566 N.E.2d 26 (4th Dist. 1991).* The Pollution Control Board, in reviewing the factual findings of the local decision-maker, is not to reweigh the evidence or make new credibility determinations. *Waste Management of Illinois, Inc. vs. Pollution Control Board, 160 Ill.App.3d 434, 513 N.E.2d 592 (2nd Dist. 1987).* The determination of whether a proposed facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected is purely a matter of assessing the credibility of expert witnesses. *Fairview Area Citizens Task Force vs. Illinois Pollution Control Board, 198 Ill.App.3d 541, 555 N.E.2d 1178 (3rd Dist. 1990). File vs. D & L Landfill, Inc., 219 Ill.App.3d 897, 579 N.E.2d 1228 (5th Dist. 1991).* It is not the duty of the Board to reweigh the evidence, to judge the credibility of the witnesses, or to substitute its opinion for that of the local decision-maker. The Appellate Court decision in F*airview Area Citizens Task Force* can fairly be read as mandating that if there is any evidence to support the local siting authority's decision, that decision must stand.

The fact that a different decision might be reasonable is insufficient for reversal. The opposite conclusion must be clear and indisputable. *Willowbrook Motel vs. Pollution Control Board, 135 Ill.App.3d 343, 41 N.E.2d 1032 (1st Dist. 1985).*

RWD relies on *Industrial Fuels and Resources vs. Pollution Board, 227 Ill.App.3d 533, 592 N.E.2d 148 (1st Dist. 1992)* for the proposition that if the conclusions of the Applicant's expert witnesses are not contradicted or directly rebutted, the decision-maker is not free to reject those conclusions. This case is, however, not like *Industrial Fuels* which the Appellate Court described as "not a case in which there is a conflict in the evidence on any material issue of fact." Instead, in this case, there is extensive cross-examination exposing weaknesses and inconsistencies in the testimony of the Applicant's witnesses, and, with regard to criterion ii, an opposing witness who points out weaknesses in and disagreements with the

Applicant's case and who opines that the evidence is insufficient to support the Applicant's conclusions. RWD's Brief makes repeated mention of the fact that CCOC's hydrogeologist, Charles Norris, does not offer an ultimate opinion on criterion ii, but RWD's Brief cites no authority in support of the proposition that such an opinion is required in order for the decision-maker to reject the conclusions of the Applicant.

This case is, in fact, more like *CDT Landfill Corporation vs. City of Joliet, PCB 98-60 (March 5, 1998).* In that case, like here, the City Council rejected the recommendations of its consultant in voting against the Application, and the Board correctly observed that a consultant report or staff recommendation is not binding on the decision-maker. *Hediger vs. D & L Landfill, Inc., PCB 90-163 (December 20, 1990).* In *CDT Landfill Corporation,* there was no evidence presented contradicting any of the Applicant's experts. Nonetheless, the Board found that the City could find such uncontradicted testimony deficient and, accordingly, the Board found that the City's decision rejecting the Application on criteria i and iii was not against the manifest weight of the evidence. This is particularly relevant here because CCOC's cross-examination of several of the Applicant's witnesses, including those on criteria i, ii, and iii, revealed serious and disturbing data manipulation, data inconsistencies, and outright errors. These factors coupled with the Applicant's troubling operating record at the existing facility provide a compelling basis for the City Council to lose confidence in the conclusions of these compromised witnesses regardless of their apparent "qualifications."

B. THE CITY COUNCIL'S FINDING THAT THE APPLICANT HAD NOT PROVEN NEED IS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The evidence of need in this case demonstrates the kind of mathematical manipulation which is so unrealistic that the City should feel to draw the conclusion that is there is no need for the proposed facility. RWD's Brief emphasizes the credentials and qualifications of its witnesses in an apparent attempt to create the impression that disagreement by the City Council with witnesses of such high caliber and obvious ability is unreasonable. In fact, Sheryl Smith does essentially the same report in every need assessment project she works on. She looks at waste generation in the service area, multiplies that amount by the number of years

the Host Agreement requires the Applicant to provide disposal capacity to the Host community, and divides this total into the capacity currently existing and available to the service area. On 13 out of 13 occasions when she has performed this analysis, she found that a need existed. (TR. 2-25, Page 45). This is not surprising since by including metropolitan Chicagoland in the service area and excluding those counties where there is substantial sited capacity, one can always guarantee the outcome of this computation. Such a simplistic analysis would seem to make it irrelevant that the existing Rochelle Landfill actually has more than 20 years remaining capacity for waste generated in the City of Rochelle. (TR. 2-25, Page 66). Similarly, it would be irrelevant that the Livingston Landfill, by itself, has annual disposal capacity almost equal to the waste generated in the Applicant's entire service area. (TR. 2-25, Page 101).

