ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

LOWE TRANSFER, INC. and MARSHALL V. LOWE,	)	
Petitioners,	)	
vs.	)	Case No. PCB 03-221
COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS	)	
Respondent.	)	

NOTICE OF FILING

TO: See Affidavit of Service

PLEASE TAKE NOTICE that on September 9/2, 2003, we hand delivered for filing with the Illinois Pollution Control Board, the attached **Respondent County Board of McHenry County, Illinois' Reply Brief in Support of its Decision to Deny Siting Approval to Lowe Transfer, Inc.,** a copy of which is attached hereto.

Dated: Sept. 2, 2003

Respectfully Submitted,

On behalf of the County Board of McHenry County, Illinois

By: Hinshaw & Culbertson

Philip R. Kuyawa
One of its Attorneys

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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on 9/2, 2003, a copy of the **Respondent County Board of McHenry County, Illinois' Reply Brief in Support of its Decision to Deny Siting Approval to Lowe Transfer, Inc.,** served upon:

Via U.S. Mail and e-mail:
David McArdle
Zukowski, Rogers, Flood & McArdle
50 Virginia Street
Crystal Lake, IL 60014

Via Hand Delivery:
Dorothy M. Gunn
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Illinois Pollution Control Board
James R. Thompson Center
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Chicago, IL 60601

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

Philip R. Krzysa

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LOWE TRANSFER, INC. and MARSHALL LOWE,	)	
Petitioners,	)	
vs.	)	Case No. PCB 03-221
	)	Pollution Control Facility Siting Appeal
COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS	)	
Respondent.	)	

RESPONDENT COUNTY BOARD OF MCHENRY COUNTY, ILLINOIS' REPLY BRIEF IN SUPPORT OF ITS DECISION TO DENY SITING APPROVAL TO LOWE TRANSFER, INC.

For the reasons set forth herein, Respondent, County Board of McHenry County ("McHenry County Board"), respectfully requests that this Board affirm its decision to deny siting approval to Lowe Transfer, Inc. and Marshall Lowe, the Co-Petitioners herein.

I. THE EVIDENCE AMPLY SUPPORTED MCHENRY COUNTY BOARD'S DECISION TO DENY SITING APPROVAL.

As set forth in both Co-Petitioners' and Respondent's opening briefs, this Board must determine whether the McHenry County Board's decision to deny siting approval was against the manifest weight of the evidence. *See Waste Management of Illinois, Inc. v. Illinois Pollution Control Board*, 160 Ill.App.3d 434, 441-42, 513 N.E.2d 592, 597 (2d Dist. 1987). According to this Board:

> "A verdict is . . . against the manifest weight of the evidence where it is palpably erroneous, wholly unwarranted, clearly the result of passion or prejudice, or appears to be arbitrary, unreasonable, and not based upon the evidence. A verdict cannot be set aside merely because the jury could have drawn different inferences and conclusions from conflicting testimony or because a reviewing court would have reached a different conclusion . . . when considering whether a verdict was

> contrary to the weight of the evidence, a reviewing court must view the evidence in the light most favorable to the appellee."

A.R.F. Landfill, Inc. v. Lake County, PCB 87-51 (Oct. 1, 1987), slip op. at *6, *quoting Steinberg v. Petra*, 139 Ill.App.3d 503, 508 (1986). As explained in A.R.F., if "this Board finds that the County Board could have reasonably arrived at its conclusions, the County Board's decisions must be affirmed." *A.R.F.*, PCB 87-51, slip op. at *6. A review of the record in this case establishes that it was clearly reasonable for the McHenry County Board to determine that criteria (ii), (iii) and (v) were not satisfied by the Applicant. Therefore, this Board should affirm the McHenry County Board's decision to deny siting approval to Lowe Transfer, Inc.

While Co-Petitioners contend that this Board and courts have been willing to reverse decisions of local hearing bodies with respect to one or more criteria, Co-Petitioners were only able to locate 12 cases where the Board and appellate courts have actually reversed a decision of local hearing body on any criterion, in spite of hundreds of pollution control facility siting cases that have been appealed to the Pollution Control Board and appellate courts. (Pet. Br. pp. 5-6). The fact that the Board and appellate courts have so seldom found that decisions of local hearing bodies are against the manifest weight of the evidence establishes how difficult it is to meet that standard. A review of the 12 cases cited by Co-Petitioners further establishes that Co-Petitioners are not entitled to the relief that they seek because out of the 12 cases cited by Co-Petitioners, the appellate court or Board have only completely reversed a County Board's denial of siting approval three times. *See Industrial Fuels & Resources/Illinois, Inc., v. Illinois Pollution Control Board*, 227 Ill.App.3d 533, 592 N.E.2d 148 (1st Dist. 1992); *Watts Trucking Service, Inc. v. City of Rock Island*, PCB 83-167 (March 8, 1984); *Frink's Industrial Waste, Inc. v. City of*

Rockford, PCB 83-41 (June 30, 1983). In most of the other cases cited by Co-Petitioners, the Board found that while the lower tribunal's decisions with respect to one or two criteria were against the manifest weight of the evidence, the tribunal's decisions with respect to the remaining criteria were correct, and the tribunals' overall decisions to deny siting approval were affirmed.[1] In the remaining cases, the Board actually reversed approval of a pollution control facility, finding that the local hearing body improperly found that a certain criteria had been met when it actually had not.[2]

Furthermore, the only three cases in which this Board or an appellate court have actually reversed a local governing body's decision to deny siting approval are all clearly distinguishable from the facts presented in this case. Unlike the case at hand, where three experts testified against the Applicant with respect to criteria (ii) and (v), in *Industrial Fuels* (which Co-Petitioners cited in their brief as being "almost identical" to this case (Pet. Br. p. 7) there was no testimony contrary to that provided by the Applicant's witnesses with respect to those criteria. 227 Ill.App.3d at 547-48, 592 N.E.2d at 157-58. The Court found this fact to be significant, noting that with respect to criterion (ii), "[n]o one testified, for example, how particular design

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[1] *See CDT Landfill Corp. v. City of Joliet*, PCB 98-60 (March 5, 1998) (affirming City's decisions on criteria (i) and (iii) and affirming denial of siting application); *Waste Hauling, Inc. v. Macon County Board*, PCB 91-223 (May 7, 1992) (affirming County Board's decisions on criteria (i), (iii), (v) and (viii) and affirming denial of siting application); *Clean Quality Resources, Inc. v. Marion County Board*, PCB 91-72 (Aug. 26, 1991) (affirming County Board's decisions on criteria (i), (ii), (v), (vi) and (vii) and affirming denial of siting approval); *Waste Management of Illinois, Inc. v. McHenry County Board*, PCB 86-109 (Dec. 5, 1986) (affirming County Board's decisions on criteria (ii), (iv), (v) and (vi) and affirming denial of siting application); *McHenry County Landfill, Inc. v. County Board of McHenry County*, PCB 85-192 (March 14, 1986) (affirming board's decisions with respect to criteria (i), (ii), (iii), (v) and (vi) and affirming denial of siting approval); *A.R.F. Landfill v. Lake County*, PCB 87-51 (Oct. 1, 1987) (affirming board's decision with respect to criteria (i), (ii) and (vi) and affirming siting denial); *Industrial Salvage, Inc. v. County Board of Marion*, PCB 83-173 (Aug. 2, 1984) (affirming County's decision with respect to criterion (i) and affirming denial of siting approval).

