BEFORE THE POLLUTION CONTROL BOARD

PROTECT WEST CHICAGO, Petitioner, vs. CITY OF WEST CHICAGO, WEST CHICAGO CITY COUNCIL, and LAKESHORE RECYCLING SYSTEMS, LLC, Respondents.	)	PCB 2023-107 (Pollution Control Facility Siting Appeal)
PEOPLE OPPOSING DUPAGE ENVIRONMENTAL RACISM, Petitioner, vs. CITY OF WEST CHICAGO and LAKESHORE RECYCLING SYSTEMS, LLC, Respondents.	)	PCB 2023-109 (Third-Party Pollution Control Facility Siting Appeal) (Consolidated)

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on November 13, 2023, LAKESHORE RECYCLING SYSTEMS, LLC electronically filed with the Office of the Clerk of the Illinois Pollution Control Board its **Post-Hearing Brief,** a copy of which is hereby served upon you.

Respectfully submitted,

LAKESHORE RECYCLING SYSTEMS, LLC,
Respondent

BY: _____
Karen Donnelly
One of Respondent's Attorneys

Karen Donnelly
Karen Donnelly Law
501 State St.
Ottawa, IL 61350
(815) 433-4775
Donnellylaw501@gmail.com

George Mueller
Attorney at Law
1S123 Gardener Way
Winfield, IL 60190
(630) 235-0606
george@muelleranderson.com

AFFIDAVIT OF SERVICE

I, the undersigned, on oath state that I have served the attached **Notice of Filing** and **Respondent Lakeshore Recycling Systems, LLC's Post-Hearing Brief,** on behalf of LAKESHORE RECYCLING SYSTEMS, LLC upon the following persons to be served via email transmittal from 501 State Street, Ottawa, Illinois 61350, this 13th day of November, 2023.

Karen Donnelly
Attorney for Respondent

SERVICE LIST

Ricardo Meza
Meza Law
542 S. Dearborn, 10th Floor
Chicago, IL 60605
rmeza@meza.law

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
60 E. Van Buren St., Suite 630
Chicago, IL 60605
Brad.Halloran@illinois.gov

Robert A. Weinstock
Director, Environmental Advocacy Center
Northwestern Pritzker School of Law
375 E. Chicago Ave.
Chicago, IL 60611
Robert.weinstock@law.northwestern.edu

Dennis G. Walsh
Daniel Bourgault
Klein, Thorpe and Jenkins, Ltd.
20 N. Wacker Dr., Suite 1660
Chicago, IL 60606
dgwalsh@ktjlaw.com
dwbourgault@ktjlaw.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PROTECT WEST CHICAGO, Petitioner, v. CITY OF WEST CHICAGO, WEST CHICAGO CITY COUNCIL, and LAKESHORE RECYCLING SYSTEMS, LLC, Respondents.	)	NO.: PCB 2023-107 (Pollution Control Facility Siting Appeal)

PEOPLE OPPOSING DUPAGE ENVIRONMENTAL RACISM, Petitioner, v. CITY OF WEST CHICAGO and LAKESHORE RECYCLING SYSTEMS, LLC, Respondents.	)	NO.: PCB 2023-109 (Third-Party Pollution Control Facility Siting Appeal)

LAKESHORE RECYCLING SYSTEMS, LLC POST-HEARING BRIEF

Now comes the Respondent, LAKESHORE RECYCLING SYSTEMS, LLC, by its attorneys, George Mueller and Karen Donnelly, and for its Post-Hearing Brief, states as follows:

INTRODUCTION

The Respondent, LAKESHORE RECYCLING SYSTEMS, LLC, operates a permitted solid waste management facility as defined in Section 3.330(b) of the Environmental Protection Act on an approximately 27.66-acre parcel located at 1655 Powis Road, West Chicago, DuPage County, Illinois. This facility receives, sorts/separates, transfers, and recycles an annualized

average of 1,250 tons per day of construction or demolition debris on approximately 6.11 acres of the site. The site also stages and removes recyclable materials, mulches production and sales from recycled wood, parks and maintains waste collection vehicles, street sweepers, and portable restroom transportation vehicles. In addition to the foregoing, the site stages and maintains containers, totes and portable restrooms with a dispatch and customer service call center on site.

On September 16, 2022, LAKESHORE RECYCLING SYSTEMS, LLC filed its application for siting approval of a new solid waste transfer station as defined in 415 ILCS 5/3-500. Proper notice was given to all property owners within 400 feet of the subject property pursuant to 415 ILCS 5/39.2(b). LRS proposes to expand its SYSTEMS at its current location to perform the following additional operations:

- Receipt and transfer of up to 650 tons per day of nonhazardous municipal solid waste;
- Receipt, solidification and transfer of up to 300 tons per day of hydro excavation waste;
- Receipt and transfer of up to 250 tons per day of single-stream recyclables;
- Drop off area for West Chicago residents of electrical/electronic devise; and
- Drop off area for recyclables generated by residents and small businesses.