The foregoing notwithstanding, Ms. Smith was still required to make some totally unrealistic assumptions in order to validate her conclusion. These assumptions are, in fact, so unrealistic that they warrant the City Council finding that her credibility is undermined. For example, Ms. Smith assumed that of the 123,000,000 tons of waste requiring disposal in the service area over the projected life of the facility, none of that would be recycled. This condition of zero recycling, however, does not exist anywhere in the service area and Ogle County, where the City of Rochelle is located, actually recycled at a rate of 30% in the last year, a rate 20% in excess of its recycling goal. (TR. 2-25, Page 57, 101). Additionally, Ms. Smith assumed that no additional capacity would ever be available for the disposal needs of the service area other than the capacity currently permitted. (TR. 2-25, Page 72). Accordingly, she assumed that the 14,000.000 ton capacity of the Will County Landfill and the capacity of the South Streator expansion would not be available to the service area even though both facilities have final siting approval. (TR. 2-25, Pages 97, 98). In the case of Spoon Ridge, a permitted landfill with 39,000,000 tons of available capacity, Ms. Smith assumed that would not be available. (TR. 2-25, Pages 98, 99). All RWD can say by way of response in its Brief is that the Hearing Officer's report agreed with Ms. Smith that it is appropriate to assume zero capacity increases in calculating need. The Hearing Officer's report is not evidence and is not even persuasive. It creates no presumptions and has no precedential value. Ms. Smith's report and testimony was also fraught with errors which substantially undermined her credibility. She understated the projected waste receipts at

the proposed facility by 500 tons per day as early as 2005. (TR. 2-25, Pages 59, 60). Her conclusions regarding the origins of the historical waste stream to the facility were not verified by her data. (TR. 2-25, Page 69). Her conclusion that the expansion would provide economic benefits to local haulers in Rochelle erroneously assumed that 100% of the waste generated in the service area originated in Rochelle. (TR. 2-25, Pages 74, 75).[5] Actually, Ms. Smith did not know the dimensions of, or the center of, the proposed service area. (TR. 2-25, Page 88). Ms. Smith's report erroneously stated that the Will County facility would be restricted to waste from within that County, but she admitted on cross-examination that the facility would actually be allowed to take waste from municipalities in neighboring communities which are contiguous to Will County. (TR. 2-25, Page 96).

Ms. Smith did an analysis of driving distances and costs from Rochelle to other facilities in the service area. Counsel for CCOC was able to demonstrate, through cross-examination and with CCOC Exhibits 1, 2, 3, and 4, that she over estimated hauling costs to these alternate facilities by over estimating and overstating the distance to the four most nearby facilities. (TR. 2-25, Pages 105-112, CCOC Exhibits 1, 2, 3, 4).

In light of the foregoing inconsistencies, errors and totally unrealistic assumptions, Ms. Smith's testimony is not persuasive, and the decision of the City Council rejecting her conclusions is not against the manifest weight of the evidence.

C. THE CITY COUNCIL'S FINDING THAT THE FACILITY IS NOT SO DESIGNED, LOCATED AND PROPOSED TO BE OPERATED THAT THE PUBLIC HEALTH, SAFETY AND WELFARE WILL BE PROTECTED IS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

This is the criterion on which there was direct conflicting evidence, the testimony of Steve Stanford, a hydrogeologist for RWD, and the testimony of Charles Norris, the hydrogeologist for CCOC. To the extent that the City Council weighed this conflicting testimony and chose to credit Mr. Norris and not Mr. Stanford, the Board's job in reviewing the City Council's decision on this criterion should be over. The fact that the

[5] Ms. Smith opined that she relied on the economic benefit analysis to support her conclusion that need existed, but also admitted that economic benefit is not one of the Section 39.2 siting criteria. (TR. 2-25, Page 81).

Hearing Officer may have weighed the testimony differently in his report is irrelevant. RWD's Brief with seven pages devoted to a critique of Mr. Norris' testimony is clearly an improper attempt to have the Board reweigh the credibility of these two witnesses.

The foregoing notwithstanding, the testimony of Mr. Stanford was not credible, and the testimony of Mr. Norris was fatally damaging to the Application. RWD's Brief mentions at least twice Mr. Stanford's conclusion that the proposed site was the best location he had ever seen from a hydrogeologic perspective. This bit of hyperbole by the witness is central to how he undermined his own credibility.