[2] *See Slates v. Illinois Landfills, Inc.*, PCB 93-106 (Sept. 23, 1993) (reversing approval based on criterion (i)); *County of Kankakee v. City of Kankakee*, PCB 03-31, 33, 35 (Jan. 9, 2003) (reversing siting approval because Board found that criterion (ii) was not met).

features or operating procedures might increase the risk of the harm to the residents. No expert witness testified that the design and proposed operation of the facility were flawed or that Industrial's application ignored or violated any of the applicable governmental regulations." 227 Ill.App.3d at 546, 592 N.E.2d at 157. Because the objector "failed to rebut or contradict Industrial's showing that the facility was designed in light of the public health, safety and welfare," the Court determined that it was forced to reverse the City Council's decision with respect to criterion (ii). 227 Ill.App.3d at 547, 592 N.E.2d at 157. Likewise, this Board found that the City's decision regarding criterion (v) was against the manifest weight of the evidence because the Applicant's presentation with respect to criterion (v) was unrebutted, and without contradiction or impeachment. 227 Ill.App.3d at 548, 592 N.E.2d at 158. Far, far from being "almost identical" to this case, *Industrial Fuels* is actually very factually different because in this case, there was ample testimony from Mr. Thomas, Mr. Nickodem and Mr. Sutherland that the location, design and plan of operations of the Lowe facility were flawed in many respects, such that the facility was not protective of the public health, safety and welfare and did not have a plan of operations that would minimize the danger to the surrounding area from fire, spills, and other operational accidents. (C.00189, pp. 9-10, 61, C.00215, p. 54, 55, C.00218, p. 79, 80). Consequently, the McHenry County Board was correct in finding, as it did, that the Applicant failed to satisfy criteria (ii) and (v).

The facts of this case are also distinguishable from those presented in *Watts Trucking* because in *Watts* the facts clearly demonstrated that criteria (ii), (iii) and (v) were met by the Applicant. In *Watts*, this Board found that the City Council's decisions with respect to those criteria were against the manifest weight of the evidence. PCB 83-167. In doing so, the Board

noted that the location of the facility was compatible with the surrounding area because the facility was located in an highly industrialized area, immediately adjacent to a rubber plant and in close proximity to the City's wastewater treatment plant and three plating plants. PCB 83-167, slip op. at *3. Even though the area where the facility was to be located was once residential, it had become more and more industrial. Id. at *4. In this case, the exact opposite is true; rather than becoming more industrial, the area surrounding the Lowe Transfer Station is becoming more residential (because of Bright Oaks and now the Plote development being zoned residential). The Board in *Watts* also found that criterion (v) was satisfied by the applicant because "the plant will have alarms, an automatic sprinkler system and two fire extinguisher stations," and the Board pointed out that "[t]here is virtually no possibility of fire itself spreading from the facility to the surrounding area." Id. at *7. In this case, however, the facility is not equipped with sprinklers (C.00179, pp. 69-70), and Mr Nickodem specifically testified that fire could quickly spread to The Hollows because of the plethora of vegetation in that area, as well as its close proximity to the transfer station. (C.00215, pp. 32-33). Finally, with respect to criterion (ii), the Board in *Watts* found that it was "unable to find any evidence other than that the facility was designed, located and proposed to be operated so that the public health, safety and welfare will be protected." Id. at *12. Here, however, there was ample evidence presented by three experts regarding deficiencies in the location, design and operations of the facility that will adversely impact the public health, safety and welfare. (C.00188-90; C.00214-19). Therefore, while the City Council's decisions in *Watts* may have been against the manifest weight the evidence, the McHenry County Board's decisions regarding criteria (ii), (iii) and (v) are not against the manifest weight of the evidence.

Finally, the facts presented in *Frink's Industrial Waste* establish that while the City of Rockford's decisions with respect to criteria (ii) and (iii) were against the manifest weight of the evidence in that case, the same is not true in the present case. In *Frink's*, the City determined that criteria (ii) and (iii) were not satisfied because the facility was located 2000 feet from a school, and there were fears that the area may become exclusively devoted to disposal facilities. PCB 83-41, slip op. at *4. The Board found that "unsupported opinion and fears that the industrial park would 'deteriorate into an exclusive site for disposal facilities'" were unfounded. Id. at *4. The Board also found that the area surrounding the facility was compatible with the facility because immediately adjacent to the facility was a building occupied by Interstate Pollution Control, which processed industrial oils and wastewater and there were several other nearby buildings that were industrial in nature, including a large new industrial building occupied by Honeywell Motor Products. Id. at *2. The facility was also located in close proximity to the Rockford Sanitary District Treatment Plant. Id. at *3. Because this Board found that the record revealed "the predominantly industrial nature of the area as a whole," the Board determined that the City's findings as to criteria (ii) and (iii) were against the manifest weight of the evidence. Id. at *6. However, a review of the record in this case clearly establishes that the area surrounding this facility is not mainly industrial. Although Lowe Enterprises and Welsh Brothers operates next to the proposed transfer station on one side, the remaining character of the property surrounding the transfer station is not industrial, with The Hollows and the Plote property directly adjacent to the facility, and Bright Oaks less than a quarter of a mile away. (C.00215, pp. 54-55). Consequently, the character of the area surrounding this proposed facility is much different than the area surrounding the proposed facility in *Frink's*, which is just one

reason why the McHenry County Board's decision with respect to criteria (ii) and (iii) are not against the manifest weight of the evidence.

As has been made clear by appellate courts and this Board, much deference is given to local hearing bodies in pollution control facility siting hearings. Therefore, a decision of local hearing body should only be reversed if it is against the manifest weight of the evidence. *Waste Management of Illinois, Inc. v. Illinois Pollution Control Board,* 160 Ill.App.3d 434, 441-42, 513 N.E.2d 592, 597 (2d Dist). The evidence presented to the McHenry County Board in the siting hearings with respect to the Lowe Transfer Station establishes that the County Board's decision was not only not against the manifest weight of the evidence, but was the only reasonable decision based on the evidence and testimony presented. Consequently, this Board should affirm the County Board's decisions with respect to criteria (ii), (iii) and (v).

II. THE MCHENRY COUNTY BOARD'S DECISION WITH RESPECT TO CRITERION (ii) WAS AMPLY SUPPORTED BY THE EVIDENCE.

It is well-settled that it is inappropriate for the Pollution Control Board to reweigh evidence and reassess the credibility of witnesses. *See Concerned Adjoining Owners v. Pollution Control Board,* 288 Ill.App.3d 565, 576, 680 N.E.2d 810, 818 (5th Dist. 1997) (explaining that it is up to "the siting authority to determine the credibility of witnesses, to resolve conflicts in the evidence, and to weigh all of the evidence offered.") However, this is precisely what Co-Petitioners ask this Board to do in their Memorandum. Specifically, Co-Petitioners spend several pages emphasizing the credentials of their own witnesses, while minimizing the credentials of the objectors' witnesses (Pet. Br., 8-10, 23), thereby, in essence, seeking a *de facto* determination from this Board that the Applicant's witnesses were superior to the objectors'

witnesses and, therefore, in turn, necessarily more believable than the objectors' witnesses. Clearly, it would be inappropriate for this Board to judge or weigh the qualifications of the experts who testified at the hearing because it is not the function of the Board or the courts "to determine which witnesses are more expert than others." *Metropolitan Waste Systems, Inc. v. Pollution Control Board*, 201 Ill.App.3d 51, 56, 558 N.E.2d 785, 788 (3d Dist. 1990); *City of Rockford v. County of Winnebago*, 186 Ill.App.3d 303, 315, 542 N.E.2d 423, 432 (2d Dist. 1989). Furthermore, there was ample evidence in the record as to the qualifications of the objectors' experts, which established that the objectors' witnesses were clearly qualified. (C.00188, pp. 6-18, C.00214, pp. 3-6, C.00218, pp. 63-65). The Board members had the benefit of observing the testimony and determining which witnesses were more credible, which is precisely what the County Board is obligated to do. *See Concerned Adjoining Owners*, 288 Ill.App.3d at 576, 680 N.E.2d at 818.