The Application withdrawn by RWD in 2000 was full of errors and inconsistencies, and one would think that in the ensuing two years prior to a second Application being filed, RWD would have gotten its facts and figures straight. That is not the case. Additionally, RWD's assumptions and interpretations were decidedly non-conservative.

Mr. Stanford, in his cross-sections, minimized the amount of sand located underneath the proposed site. Sand bodies in his cross-sections were often depicted as being of diamond shape with the thickest portion encountered at the boring, and the sand body pinching out immediately on either side of the boring. This was true even when sand was identified at similar or identical elevations in adjacent borings where correct geologic practice would have been to interpret the same as continuous between the two borings. Examples of this can be found at Borings G-41, R-107, G-122, EB-31, EB-33, EB-35, EB-32, and RL-8. (TR. 3-3, Pages 159-162, 191, 216).

In an equally startling display of intentionally minimizing negative features, Mr. Stanford classified observation wells with virtually identical elevations and identical depths into Bedrock as being in different geologic units based solely upon the permeability determined in slug testing of those wells. Examples would be Wells G-34-D and G-106-D. (TR. 3-3, Pages 208, 209). Similarly, Well G-24-D, whose sand pack is only 4-1/2 feet below the top of Bedrock, is classified as being in the lower Dolomite, otherwise defined as the area below the top 10 feet of the Bedrock. (TR. 3-3, Page 212). As another example, the tested interval of Well G-68-I hydrogeologically behaves like an aquifer, the material is geologically classified like the tight Tiskilwa Till which Mr. Stanford relies on as an impermeable barrier between the bottom of the liner and uppermost

aquifer, but yet the high permeability results from this well are not included in assessing the overall permeability of the Tiskilwa Till. (TR. 3-3, Page 167). As a further example of Mr. Stanford's intentionally under estimating the permeability of the Tiskilwa Till, Mr. Norris pointed out that the slug tests (which measure field permeability) conducted in the Tiskilwa Till for the 2003 Application are almost an order of magnitude (10 times) lower in permeability than those reported in the 2000 Application, but that this difference is not apparent in slug tests measuring the permeability of the uppermost aquifer. (TR. 3-4, Page 107).

During the hearings, there was significant controversy about the elevation and extent of the uppermost aquifer, how it related to the Dolomite Bedrock, and how this aquifer interacted with the underlying St. Peter Sandstone aquifer which serves the nearby Creston municipal water wells. Mr. Stanford's gross inability to even identify and classify the top of Bedrock renders his conclusion about the quality of the geologic setting completely meaningless. Mr. Stanford showed the Bedrock to the east of Boring G-68-I as rising when the next well or control point in that direction actually had a lower top of Bedrock. (TR. 3-3, Page 164). On Cross-Section K-K', Mr. Stanford depicted Boring EB-31 as encountering Bedrock when the actual boring log showed that it did not. (TR. 3-3, Page 190, App. Page 2158). Also on Cross-Section K-K' Mr. Stanford depicts 40 feet of Bedrock encountered in Boring EB-35. However, on Cross-Section C-C', he depicts the same boring as having over 60 feet of Bedrock. He explains this anomaly as being "for illustrative purposes." (TR. 3-3, Page 192, App. Pages 2151, 2158). Boring EB-33 is depicted in the cross-sections as encountering silty clay, but in the boring logs is shown as actually encountering Bedrock. (TR. 3-3, Pages 214, 215). This anomaly is described by Mr. Stanford as a "tracking error." On Cross-Section K-K', Boring EB-33 is shown as ending in St. Peter Sandstone, yet no rock was recovered for classification purposes from this boring. (TR. 3-3, Page 218, App. Page 2158). According to the boring log, G-104-I did not hit Bedrock, yet Table 2 in his report showed it as encountering Bedrock several feet below the actual termination of the boring. (TR. 3-3, Page 221). This was conceded by Mr. Stanford to be "an error." Boring G-109 in Cross-Section J-J terminates at Elevation 750, but the boring log shows it as terminating at Elevation 771. (TR. 3-3, Page 239). This was characterized by Mr. Stanford as a "drafting error."