Co-Petitioners also ask this Board to reweigh the evidence and conclude that simply because their witnesses testified that the facility satisfied criterion (ii), the County's decision on this criterion must be against the manifest weight of the evidence. However, simply because there is some evidence which, if accepted, would support a contrary conclusion does not mean that the County Board's decision is against the manifest weight of the evidence. *See Wabash and Lawrence Counties Taxpayers and Water Drinkers Association v. Pollution Control Board*, 198 Ill.App.3d 388, 393, 555 N.E.2d 1081, 1086 (5th Dist. 1990). Here, there was ample evidence presented by objectors' witnesses, which directly contradicted the testimony of the Applicant's experts, and the County Board was free to accept that evidence over that of the Applicant's. Because there were experts that specifically found that the facility did not satisfy criterion (ii),

the County Board's decision is not against the manifest weight of the evidence and should be affirmed by this Board. *See Metropolitan Waste Systems,* 201 Ill.App.3d at 56, 558 N.E.2d at 788; *City of Rockford*, 186 Ill.App.3d at 315, 542 N.E.2d at 432.

Furthermore, Co-Petitioners are incorrect in asserting that they have proven that the transfer station satisfies criterion (ii) simply because the Lowe Transfer Station allegedly met or exceeded the standards for transfer stations. (Pet. Br. pp. 7, 23). First of all, there are no industry standards or state regulatory standards with respect to transfer stations. (C.00218, p. 17). Rather, there is only conflicting testimony from experts as to what is desirable or accepted practice. Even if there were such standards, Co-Petitioners' argument would still fail based on the court's holding in *McHenry County Landfill, Inc. v. Illinois Environmental Protection Agency*,154 Ill.App.3d 89, 506 N.E.2d 372 (2d Dist. 1987). In *McHenry County*, the applicant contended that the county board could not deny siting approval for its landfill because the landfill met or exceeded State design and operation requirements. 154 Ill.App.3d at 100, 506 N.E.2d at 380. The appellate court disagreed, and held that a county board may deny siting approval "where it determines that the proposed landfill presents a potential health hazard to the surrounding community, notwithstanding the applicant's complete compliance with the EPA's and PCB's technical requirements." 154 Ill.App.3d at 101, 506 N.E.2d 372, 381. *In McHenry County*, the Court concluded that the record amply supported the county board's conclusion that the landfill did not satisfy criterion (ii) despite the fact that the facility met applicable EPA requirements. *Id.* Likewise, in this case, there was ample evidence in the record to establish that the Applicant did not satisfy criterion (ii) even if, assuming arguendo, the facility did comply with or even exceed applicable design standards, as asserted by Co-Petitioners.

In support of its argument that this facility must satisfy criterion (ii) because it meets or exceeds design standards for transfer stations, Co-Petitioners cite to *Clutts v. Beasley*, 185 Ill.App.3d 543, 541 N.E.2d 844 (5th Dist. 1989). (Pet. Br. pp. 7, 23). However, *Clutts* is clearly not controlling because *Clutts* is a case where Illinois Environmental Protection Agency standards were directly at issue, while there are no EPA standards at issue in this case. See 185 Ill.App.3d at 546-47, 541 N.E.2d at 846. *Clutts* is also distinguishable because it is a case where appellate court upheld a local siting authority's approval of a landfill, not a case in which the Board or court reversed the local siting authority's denial of siting approval for a transfer station. *See id.* That distinction is extremely significant because the Court in *Clutts* merely found that the County Board's decision granting siting approval was not against the manifest weight of the evidence. *Id.* The Court never asserted, as Co-Petitioners contend, that complying with EPA regulations and standards is all that is required to meet criterion (ii). In fact, such an assertion is nonsensical because if criterion (ii) only required that a facility comply with EPA rules and regulations or existing design standards, there would be no need for a local hearing body to determine if that criterion was met, as such a determination could simply be made by the EPA or the IPCB. However, it clearly not the province of the EPA or IPCB to determine if an Applicant has satisfied criterion (ii). *See McLean County Disposal, Inc. v. County of McLean*, 207 Ill.App.3d 477, 566 N.E.2d 26 ("The legislature has charged the county board, rather than the PCB, with resolving the technical issues such as public health ramifications of the landfill's design."). Therefore, it is clear that more than mere compliance with EPA rules and regulations is required to satisfied criterion (ii). Even where standards exist, it is the siting authority's role to consider the application of those standards to a given location, and it is the province of the local

siting authority to determine if an Applicant has located designed and planned to operate a facility that will protect the public health, safety and welfare in spite of an applicant's compliance with applicable rules, regulations and industry standards.

Throughout their Memorandum, Co-Petitioners selectively pick and choose evidence and testimony that they apparently believe establishes that their facility satisfied criterion (ii). In doing so, Co-Petitioners are asking this Board to reweigh the evidence in this case, which this Board has no authority to do. *See Concerned Adjoining Owners*, 288 Ill.App.3d at 576, 680 N.E.2d at 818. Additionally, in presenting its version of the facts, Co-Petitioners leave out much of the testimony of the witnesses opposing the Applicant, which clearly establishes that the facility is not located, designed and operated to protect the public health, safety and welfare. By failing to refute much of the testimony elicited from the objectors' witnesses, Co-Petitioners have established that their facility will not be located, designed or operated to protect the public health, safety and welfare.

A. The McHenry County Board's decision that the transfer station is not located to protect the public health, safety and welfare is amply supported by the evidence.

The evidence and testimony cited by Co-Petitioners in their brief clearly fails to establish that the location of the transfer station will protect the public health safety and welfare because while the Co-Petitioners focus on specific areas of the facility that they believe are "state of the art," Co-Petitioners simply do not address problem areas of the facility that show that the transfer station is not located to protect the public health, safety and welfare.

One of the major problems that Co-Petitioners do not even mention in their brief, even though much testimony was presented at the siting hearing with respect to the topic, is the

inadequate size of the facility. Instead, Co-Petitioners focus on the queuing distance and internal traffic, contending that the queuing distance and traffic patterns on the site will not cause any problems or back-ups. (Pet Br. p. 12). While there may be adequate queuing in this facility a majority of the time, nonetheless, direct testimony from Mr. Nickodem established that there will likely be traffic back-ups on Route 14 based on the inadequate size of the site. (C.00214, pp. 29, 55). Mr. Nickodem also found that the traffic patterns on site were poorly designed because they could cause back-ups and even accidents. (C.00214, pp. 33-34). Furthermore, testimony at the siting hearing establishes that once on the site, trucks will not have room to maneuver around the site. (C.00214, pp. 34-51). Obviously, Co-Petitioners could not refute this point and, therefore, did not even address this issue. Because the size of the facility is not protective of the public health safety and welfare in that its inadequate size can quite possibly lead to accidents and traffic back-ups, the County Board could have concluded on that basis alone that the transfer station did not satisfy criterion (ii).

Co-Petitioners also fail to adequately explain how this facility is located to protect the public health, safety and welfare when it is located immediately adjacent to The Hollows. Instead of simply admitting the obvious fact that the transfer station is located next to an environmentally sensitive area, the Co-Petitioners in their brief place much emphasis on the fact that the site is zoned I-2, and seem to suggest that the zoning of the site should be determinative with respect to the whether the location meets criterion (ii), just as they did at the siting hearing. (Pet. Br. p. 22). However, it is clear that zoning is not all that should be considered in determining if a pollution control facility, such as a transfer station, is located to protect the health, safety and welfare of the public. If this were true, there would be no need for any

demonstration beyond compliance with local zoning standards. However, this is not the case, and the McHenry County Board was allowed, and even obligated, to consider how the property surrounding this transfer station was actually being used instead of examining only the zoning of such property. As such, the County Board had more than ample evidence to establish that the facility was not located to protected the public health, safety and welfare because of its close proximity to The Hollows.