Critical to the assessment of the potential performance of the landfill is an understanding of groundwater flow. This is assessed by developing potentiometric surface maps for the various water units encountered under the site. Mr. Stanford's efforts here were no better than in the Bedrock. First of all, Mr. Stanford did not include in his potentiometric surface maps the leachate heads of wells in the existing facility. (TR. 3-3, Pages 197, 198). The potentiometric surface map of the water table, when compared to the topography of the site, actually shows a portion of the site as being under standing water. Mr. Stanford described this as a "contouring artifact." (TR. 3-3, Page 213). The heads (water levels) from Well R-107, a monitoring well for the existing facility although depicted on Cross-Section J-J', are not even included in the potentiometric surface maps. (TR. 3-3, Page 194, App. Page 2157). Mr. Norris was troubled by the omission of this "critical well." (TR. 3-4, Page 111). Although Mr. Stanford discounted the importance of the potentiometric surface map of the uppermost aquifer, that map shows groundwater at the north end of the site moving against the known regional flow direction and actually leaving the site in the direction of the Creston municipal wells. (TR. 3-4, Pages 158-160).

In an apparent concession of the fact that Mr. Stanford's groundwater impact assessment was seriously flawed, RWD argues in its Brief that a groundwater impact assessment (GIA) is not even required in a siting hearing. That notwithstanding, if a GIA is presented, its accuracy and believability becomes an important consideration in assessing the credibility of the witnesses. Mr. Stanford acknowledged that he did not even use the site specific permeability data in performing the GIA. (TR. 3-3, Pages 151-153). Mr. Stanford acknowledged that the applicable groundwater standard (AGQS) for ammonia is .390, and that the predicted concentration of ammonia at his point of compliance in the GIA is .385, barely under the limit. However, he assumed a starting concentration of ammonia of zero, when in fact the known background concentration at the site is .243. This would lead to a final concentration when one adds the contribution from leachate to the known background concentration of .628. (TR. 3-3, Pages 154-158). Mr. Norris, on behalf of CCOC, made the same observation and pointed out that with regard to ammonia, the AGQS is exceeded in the GIA. (TR. 3-4, Page 55). Nonetheless, Mr. Stanford continued to insist that the GIA did not fail. Mr. Norris further pointed out that since the GIA did not incorporate known site specific permeabilities,

the GIA was, by ignoring this data, able to eliminate 95% of the known flow underneath the site. (TR. 3-4, Pages 59-61).

RWD dismisses Mr. Norris as biased and characterizes his extensive criticisms of the Application's data interpretation as trivial. Describing Mr. Norris as "puffing" regarding his credentials, RWD points out that he has only been a licensed geologist for a few years, but RWD fails to point out that the licensing requirement has only existed in Illinois for a few years. In fact, Mr. Norris is licensed in multiple states; he has over 30 years of experience in the area; he is a past President of the Colorado Groundwater Association, and he was for a number of years the Manager of the Industrial Relations Consortium of the Laboratory for Supercomputing in Hydrogeology at the University of Illinois. (TR. 3-4, Pages 36, 37, 39, 40). Mr. Norris pointed out that he limited his testimony, particularly with regard to the migration of contaminants from the existing facility due to the fact that the Applicant had not included all of the required documents previously filed with the Environmental Protection Agency. (TR. 3-4, Pages 45-50).[6]

Mr. Norris confirmed that RWD's groundwater impact assessment did not model the site conditions accurately. (TR. 3-4, Page 66). He also pointed out that Mr. Stanford's introducing a continuous sand layer into the model, which he claimed to be a very conservative assumption, actually had the opposite effect in that the sand layer in the model was configured in such a way as to introduce horizontal flow from outside the facility boundaries in order to dilute any contaminants that would pass through the sand layer. (TR. 3-4, Page 63).

Mr. Norris emphasized that RWD's conclusions regarding the abilities of the Tiskilwa Till to act as a barrier between the bottom of the landfill and the uppermost aquifer are totally unwarranted and, in fact, contradicted by the site specific data. He pointed out that contamination leaving the existing facility in the form of either gas or leachate and observed in Monitoring Well R-107 proves that there are rapid flow paths through the Tiskilwa Till. (TR. 3-4, Pages 74-76). These impacts in Well R-107 indicate the presence of preferred pathways for migration in the Tiskilwa Till, thereby undermining its ability to act as a major

[6] Section 39.2(c) of the Act requires that a siting application shall include "all documents, if any, submitted as of that date to the Agency pertaining to the proposed facility ..."

component that enhances the public health, safety and welfare. (TR. 3-4, Pages 77-78). Mr. Norris also observed that hydrographs for numerous wells at the site with similar amplitude of seasonal head variations at different depths demonstrate that there is an extensive fracture flow network in the Tiskilwa Till, allowing rapid movement of water through that Till. (TR. 3-4, Pages 81-83). He also pointed out that the sand observed in the Tiskilwa Till, contrary to the interpretation of Mr. Stanford, is highly connected. (TR. 3-4, Pages 89-90). Lastly, he noted that the declining vertical gradients as one moves downward through the Tiskilwa Till toward the top of Bedrock absolutely contradict the Applicant's interpretation of the Tiskilwa Till as tight and massive. (TR. 3-4, Pages 91-95).

Mr. Norris was also disturbed by the numerous errors, inconsistencies, and data manipulations in the Application and Mr. Stanford's testimony. He pointed out that monitoring well head data contained in the Application is inconsistent with data from the same monitoring wells on file with the IEPA. (TR. 3-4, Pages 99-100). He was troubled by the differing and contradictory interpretations of the same data points in the east/west and the north/south cross-sections. (TR. 3-4, Page 101).

Although RWD's Brief describes Mr. Norris' criticisms of the Application as "trivial," Mr. Norris was deeply troubled by the fact that the Application and Mr. Stanford have failed to correctly identify and describe the uppermost aquifer immediately under the site. He pointed out that Mr. Stanford has chosen the wrong well heads (water levels) to draw his potentiometric map of the uppermost aquifer, and that this error is propagated to the design of the groundwater monitoring system. (TR. 3-4, Page 112). He referred to these as critical data irregularities and observed that if the uppermost aquifer had been correctly mapped, it would show a clear flow path in the direction of the Creston municipal water wells. (TR. 3-4, Page 103-105).

The significance of the foregoing is that Mr. Norris identified a nearby municipal water supply which is at immediate risk of contamination from landfill leachate releases. On cross-examination, he performed some calculations to assess this risk. He first of all pointed out that despite the Applicant's claim of an impermeable Tiskilwa Till, water will travel from the ground surface at the site to the uppermost aquifer in less than 50 years. (TR. 3-4, Page 154). He also calculated that water will travel from the uppermost aquifer into the regional St. Peter Sandstone aquifer in 3.8 years. (TR. 3-4, Pages 173-175). He concluded by

computing that water will travel from the ground surface at the site to the Creston municipal wells in 169 years. (TR. 3-4, Pages 183, 184, 186-187).

CCOC was, and is, very critical of the Applicant's handling of the groundwater interceptor trench between existing Units 1 and 2, described by the Applicant and its witnesses as a French Drain designed to trap and divert contamination from Unit 1 before it impacts Unit 2 of the existing facility. RWD's Brief misses the point by arguing that Unit 1 is a pre-Subtitle D Landfill, and therefore contamination from the same is not surprising. The real issue is that RWD's actions with regard to the groundwater interceptor trench demonstrate a callous disregard for the groundwater contamination leaving the existing landfill and a conscious decision to avoid addressing a serious existing problem.

Mr. Norris observed that the groundwater interceptor trench, an engineered underground gravel layer, is, in fact, a French Drain installed and designed to trap and extract any contamination releases into the groundwater from Unit 1. (TR. 3-4, Page 69). Data reported to the IEPA verify that groundwater in the interceptor trench is impacted with organics and chlorinated compounds. (TR. 3-4, Pages 72-73). Mr. Zinnen, the Applicant's design engineer, confirmed that while water in the interceptor trench would appropriately be considered as leachate. (TR. 2-25, Page 192). Even though Mr. Zinnen has been involved with the existing facility for 10 years, he did not know the volume of contaminated water moving through the interceptor trench and did not know if that water was even being analyzed anymore. (TR. 2-25, Pages 189, 192). Clyde Gelderlous, the person in charge of daily operations at the existing facility, did not know anything about the groundwater interceptor trench other than water was no longer being pumped from the same. (TR. 2-26, Pages 60, 61). Tom Hilbert, the Vice-President of Engineering for Winnebago Reclamation, one of the co-owners of RWD, indicated that they do not keep a record of how much leachate is generated in Unit 1, the unlined disposal area. (TR. 2-26, Page 124). He recalled that the groundwater interceptor trench was installed in 1995 or 1996 and was pumped for a year with the extracted groundwater discharged into a sedimentation basin. When RWD realized that this water was too impacted to discharge into the waters of the State of Illinois, they stopped pumping the trench altogether. Monitoring shows the groundwater in the interceptor trench is still contaminated, and Mr. Hilbert indicated that while they have considered, and are still considering, de-watering

the trench, they have not done so in approximately 6 years. (TR. 2-26, Pages 127-130).