Another major problem with the site's location is the absence of an adequate buffer between the site and The Hollows. While Co-Petitioners contend that screening is adequate at the facility in large part due to the scale house and the concrete structures on the site (Pet. Br. p. 13), Mr. Nickodem specifically found that the scale house was not a complete buffer for litter or noise. (C.00216, pp. 6-7). Furthermore, Mr. Nickodem explicitly stated that the screening designed for the facility was inadequate to minimize the effect on the Hollows as well as abate noise that may be experienced on the Plote property. (C.00215, pp. 64-65).

B. The McHenry County Board's decision that the transfer station is not designed to protect the public health, safety and welfare is amply supported by the evidence.

While Co-Petitioners repeatedly assert in their brief that elements of the design on the transfer station "exceed" standard designs for a transfer station, Co-Petitioners fail to point out there are "no industry standards." (C.00218, p. 17). Co-Petitioners also fail to mention many areas where their facility is lacking, all of which were specifically noted by the objectors' witnesses at the siting hearing, and are set out below. Co-Petitioners also fail to acknowledge that some of the design features that they contend exceed design standards actually provide no benefit, and may even be harmful. Two such examples are the indoor scale house and the indoor

untarping of vehicles. While Co-Petitioners seem to suggest that these are positive components of the design of the facility (Pet. Br. pp. 13-14), Mr. Nickodem disagreed. Mr. Nickodem testified that there was "no advantage" to an indoor scale house, and actually stated that an indoor scale house was a disadvantage because it would be "just another building where you can build up carbon monoxide from vehicle exhaust. (C.00215, pp. 81-82. Mr. Nickodem also testified that untarping inside the transfer station presented a safety hazard in that the goal in designing transfer stations is to minimize the number of people on the floor because "the more people you have on the floor, the more potential there is for another truck to hit that person or the front end loader backing or going forward to hit that person." (C.00217, pp. 20-21). Because the design features that Co-Petitioners assert enhance their facility may in fact actually be harmful to the facility, it is clear why the McHenry County Board correctly found that the Applicant failed to satisfy criterion (ii).

Furthermore, the evidence presented at the hearing established that certain design components were missing in this facility, which made the facility not designed to protect the public health, safety and welfare. Likely the most pressing problem is that the groundwater in and around the site was not adequately protected. (C.00188, p. 33). Co-Petitioners, however, argue that the Applicant was the only party to provide testimony from a hydrogeologist, and, therefore, that witness' testimony must have been accepted since the County made no credibility finding against its hydrogeologist. (Pet. Br. 17). That contention, however, is clearly specious as the McHenry County Board was not required to make any record of its credibility findings in its resolution. Rather, it is well-settled that a local hearing body does not have to indicate specific facts upon which it made its decision, but only has to "indicate which of the criteria, in

its view, have or have not been met." *E & E Hauling, Inc. v. Pollution Control Board*, 451 N.E.2d 555, 577-578 (2d Dist. 1983). Additionally, Co-Petitioners ignore the fact that Lawrence Thomas, a professional engineer with 23 years of experience in hydrogeology, provided testimony directly refuting that of the Applicant's witness, Mr. Dorgan. (C.00188, pp. 6-7, 33). Consequently, the County Board was clearly within its rights to accept Mr. Thomas' testimony over that of the Applicant's witness and find that the groundwater was not adequately protected because of the inadequate groundwater monitoring plan, and the further fact that there was no ability to stop the flow of contaminants into the groundwater (C.00188, pp. 43-44, 48-51).

Co-Petitioners assert that the groundwater will be adequately protected because the facility is equipped with groundwater monitoring wells. (Pet. Br. p 19). However, the presence of the two wells proposed by the Applicant does not establish that the facility is protective of groundwater in the area. In fact, the testimony at the hearing establishes that those groundwater monitoring wells will be of little, if any, assistance in determining whether there is groundwater contamination. (C.0188, pp. 48-49). That is true because there are no up-gradient wells and also because the wells are only testing the top layer of the stratigraphy. *Id.* The groundwater monitoring system is also inadequate because there is nothing that will stop "sinkers," or objects denser than water, including contaminants, from moving into the groundwater. (C.00188, p. 36). The contamination of groundwater is a particular problem because the shallow groundwater will undeniably flow to Lake Plote, Lake Atwood, Lake Killarney and the nearby "irreplaceable" wetlands (C.00188, pp.6-7, 25-28, C.00190, pp. 44-45). Mr. Zinnen agreed would that the

groundwater would flow to those areas and even stated that the groundwater flows at a rapid rate to the wetlands. (C.00181, p. 25, C.00186, p. 87)

The storm water management system is also not designed to protect the public health, safety and welfare because storm water falling into the ramps and apron of the facility will be treated as storm water, rather than contact water, even though such water may come into contact with contaminants on the apron and on the trucks themselves. (C.00215, pp. 11-12, 21-22). Finally, the most discussed problem with the storm water system, which Co-Petitioners did not even acknowledge in their brief, is the fact that there is no ability to stop materials in the storm water system from migrating into the sewer system and on into groundwater if, in fact, contamination is detected. (C.00188, p. 43). Co-Petitioners seem to suggest that the County Board should not have even considered the possibility of groundwater contamination because Mr. Thomas did not know of any transfer stations that caused groundwater contamination, but Mr. Dorgan, the Applicant's own witness, admitted that he was not aware of testing to determine if any contamination existed. (C. 00224, p. 19).

Additionally, Co-Petitioners' assertion that the storage tanks designed to hold contact water are "more than sufficient" (Pet. Br. 17) is unfounded because the Applicant's own experts admitted that they did not perform any calculation to determine if the proposed capacity was sufficient to properly contain all run-off. (C.00181, p. 48), and Mr. Nickodem stated that he did not believe that the tanks were of adequate size. (C.00214, pp. 59-60, C.00215, p. 86).

Co-Petitioners also point out the facility's "special and unique design features," including its automatic doors, which they contend will reduce the potential for noise and litter. (Pet. Br. p. 19). However, Co-Petitioners fail to point out that the automatic doors to the transfer station are

only at the ends of the building for the transfer truck tunnel, while the doors on the west side, which is directly facing The Hollows, will generally be opened. Furthermore, it is clear that the automatic doors will not be closed at all times and, in fact, the doors will be opened whenever vehicles are fueled in the facility (C.00216, p. 28) as well as when trucks are entering and exiting. When the doors are not closed, noise and litter will surely travel to surrounding neighbors, including Bright Oaks, The Hollows and the Plote property. Co-Petitioners also contend that the building being designed to have its open side face the prevailing wind will be beneficial because it will minimize the potential for the wind-blown distribution of litter. However, Mr. Nickodem testified that location of the open side of the building would not necessarily be beneficial, as wind could swirl around and travel out of the building instead of stopping inside, thereby sending noise, odor and litter to neighboring properties. (C.00216, pp. 41-42).

Co-Petitioners also point out its landscaping plans, which it believes are adequate in minimizing potential impacts to surrounding areas. (Pet. Br. p. 21). However, Mr. Nickodem testified, and the Applicant's own witness, Mr. Gordon, agreed that the way to most successfully minimize sound to neighbors would be through the use of a barrier wall, which was not included in the Applicant's design of the facility (C.00215, pp. 64-65; 00816, p. 10). Although Co-Petitioners place much emphasis on the fact that the landscaping was developed after consulting with the Conservation District (Pet. Br. p. 21), Co-Petitioners fail to point out the McHenry County Conservation District drafted a resolution that opposed the transfer station (C.07203-07), indicating that the McHenry County Conservation District obviously did not believe that the landscaping would be adequate to protect its property.