The sum and substance of the foregoing is that Unit 3, the groundwater interceptor trench, was installed for the sole purpose of identifying and removing groundwater contaminated by Unit 1. When RWD realized that this groundwater which they had been improperly discharging into a storm water run-off pond was, in fact, contaminated, they simply walked away from the problem.

The foregoing attitude of intentionally turning one's back on serious operational and environmental problems is consistent with RWD's operational history at the existing site. The most striking aspect of that operational history is RWD's continuous, and sometimes confrontational, refusal to acknowledge and address problems. Mr. Gelderlous admitted that while he was operating the facility between 1991 and 1996, he received 5 administrative citations which he appealed in every case to the Pollution Control Board and, in one case to the Appellate Court despite the fact that each citation carried only a $500 fine. (TR. 2-26, Pages 67-69). When shown the Board's decision finding him responsible for the violations set forth in PCB case: 92-64, Mr. Gelderlous still denied responsibility. (TR. 2-26, Page 70). Similarly, when confronted with CCOC Exhibit 5, an inspection report indicating that a special waste stream was mostly water, Mr. Gelderlous denied that this had occurred. (TR. 2-26, Page 52). He also denied that the inspection report's reference to the operator's failure to cover exhumed waste was a problem. (TR. 2-26, Page 52).

Mr. Hilbert, who has been involved with the facility since the mid-90's, pointed out that there have only been 5 notices of violations and 2 administrative warnings since 1995. (TR. 2-26, Page 98). However, in 41 inspections between February, 1999 and November, 2001, deficiencies were noted on 35 occasions. (CCOC Exhibit 8). Mr. Hilbert dismissed these as pending notices, meaning problems previously identified which had not yet been corrected. (TR. 2-26, Page 139). Violations Mr. Hilbert admitted did include one on November 1, 1999 for leachate flows entering the waters of the State. (TR. 2-26, Page 136).

In addition to refusing to admit responsibility for violations, RWD has demonstrated a pattern of severely late responses to IEPA directives. Mr. Gelderlous could not recall whether it might have taken as long as 6 years from the date of the initial mandate for RWD to install a required gas management system at the existing facility. (TR. 2-26, Page 59). The facility was first cited for lack of compliance with gas

monitoring directives on July 31, 1996. (TR. 2-26, Page 131). Mr. Hilbert acknowledged that deficiencies related to the gas monitoring system were noted 10 more times in inspections over the next 3 years. (TR. 2-26, Pages 135, 136). Lastly, the IEPA directed RWD to initiate closure on Unit 1 in 2000, and informed RWD in writing that this closure should have been completed by July 28, 2000. (CCOC Exhibit 9). As of the date of Mr. Hilbert's testimony on February 26, 2003, the closure of Unit 1 was still not completed. (TR. 2-26, Page 143).

Given the foregoing pattern of conduct, RWD is properly characterized as a non-compliant party and litigious operator who would not be proactive in ensuring environmental safety. The see- no-evil approach demonstrated in RWD's approach to the groundwater interceptor trench should, alone, be sufficient to justify the City Council in finding that the facility is not so designed, located, and proposed to be operated as to protect the public health, safety, and welfare.

D. THE CITY COUNCIL'S FINDING THAT THE FACILITY IS NOT SO LOCATED AS TO MINIMIZE INCOMPATIBILITY WITH THE CHARACTER OF THE SURROUNDING AREA AND TO MINIMIZE THE EFFECT ON THE VALUE OF THE SURROUNDING PROPERTY IS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The testimony of RWD's two witnesses on this criterion was seriously flawed and anything but persuasive. Chris Lannert, who testified that the facility would be compatible with surrounding land uses, has testified at siting hearings on 35 previous occasions, coming to the conclusion that the facility would be compatible on 34 of those occasions. The one time Mr. Lannert concluded that a facility would not be compatible, he was testifying for a siting opponent. (TR. 2-24, Page 86).

Despite all the off-site photoviews Mr. Lannert used to demonstrate compatibility, he had none from the Village of Creston which is the closest urban area and may contain up to 100 homes. (TR. 2-24, Page 94). He acknowledged that the proposed facility would be the largest land form in Ogle County. (TR. 2-24, Page 109).

Most troubling about Mr. Lannert's testimony is that his conclusions were based in substantial reliance on an off-site screening berm between the proposed facility and the Village of Creston. He did not

know who owns the land on which this berm is located, or how it will be regulated since it is, in fact, not part of the facility. (TR. 2-26, Pages 190, 191). This berm is already 35 feet high in places, but still not vegetated. (TR. 2-24, Pages 99,112).