Throughout their brief, Co-Petitioners point out that certain design features of this facility meet or exceed design features that were proposed on the Woodland facility in Kane County, a facility designed by Mr. Nickodem for which siting approval was denied. However, Co-Petitioners fail to point out the important features that were present in the Woodland facility that Mr. Nickodem specifically found were lacking in this facility that caused it to be designed in a way that did not protect the health, safety and welfare of the public. The major features that are missing in this facility, which were present in the Woodland facility, include paving over the entire site, as well as curbing, gutters and multiple valved catch basins to stop and isolate spills. (C.00216, pp. 25-26, 53-54; C.00218, pp. 16-17). Additionally, the Woodland facility was equipped with a sprinkler system, a 200-pound wheeled water fire extinguisher and a detention pond which would supply water for fires (C.00218, pp. 29-30), while the only fire protection equipment proposed for the Lowe Facility consists of hand-held fire extinguishers and a fire pit with no on-site water source. (C.00215, pp. 31-32; C.00179, pp. 78-79). Furthermore, the Woodland facility was proposed to be equipped with a screening wall, similar to a tollway screening wall (C.00214, pp. 25-26), unlike the minimal screening proposed for the Lowe facility. (C.00186, pp. 9-10). Based on the design features set out above that were present in the Woodland facility and missing in the Lowe Transfer Station, it is clear that while Mr. Nickodem believed that the facility he designed for Woodland would satisfy criterion (ii), the facility in this case would not, as McHenry the County Board properly found.

C. The McHenry County Board's decision that the plan of operations of the Lowe Transfer Station was not designed to protect the public health, safety and welfare is amply supported by the evidence.

Co-Petitioners contend that the transfer station will be operated to protect the public health, safety and welfare because no hazardous waste will be accepted (Pet. Br. p. 22). However, this fact, in and of itself, does not establish that the facility will be operated in a way to protect the health, safety and welfare. Even though hazardous waste will not be accepted into the facility, it is clear that approximately two tons of household hazardous waste will come through the transfer station per year as people often include household hazardous waste in their garbage. (C.00180, pp. 33-35; C.00187, pp. 33-34, C.00190, p. 86). It is also undisputed that if a portion of this waste, which is liquid, flows onto some part of the site that is not covered by the geomembrane liner, such as the ramp or apron, this waste will flow directly into the storm water system and then to groundwater in the area. (C.00215, pp. 11-12, 21-22). Even if it is discovered that a truck is spilling household hazardous waste onto an area of the site, there is no way to prevent that waste from reaching into the groundwater, as the storm water connection system is not equipped with a control valve or other shut-off mechanism. (C.00188, p. 43). Because there is not an adequate plan of operations that appropriately deals with *possible* household hazardous waste spills or other types of spills which may leave the site and find their way to the nearby environment, the McHenry County Board correctly found that the plan of operations of the facility was not designed to protect the public health, safety and welfare.

In addition to an inadequate plan of operations that fails to minimize noise, litter or odors, the Applicant's plan of operations is also not designed to minimize dust. The Applicant's own witness testified that dust will exist in the facility. (C.00184, pp. 75-76). The amount of dust

present on this site is actually more than on most other transfer facility sites because some areas of site are covered in gravel, rather than being entirely paved, as most sites are. (C.00215, pp. 29-30, C.00218, pp. 16-17). The prevalence of dust will also be increased because the site is expected to handle a significant amount of construction and demolition debris. (C.00215, pp. 34-36). Despite the distinct presence of dust in and around the transfer station, the Applicant will not provide misters to reduce the amount of dust. (C.00184, pp. 75-76). Because the plan of operations of the Lowe Transfer Station is not designed to control and minimize the amount of dust on the property, the McHenry County Board was correct in finding that the plan of operations was not protective of the public, health safety and welfare.

Furthermore, Co-Petitioners contend that their facility will be operated in a way that protects the public health, safety and welfare simply based on promises of what Mr. Lowe will do in the future, with no proof of such. (Pet. Br. pp. 22-23). For example, Co-Petitioners contend that they will hire a certified transfer station operator as manager of the facility, but Mr. Lowe admitted that he currently has "no clue" who will be the operator of the facility. (C.00202, pp. 59). Additionally, Co-Petitioners promises to hire an emergency response contractor to identify, test, isolate and haul off materials that are deemed hazardous, but Co-Petitioners have not yet determined who that will be or what exactly the contractor will be required to do with hazardous material. (C.00180, pp. 32-33). Finally, the Applicant asserts that he will adequately control vectors on the site, but there is no commitment yet for any type of vector control. (C.00185, p. 96).

It is especially troubling that Mr. Lowe expected the County Board to trust him to fulfill the promises that he made because Mr. Lowe has no experience in running a transfer station

facility and apparently was not interested enough in his own facility to read the application that he filed and signed. (C.00203, p. 48) It is even more troubling that Mr. Lowe promised to have his entire staff trained in waste screening, health and safety protocol and emergency response in light of the fact that Mr. Lowe himself admitted that he would not know what to do in an emergency situation. (C.00201, p. 19). Mr. Lowe's own witness, Mr. Gordon, admitted that "experience is a very important component of making sure that the facility operates properly." (C.00186, p. 28). Because of Mr. Lowe's lack of experience in the transfer station business and the fact that he has failed to create a plan of operations that will adequately protect the public health, safety and welfare, it was entirely appropriate for the McHenry County Board to find that Lowe Transfer, Inc. failed to satisfy criterion (ii).

III. THE MCHENRY COUNTY BOARD'S DECISION WITH RESPECT TO CRITERION (iii) IS AMPLY SUPPORTED BY THE EVIDENCE.

Co-Petitioners devote substantial time and effort to discussing the qualifications of its own witnesses, Larry Peterman and Frank Harrison, and attempting to discredit the Village of Cary and Bright Oaks Subdivision witnesses. However, when reviewing a decision under a manifest weight of the evidence standard, the reviewing court may not reweigh evidence and may not reassess the credibility of witnesses. *Worthen v. Roxana*, 253 Ill.App.3d 378, 384, 623 N.E.2d 1058, 1062 (5th Dist. 1993); *Wabash*, 198 Ill.App.3d at 392, 555 N.E.2d at 1085. Therefore, Co- Petitioners' argument that his witnesses were superior and/or more credible is irrelevant. After hearing testimony of all the witnesses over the course of 11 days, no basis exists to challenge the decisions of the McHenry County Board as to the credibility or superiority

of each witness. The McHenry County Board had the clear prerogative to believe whomever it chose to believe.

Co-Petitioners hinge their argument that the transfer station is compatible with surrounding property by looking at the zoning of the surrounding properties. However, Co-Petitioners failed to take into account the actual and planned uses of the surrounding property. The Plote property was, during the siting hearing process, being zoned residential and being developed as residential property, rather than industrial (as it was previously zoned). (C.04057-7235). The McHenry County Conservation District Hollows Conservation Area was zoned industrial, but it was reclaimed and devoted to conservation and recreational open space uses. Co-Petitioners did not examine or consider the impact of the transfer station on the Kaper development across the street. (C.00205, p. 9, 15). Finally, testimony was given that the trend in surrounding area was to be a residential and not heavily industrial, according to the Village of Cary Comprehensive Plan. (C.00205, p. 21; C.00402-403).

Co-Petitioners' experts clearly did not take these actual uses into account when reaching their conclusion that the transfer station was compatible with the surrounding property. The applicant, Mr. Lowe himself, acknowledged that the Village of Cary was becoming a bedroom community. (C.00205, p. 11). Testimony regarding the proposed landscaping, which the Co-Petitioners claim was designed to protect the surrounding area, raised doubts as to the actual protection given. For example, although the Bright Oaks subdivision was supposedly protected by a berm, testimony showed that it was not, as the second story of the homes were actually visible above the berm from the transfer station site. (C.00204, p. 24). Co-Petitioners' own experts admitted on cross-examination that they would not recommend having the transfer

station, or any heavy industrial use, next to a residential neighborhood. (C.00194, p. 14). Mr. Peterman, Co-Petitioner's witness, also agreed with the Village of Cary's City Administrator, Cameron Davis, that it was not preferable to put a transfer station at the gateway to Cary. (C.00193, p. 96-98).