Peter Polletti, a real estate appraiser, is also a regular in landfill siting hearings having testified 20 to 25 times that a proposed facility will not impact property values. (TR. 2-24, Page 146). A limiting condition for his conclusions is that there would be 100% compliance with all regulations, a dubious assumption given RWD's operating record. (TR. 2-24, Page 148).

Although Mr. Polletti's conclusions are presented as science, they are nothing more than guesses and statistical manipulations. Mr. Polletti's approach is to compare various aspects of property sales in a target area defined as generally a 1 to 1.5 mile radius around the proposed site and a control area defined generally as the remainder of the community. Mr. Polletti is not aware of any studies that establish the scientific validity of this approach. (TR. 2-24, Page 159). The Village of Creston is within his target area. Mr. Polletti conceded that Creston has an 11% higher household income than the City of Rochelle, but yet has lower property values. (TR. 2-24, Pages 152-158). Mr. Polletti admitted that he would just be guessing that the proximity of the railroad and lack of proximity to shopping might account for these differences, and that he did not have any data to support those guesses. The analysis also assumes that the existing landfill operation which is one-eighth the size of the proposed expansion has a similar impact on surrounding property values and, again, Mr. Polletti was unaware of any studies other than his own to support that assumption. (TR. 2-24, Pages 163, 165).

As was the case with a number of other witnesses for RWD, Mr. Polletti's testimony was severely undermined by the serious and unjustified data manipulation required to reach his conclusions. Mr. Polletti analyzed every fifth sale out of 370, yet his total of 80 indicates that other sales were added. He offered no explanation as to those. (TR. 2-24, Pages 170, 171). He excluded, without justification or scientific support, all bi-level and tri-level sales, all residential sales which included large lots, all residential sales involving construction before 1950, and all residential sales including out buildings. (TR. 2-24, Page 169). He also excluded from his control group all sales in an area called Lindenwood without offering explanation. (TR.2-

24, Pages 160-161). On the other hand, he included one sale in the target area that was outside the time parameters for his study, and that sale, coincidentally, had the highest rate of appreciation of any sale within the target area. (TR. 2-24, page 166).

Despite the selective inclusion and exclusion of sales information, Mr. Polletti's numbers, in fact, suggest that there will be an impact on property values. He did not consider rate of turn-over in the control and target study areas, nor percentage of asking price realized, nor lot size other than to exclude large lots. (TR. 2-24, Pages 157, 158). He did acknowledge that lot sizes in Creston in the target area were larger than Rochelle in the control area, but disputed that there is a correlation between prices and lot size. (TR. 2-24, Page 162). He also admitted that if the residential sales in the target area were looked at sequentially, every single sale has a lower rate of appreciation than the previous sale. (TR. 2-24, Page 168, 169). Lastly, he acknowledged that the 4 sales in the target area since the first Application was filed have a significantly lower average price than the remainder of the sales prior to filing of the first Application. (TR. 2-24, Page 172).

With regard to compatibility, Mr. Lannert's conclusions are substantially based upon the existence of a screening berm, which is outside of the facility's boundaries and, therefore, beyond the ability of the siting authority to control. Mr. Polletti's conclusions are based on highly selective data manipulation, and even then Mr. Polletti never disputed that there is no scientific validation of his conceptual approach to assessing real estate value impacts. In fact, the data, as selective as it is, clearly shows decreasing rates of real estate appreciation in the area surrounding the existing landfill. Accordingly, the City Council was justified in concluding that this criterion had not been met.

CONCLUSION

For the foregoing reasons, Concerned Citizens Of Ogle County respectfully prays that the decision of the Rochelle City Council denying the Siting Application be affirmed.

Concerned Citizens Of Ogle County,

BY: _____
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APPENDIX A

In reliance on the terms of the Host Agreement, RWD has acquired the property known as the Babson Farm as well as the property known as the Creston Parcel. At the request of the City, RWD has annexed both of these parcels to the City, in each case under an Annexation Agreement, which specifically provides for the use of the property as a landfill. Despite its obligations under the terms of the Host Agreement, the City did not cooperate with RWD in the planning, development or consideration of the expansion and has completely failed to make accurate information concerning the landfill available to the public. Moreover, we believe that the City has, indirectly and without informing RWD or the public, taken action which has the intended or probable effect of interfering unreasonably with the operation or expansion of the facility by adopting requirements or conditions that have not been disclosed.