Co-Petitioners also argue that Mr. Peterman set forth 14 factors, which demonstrated that the transfer facility met the first part of criterion (iii), and that since these factors were not contradicted by the Village of Cary, the application was sufficient as to compatibility. Again, Co-Petitioners fail to acknowledge that the McHenry County Board has the ability to make credibility determinations, and to believe or disbelieve any testimony given. *Tate*, 188 Ill.App.3d at 1022. Furthermore, Mr. Petterson testified as to the incompatibility of the transfer station, not only under the present uses, but with the future uses under the McHenry County 2010 Plan and the Cary Comprehensive Plan, which was never contradicted. (C.00208, p. 97).

Co-Petitioners' argument that the transfer station was compatible with the surrounding property was essentially that it was proper under the current zoning scheme. (C.00193, p. 125). This ignores the actual and future surrounding uses of the property, and in examining the actual and future uses of the property, the McHenry County Board's decision against the compatibility of the transfer station with the surrounding area was fully supported.

The second part of criterion (iii) is that the transfer station is located so as to minimize the impact on property values. First of all, Co-Petitioners' own expert witness, Mr. Frank Harrison, was only able to find one comparable study relating to the proposed location of this transfer station, although his report included eight stations. Such a lack of comparable studies indicates that an inherent incompatibility may exist. (C.00220, p. 33). Co-Petitioners' own

witness agreed, and stated that he was not surprised that there were no other comparable studies, since transfer stations are essentially an industrial use, thus implying that industrial uses do not belong next to residential neighborhoods. (C.00193, p. 115).

However, the one comparable study that did exist, pertaining to the Princeton Village subdivision adjacent to the Northbrook Transfer Station, in fact directly supports the McHenry County Board's decision that this facility would be incompatible with the surrounding area, and, therefore, in turn, adversely impact property values. Co-Petitioners' expert attempted to show that the houses closest to the transfer station appreciated at the same rate as those further away. (C.00193, p. 72). However, what was "close" and what was "far away" were apparently arbitrarily decided. In addition, Mr. John Whitney testified that Applicant's appraisal expert did not remove all other significant influences on the property value so as to sufficiently isolate the actual effect of a transfer station on adjoining property values. (C.00220, pp. 30-31). In fact, Mr. Harrison admitted that if the entire neighborhood was affected by the transfer station, then the appreciation rates of the "close" and "far away" properties would be similar, which is exactly what his report concluded. (C.00193, p. 72). Mr. Harrison also failed to acknowledge the significant fact that Princeton Village was built after the transfer station, thereby taking the transfer station into account during the initial sales and development of the property. Therefore, there is sufficient evidence for the McHenry County Board to discredit the comparison study by Co-Petitioners which purported to show no significant impact on property values.

However, what the study did show, which was pointed out by Mr. Klasen at the siting hearing and during the Committee's deliberations was that many of the properties in the Princeton Village area had appreciated very little, or, worse yet, had actually depreciated in

value. (C.00220, p. 88; C.07237, pp. 16-18). The average appreciation rates in the Princeton Village study (approximately 1%) were significantly lower than an average expected appreciation rate in Cook County of 5-6%, or, more importantly, the 16% rate found in the neighboring Northbrook area. (C.00220, p. 88).

Mr. John Whitney also criticized Mr. Harrison's report. Co-Petitioners attempt to discredit Mr. Whitney as he did not make any independent study of the transfer station and had no opinion of the impact on property values and that somehow Mr. Whitney's failure to perform an independent study or have such an opinion made his critique of the methodology employed by Applicant's appraisal witness unbelievable. (Pet. Br. p. 36). However, Co-Petitioners carry the burden of proof to show that the transfer station is compatible with the surrounding area, and that impacts on surrounding property sales are minimized. *Waste Management of Illinois, Inc. v. Pollution Control Board*, 123 Ill.App.3d 1075, 1083, 463 N.E.2d 969, 975 (2d Dist. 1984). Further, Mr. Whitney was not required to testify as to a final quantitative opinion on the effect of the transfer station on property values. Mr. Whitney's testimony that Co-Petitioners' witness did not properly study potential property value impact, along with his reasons for believing so, was sufficient. The local siting authority has the sole decision-making authority, and it has been determined that expert testimony showing deficiencies under the statutory criteria is sufficient to deny siting approval. *CDT Landfill Corp. v. City of Joliet*, 1998 WL 112497, PCB 98-60 (March 5, 1998). Again, it is up to the McHenry County Board to make credibility determinations, and give Mr. Whitney's testimony the weight it felt it deserved. *Tate*, 188 Ill.App.3d at 1022.

Finally, Co-Petitioners rely on two letters solicited from Princeton Village property owners to attempt to demonstrate a lack of impact on neighborhood property values. (Pet. Br. p.

33). However, these letters do not support Co-Petitioners' case because there is no objective support for the assertions contained in them. There is no determination of what their statements to the effect that property values had "increased" meant, in that they could be referring to the 1% increase in valuation, rather than the normal appreciation rate in the area. Public comments are not entitled to the same weight as expert testimony submitted under oath and subject to cross-examination. *CDT*, 1998 WL 112497 at *5. The McHenry County Board could determine how much weight to give these comments, and its determination should not be reversed. The lack of support and lack of cross-examination to determine the writer's intent weakens the credibility to be given to these letters. Again, the McHenry County Board has the power to determine credibility. *Tate*, 188 Ill.App.3d at 1022.

For the foregoing reasons, the McHenry County Board's decision that the transfer station was incompatible with the surrounding area was not against the manifest weight of the evidence.

IV. THE MCHENRY COUNTY BOARD'S DECISION WITH RESPECT TO CRITERION (v) WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The testimony at the local siting hearing clearly established that the plan of operations of Lowe Transfer Station, Inc. was not designed to minimize the danger to surrounding areas from fires, spills or other operational accidents, all as found by Mr. Thomas, Mr. Nickodem and Mr. Sutherland. (C.00189, pp. 9-10, C.00215, p. 55, C.00218, p. 80).

Co-Petitioners contend that the facility is designed to protect the groundwater because the floors of the facility will be concrete, and because the facility will have a geomembrane liner beneath it. (Pet. Br. p. 39). However, these features in and of themselves may not be adequate to prevent groundwater contamination, which is a serious concern. It is undisputed that the liner

spans only tipping floor and tunnel (C.00187, p. 11), so if any spills occur elsewhere on the site, such as the ramps or the apron, the spill will go directly into the storm water collection system, which, in turn, would flow into the groundwater in the area. This is particularly problematic because there are no valves or other devices designed to shut off the flow of water if such a spill or leak does occur. (C.00181, pp. 82-83). Further, there is also no curbing to stop the flow of contaminants onto neighboring properties, save for a curb separating Lowe Transfer Station from Lowe Enterprises, Inc. (C.00215, pp. 18-19). Therefore, adequate safeguards have not been proposed to stop contaminated run-off from flowing into The Hollows or Plote Property. As such, the plan of operations will not minimize the danger of spills to neighboring property, and criterion (v) is not satisfied.

The plan of operations is also not designed to minimize the danger of operational accidents because while Co-Petitioners contend that the internal traffic flow is designed in a safe manner (Pet. Br. p. 40), this was directly refuted by Mr. Nickodem, who testified that the traffic pattern designed by the Applicant, which allows for merging traffic, can cause back-ups and even accidents. (C.00214, pp. 33-34). The risk of accidents on the site is increased because there is not enough room for vehicles to maneuver around that site. (C.00214, pp. 34-35, 45-51). Because the site is not large enough, and because of the designated traffic patterns, there are likely be to bottlenecks and possible collisions at the entrance of the facility as well as large traffic back-ups. (C.00214, pp. 50-51). Therefore, the internal flow of traffic is not designed to minimize the danger of operational accidents, but actually will contribute to such accidents.

Co-Petitioners also contend that their facility has a plan of operations that minimizes the danger of fires because they have a pit into which burning debris can be pushed, a sand pit and

an alarm system (Pet. Br. p. 40-41). Apparently, Lowe believes that such features are all that is necessary to adequately protect against fires inside the facility. However, expert testimony established that this was clearly inadequate. Co-Petitioners assert that it was not necessary to have sprinklers in this facility because sprinkler systems are "not a standard design feature in the solid waste industry." However, Co-Petitioners fail to point out that because of the facility's location and certain operations within this facility, it is at a much greater risk of fire. Mr. Nickodem explained that the risk of fire was greater at this facility because of the vegetation directly adjacent to the facility in The Hollows. (C.00215, pp. 32-33). A fire is also more likely to occur at this facility because the Applicant has decided to fuel its vehicles inside the transfer station. (C.00215, p. 30). Mr. Nickodem explained that it is quite possible for fueling in the building to cause a fire because a front-end loaders often scrape the floor, which could cause sparks that ignite the fuel. (C.00216, p. 28-29). This is precisely why transfer stations are typically designed so that trucks are not fueled indoors. *Id.* Therefore, while it may not be standard to have a sprinkler system in a transfer station, it is reasonable for the McHenry County Board to conclude that a sprinkler system would be necessary to minimize the danger of a fire in to this facility.

Co-Petitioners point out the fact that fueling will occur inside the transfer station as a positive feature of their plan of operations (Pet. Br. 41-42). However, Co-Petitioners fail to acknowledge or even consider that fueling inside the transfer station will actually increase the risk of fires, which is why transfer stations do not fuel vehicles inside buildings. (C.00216, pp. 24-25, 28-29). Because of the increased risk of fire, it is clear to see why it is not beneficial, and

in fact actually detrimental, to propose a plan of operations that includes indoor fueling of vehicles.

Although Co-Petitioners point out that Mr. Nickodem stated that it is rare for fire protection services to come to a waste facility to assist in a fire, Co-Petitioners have failed to point out the testimony of other witnesses which established that fires do, in fact, occur at transfer stations. In fact, Applicant's own witness testified that he has known of fires occurring in transfer stations (C.00179, p. 75). Additionally, Mr. Nickodem testified that there is a potential for fires to occur in transfer stations, and personally knows of one transfer station that actually burned down as a result of a fire. (C.00216, pp. 13-14). Because of the danger of fires, Mr. Nickodem testified that transfer facilities "need to have fire suppression systems in place to be able to handle that occurrence." (C.00216, pp. 14). With respect to the Lowe Transfer Station, a fire suppression system does not exist, as the facility is not only lacking a sprinkler system, but is also lacking a storm water detention pond, from which water can be drawn to help combat a fire if necessary. (C.00179, pp. 78-79). Furthermore, there are no procedures proposed concerning who to notify in the case of a fire. (C.00179, pp. 70-71). Because the evidence clearly showed that the facility's plan of operations was not designed to minimize the danger of fires, the County Board was justified in finding that the Applicant failed to satisfy criterion (v).

A review of *Industrial Fuels* establishes that while the fire protection services with respect to the facility at issue in that case were clearly adequate, the fire protection services proposed for the Lowe Transfer Station are clearly inadequate. This is true because the facility in *Industrial Fuels* was equipped with a fire suppression system matched to the type of fire that might occur and the specific location of such a fire, as well as a comprehensive sprinkler system.

227 Ill.App.3d at 537, 592 N.E.2d at 152. The Court also noted that "[f]ire hydrants are adjacent to the site, which is located close to fire, medical, and police services, and all necessary utilities are available, including water, sanitary sewer, storm sewers, natural gas and electricity." *Id.* In this case, not only is the facility not equipped with a sprinkler system, but there are no nearby fire hydrants or other sources of water, which is why the Applicant's own witness suggested that a fire truck would have to transport whatever water was necessary to fight a fire. (C.00179, 78-79). Based on all of the features of an adequate fire protection system that are missing in the Applicant's plan of operations, the McHenry County Board appropriately found that the Applicant failed to satisfy criterion (v).

Co-Petitioners also contend that the facility is designed to minimize the danger of accidents because there is an emergency access gate into the facility (Pet. Br. 41). However, Mr. Gordon and Mr. Zinnen conceded that an easement has not yet been dedicated for that purpose, and they do not know if a dedicated easement will be obtained. (C.00186, pp. 49-51). Furthermore, Mr. Nickodem testified that he did not believe that any emergency vehicles would be able to get into the facility from the emergency access point as trucks would be blocking that gate due to the small size of the site. (C.00214, pp. 56-57). As a result, the access gate is questionable at best. Even assuming that the proposed emergency access gate will be properly dedicated, and will be able to be utilized effectively by emergency vehicles, this does not create a plan of operations that is designed to minimize the danger of spills, fires and other operational accidents because, as noted above, there are many other problems with the facility's plan of operations that will not be remedied simply by quick and easy access to the facility.

For the reasons set forth above, as well as those contained in Section II, the McHenry County Board had ample evidence upon which to conclude that the plan of operations with respect to this facility was not designed to minimize the danger of fires, spills and other operational accidents. Consequently, the McHenry County Board appropriately denied Mr. Lowe's application for siting approval on this criterion.

V. THE MCHENRY COUNTY BOARD'S IMPOSITION OF A "HOST FEE" WAS LAWFUL.

In the present case, the Co-Petitioners' argument that the County Board's imposition of the "host fee" was unlawful is not ripe for adjudication because the County Board denied siting approval to the Applicant, and because of that denial, the Applicant will clearly not be required to pay any "host fee." Because any decision by this Board as to whether that host fee was lawful would have no effect on the issues it this case, any such decision would be an advisory opinion, which is strictly prohibited under Illinois law. *See Barth v. Reagan*, 139 Ill.2d 399, 419, 564 N.E.2d 1196, 1205 (1990). However, if the Board decides to address this issue, it is clear that the imposition of the host fee was lawful and authorized.

The imposition of a condition is specifically authorized by Section 39.2(e) of the Environmental Protection Act. Section 39.2(e) of the Act specifically provides that a County Board "may impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section and as are not inconsistent with regulations promulgated by the Board." 415 ILCS 5/39.2(e). Section 39.2(e) specifically allows a local unit of government to negotiate and enter into a host agreement with a local siting applicant, and requires the terms and

conditions of that agreement to be disclosed and made a part of the hearing record. 415 ILCS 5/39.2(e).

Co-Petitioners argue that Section 39.2 does not allow for the assessment of fees against an applicant, and that it does not grant authority to require financial responsiblity. (Pet. Br. p. 48). However, Section 39.2(e) specifically allows a local unit of government to negotiate and enter into a host agreement with a local siting applicant, and requires the terms and conditions of that agreement to be disclosed and made a part of the hearing record. 415 ILCS 5/39.2(e). Illinois has also determined that economics is a relevant consideration under Section 39.2, and it is within the local siting authority's discretion to consider it. *See Concerned Adjoining Owners v. Pollution Control Board*, 288 Ill.App.3d 565, 535, 680 N.E.2d 810, 817 (5th Dist. 1997). Under Section 39.2(e), the McHenry County Board was clearly authorized to examine the economic impact that the transfer station would have on the County, and impose such conditions on approval of the transfer station.