If the City's breach of the Host Agreement is not cured by the action of the PCB or otherwise, the City's course of conduct violates the City's obligations under the Host Agreement as well as the implied obligation of "good faith" which is imposed on the City under Illinois law, thereby relieving RWD from further monetary and other obligations under the Host Agreement. We note that the City's course of conduct also constitutes "Uncontrollable Circumstances" under Section 13.4 of the Host Agreement in that denial of the expansion constitutes an "act, event or condition . . . that has had . . . a material adverse effect on" RWD's rights under the Host Agreement and was "beyond the reasonable control of" RWD. Those circumstances, if not cured, thus further excuse RWD's obligation to perform various non-monetary obligations under the Host Agreement, including providing the City with disposal capacity for 20 years under Section 2.2, providing free waste disposal under Section 3.1, reserving such capacity under Section 3.9 and assuming the closure and post-closure costs for the existing facility, including Unit I (Section 3.12).

Because these issues are quite serious and involve substantial damages, we want to make sure that the City is on notice at the earliest opportunity and will summarize the legal bases for our claim in order that the City Council may carefully consider its obligations.

When the Host Agreement was executed, the City was not the siting authority in that the land had not yet been annexed to the City. The City was the lessor of the existing facility and assumed its duty to cooperate with RWD "in its efforts to obtain siting approval for an expansion of the existing landfill facility" in its ***proprietary*** capacity as lessor. Thus, if RWD had applied for an expansion with Ogle County as the siting authority, the City clearly could not have voted to object to the expansion consistent with its "Cooperative Guarantee." Although the City subsequently became the siting authority for the expansion, its duties under the landfill lease remained unchanged, and it was obligated to communicate effectively with RWD and the public before, during and after the proceeding regarding the City's requirements, standards and conditions associated with the landfill and to approve a reasonable expansion recommended by the City staff's independent consultants and attorneys as well as by the Hearing Officer.

have the ***legislative*** authority to enact an ordinance or resolution that breaches its contractual obligations under a lease of municipal property, but that does not preclude an action for breach of contract in connection with a lease entered into in its ***proprietary*** capacity. See In re Wa-Wa-Yanda, Inc. v. Dickerson, 18 A.D.2d 251, 254, 239 N.Y.S.2d 473, 477 (1963). Under such circumstances "[u]se of the ordinance was merely the City's way of breaching the contract." E & E Hauling, Inc. v. Forest Preserve District of DuPage County, 613 F.2d 675, 680 (7th Cir. 1980).

In E & E Hauling a landfill operator leased the Mallard Lake Recreational Preserve from the DuPage County Forest Preserve District with the exclusive right to operate and maintain a sanitary landfill. When the Forest Preserve District subsequently adopted new ordinances prohibiting certain waste from being deposited at the landfill site, the Seventh Circuit found there was a claim against the Forest Preserve District for violating the Contract Clause of the United States Constitution, which provides "No State shall . . . pass any . . . law impairing the Obligation of Contracts." That is somewhat similar to what had happened in the Wa-Wa-Yanda case where the town had leased land for a marina and the sale of gasoline but subsequently enacted an ordinance barring the sale of gasoline. Such an abrogation of contract rights is not permissible, and someone contracting with a municipality, such as RWD, has a right to either enforce its contract against the City or obtain damages for the contract's unconstitutional impairment. One way or the other, RWD is entitled to enforce the City's contractual duties under the lease made in the City's ***proprietary*** capacity. That right to enforce the contract is not the same as a right to challenge the City's ***legislative*** authority, and the City's exercise of legislative authority in violation of such a contract entitles RWD to contract remedies. See also Mid-American Waste Systems, Inc. v. City of Gary, 49 F.3d 286 (7th Cir. 1995) (lessee of the Gary landfill could claim damages against the City under its lease for interfering with the operation of the landfill).

Host Agreement are to be considered made **"Under Protest."** RWD has expended millions of dollars in good faith in reliance on the City's assurances and on the City's express obligation to comply with its cooperation obligations under the Host Agreement. Thus, RWD expects that the City will either cure its default or answer in damages or such other remedies as may be appropriate.

Very truly yours,

ROCHELLE WASTE DISPOSAL, L.L.C.

By McGreevy, Johnson & Williams, P.C.
Its Attorneys

By _____
Michael F. O'Brien
One of its Attorneys

cc: Dennis Hewitt, Esq.
Charles Helsten, Esq.

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