Co-Petitioners argue that there was no discussion by the McHenry County Board prior to the adoption of the host fee agreement. This is plainly wrong. Not only does the board not have to conduct any debate so long as the members have an opportunity to review the record prior to the vote (*Slates v. Illinois Landfills, Inc.*, 1993 WL 387195 (IPCB Sept. 23, 1993), but a discussion did in fact take place. The McHenry County Landfill Siting Committee discussed the imposition of the host fee, and decided that the $1.90 fee was reasonable and appropriate. (C.07237, pp. 29-36).

Furthermore, Mr. Lowe himself, specifically agreed to accept a condition of a host community payment equal to what the evidence showed was necessary to defray the impact of

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the facility on the County. (C.00203, pp. 26, 28). Co-Petitioners do not acknowledge this fact in its brief. In fact, Mr. Lowe agreed to the host fee structure adopted by the McHenry County Board. (C.00203, pp. 25-28).

Accordingly, the host fee imposition as a special condition of the approval of the transfer station was lawful and authorized.

VI. THE MCHENRY COUNTY BOARD DID NOT MISAPPLY THE UNNUMBERED CRITERION.

As is made clear by section 39.2(a), the McHenry County Board was able to consider "as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent company) in the field of solid waste management when considering criteria (ii) and (v) under this Section. 415 ILCS 5/39.2(a). Despite the clear language of this statutory provision, Co-Petitioners contend that the McHenry County Board had no authority to consider Mr. Lowe's lack of experience.

The cardinal rule of statutory construction is to give statutory language its "plain and ordinary meaning." *Vicencio v. Lincoln-Way Builders, Inc.* 204 Ill.2d 295, 789 N.E.2d 290 (2003); *Paris v. Feder*, 179 Ill.2d 173, 177, 688 N.E.2d 137 (1997). Despite this well-settled rule, Co-Petitioners contend that the language in 39.2(a) that allows county boards and municipal governing bodies to consider the "previous operating experience" of an applicant does not in fact mean what it actually says. Rather, Co-Petitioners contend that section 39.2(a) does not allow the County Board to consider Mr. Lowe's "lack of experience." However, the plain language of section 39.2(a) does allow county boards to consider whatever experience an operator may have,

whether it is good, bad, a little, a lot or none at all. Any other interpretation of that phrase would defy logic and reason and contradict the cardinal rule of statutory construction.

Co-Petitioners also seem to erroneously suggest that the McHenry County Board denied siting approval and found that criteria (ii) and (v) were not met solely based on the "previous operating experience" and "prior operating record" of the Applicant. However, there are no facts to support such an assertion, and, in fact, when viewed as a whole, the evidence clearly shows that the County Board considered the unnumbered criterion only as one factor in deciding whether criterion (ii) and (v) were met, and not as the sole determinant with respect to those criteria. When providing an explanation of the unnumbered criterion, Mr. Helsten specifically stated that County Board members did not even have to consider this criterion, and simply polled the Board members to determine if, in fact, they did consider the Applicant's prior experience and prior operating record when deciding criteria (ii) and (v). (C.07244, p. 19). The Board members were never told that they could solely base their decision on those factors, but, rather, were simply told that they may or may not take them into consideration. *Id.*

The statements made by Mr. Klasen at the Regional Pollution Control Facility Committee meeting establish that the Committee members clearly were not basing their decisions with respect to criteria (ii) and (v) solely on Mr. Lowe's lack of experience. In fact, when Mr. Klasen stated that he thought criteria (ii) and (v) were not met, he did not even mention Mr. Lowe's lack of experience but, rather, found that those criteria were not met because the facility was located next to The Hollows, and because he was concerned about spills that may affect the Hollows and other areas (C.07237, pp. 15, 20). Because there is no evidence to support Co-Petitioners'

contention that the only basis for the County Board's decisions with respect to criteria (ii) and (v), their argument should fail.

VII. THE MCHENRY COUNTY BOARD'S DECISION PROPERLY SET FORTH THE REASONS FOR ITS DECISION IN ACCORDANCE WITH SECTION 39.2 AND THE MCHENRY COUNTY ORDINANCE.

For some reason, Co-Petitioners fail to address in their brief paragraphs 4(d) and 4(e) of their underlying Petition. This lack of discussion bears out the absolute ridiculousness of Co-Petitioners' argument. In addition, claimed grounds for appeal not pursued or argued in a brief results in a waiver of those issues. *See* Ill. Sup. Ct. Rule 341(e)(7); *Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc.*, 144 Ill.App.3d 334, 344, 494 N.E.2d 180, 186 (2d Dist. 1986); *Albert Warner v. Warner Bros. Trucking, Inc. and Urbana & Champaign Sanitary District*, 1994 WL 163958, PCB 93-65, n.3 (April 21, 1994). Therefore, Co-Petitioners have waived these issues. However, even if the Pollution Control Board addresses these issues, Co-Petitioners have failed to demonstrate that the McHenry County Board's decision was improper.

Paragraph 4(d) alleges a violation of Section 39.2(e) of the Act, which states that the decision of the County Board must be in writing "specifying the reasons for the decision." 415 ILCS 5/39.2(e). This argument has no merit, as case law clearly shows that so long as a decision is in writing and a record has been made of the decision, neither a detailed statement finding specific facts, nor a detailed explanation of the relationship between the facts, the criteria, and the conclusions is necessary. *E & E Hauling, Inc. v. PCB*, 451 N.E.2d 555 (2d Dist. 1983), *aff'd* 107 Ill.2d 33, 481 N.E.2d 664 (1985); *Clutts v. Beasley*, 541 N.E.2d 844 (5th Dist. 1989); *Sierra Club v. City of Wood River*, 1995 WL 599852 (Oct. 1995). The decision can be framed in the language set out in the statute. *See id.*

The McHenry County Board's decision denying the siting approval for the transfer station was set forth in Resolution No. R-200305-12-104, which contained a vote on each criterion. A voluminous record of the hearing, which took place over the course of 13 days, resulting in a transcript of approximately 4,000 pages. Furthermore, discussions by the McHenry County Landfill Siting Committee regarding each criterion took place. Under existing Illinois and PCB caselaw, it is clear that the record supports the determination and Resolution of the McHenry County Board, and Co-Petitioners' request to reverse the determination of the Board for failing to set forth its reasons for its determination should fail.

Paragraph 4(e) of Co-Petitioners' petition alleges a violation of a County ordinance; however, Co-Petitioners fail to even mention this argument in their brief. Even if this argument is considered, case law shows that the Illinois Pollution Control Board will not review procedures employed in a siting proceeding to determine if they are in compliance with a local siting ordinance, nor will it compel performance of a local ordinance. *See Residents Against a Polluted Environment*, PCB 96-243, slip op. at 6 (Sept. 19, 1996); *Smith v. City of Champaign*, PCB 92-55, slip op. at 3 (Aug. 13, 1992). Therefore, Co-Petitioners' argument is inappropriate and should be denied.

However, even it the Pollution Control Board decides to examine this issue, it is clear that the County Board's decision is in accordance with the McHenry County siting ordinance. All the ordinance requires is a decision in writing in accordance with Section 39.2 of the Act. (McHenry County Regional Pollution Control Facility Siting Ordinance No. 0-9412-1200-88; attached to Lowe's Petition for Hearing as Exhibit B). Section 39.2 does not require a decision to be set forth detailing each and every consideration of the Board in denying the application. See

discussion *supra*. The Resolution issued by the County Board in this matter is obviously in writing, and complies with the requirements of Section 39.2, as discussed previously. Therefore, Co-Petitioners' argument that the McHenry County Board's determination is contrary to the local McHenry ordinance is inappropriate and without merit.

VIII. CONCLUSION

For the reasons set forth above, the McHenry County Board, respectfully requests that the Illinois Pollution Control Board uphold the County Board's decision to deny siting approval to Lowe Transfer, Inc.

Dated: September 2, 2003

Respectfully Submitted,
RESPONDENT COUNTY BOARD
OF MCHENRY COUNTY, ILLINOIS

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