The intended service area for this proposed facility includes the majority of DuPage County, a portion of Kane County, and the northwest portion of Will County. LRS began providing municipal solid waste collection SYSTEMS to communities and businesses in the service area in 2016, acquiring the existing facility from the K. Hoving Companies in 2017 to facilitate the expansion of its SYSTEMS.

In support of the proposed transfer station, LRS submitted a siting application consisting of extensive drawings, tables, calculations, and detailed text which address the proposal's

compliance with each of the nine statutory siting criteria set forth in Section 39.2 of the Act and the facility's compliance with the requirements of the Code of Ordinances of the City of West Chicago for pollution control facility siting.

Applicant called three witnesses. First, Lakeshore called John Hock, a professional engineer in Illinois and five other states with over 35 years of experience in the solid waste industry. Mr. Hock testified on siting criteria 1, 2, 4, 5, 7, 8 and 9. Second, Lakeshore called Dale Kleszynski, a certified professional real estate appraiser who prepared a land use compatibility and real estate impact study regarding the subject property. Mr. Kleszynski specifically testified regarding criterion three and opined that the subject property, as proposed, meets the standard of minimizing incompatibility with the character of the surrounding area and minimizes the effect on value of the surrounding property. (Tr. 276). Lastly, Lakeshore called Michael Werthmann, a traffic and transportation engineer with more than 25 years of experience, who prepared a Traffic Study and testified regarding criterion 6, and specifically opined that the traffic patterns to and from the facility are so designed as to minimize the impact on existing traffic flows.

Public hearings were held on January 3, 4, 5, 10, 12, 16, and 19, 2023. All parties and individuals who wished to participate or give public comment and registered as required, were allowed to do so. As required by local ordinance and Section 39.2 of the Act, the record remained open through and including February 18, 2023. Substantial public comment was received in support of the application, and there was public comment filed from various residents and PODER opposing the application. PWC and PODER appeared as objectors. The City of West Chicago also participated in the hearings.

On February 26, 2023, the City of West Chicago City Council met in executive session and deliberated on the evidence. On February 27, the City Council unanimously adopted Ordinance #23-O-006 conditionally approving the siting application. The ordinance adopted the hearing officer's report and recommendations and made further detailed findings of its own, including the credibility of various witnesses.

JURISDICTION

An issue was raised regarding service on the Canadian National Railway, parcel 01-32-506-001. 415 ILCS 5/39.2(b) requires applicants for local siting approval to give timely pre-filing notice to nearby property owners. Such service must be "either in person or by registered mail, return receipt requested, on the owners of all property within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, said owners being such persons or entities which appear from the authentic tax records of the County in which such facility is to be located..."

PWC argued that the Canadian National Railway did not own the railroad tracks adjacent on the east side to the subject site, that the owner of those tracks was the EJ&E Railroad, and that LRS had failed to comply with the service requirements of the statute. The argument is not founded on the authentic tax records of the County.

PWC's argument is supported by 5 exhibits, and the important ones are not authentic tax records of DuPage County. The owner of the subject parcel is first identified in Exhibit 1, which is an old annexation record of the City of West Chicago, which purports to show that the subject parcel in 2003 was owned by EJ&E Railroad. West Chicago's old annexation records are not authentic tax records of the County, and no one could reasonably be expected to search for or

find this record. This is also the only exhibit attached to the motion which directly links the subject parcel to EJ&E Railroad.

The tax bills referenced in PWC Exhibits 2 and 5 do not contain the parcel number, so they do not establish the link. PWC argues that the Applicant should have known that the tax bills relate to the subject parcel because they indicate that some West Chicago taxing districts are involved. There are many railroads in West Chicago, so this argument fails.

The other major exhibit relied upon in the motion is a set of records from the Illinois Department of Revenue (Exhibit 3), once again not authentic tax records of the County.

In response, LRS provided explanatory testimony from John Hock, and offered Applicant's Exhibits 5 and 6. Exhibit 5 is an official tax record of DuPage County, being Map page 1-32B-W of the County Clerk's official tax/plat maps. As indicated on the face of the map, these maps show the "DuPage County, Illinois, 2022 real estate tax assessment parcels." This map affirmatively identifies the owners of two sets of railroad tracks directly east of the subject parcel -- one set owned by Union Pacific Railroad and the second set owned by Canadian National Railway. Applicant's research further determined that the EJ&E Railroad had been purchased in its entirety about 10 years ago by Canadian National.

Applicant's Exhibit 6 is a photograph of the building where PWC claims EJ&E should have been served. What that photograph reveals is that this building is actually owned by Canadian National Railway.

PWC then argues that this property owner was not served by either registered mail or in person. In fact, the railroad company was personally served by parcel delivery service at its home office in Montreal, Canada, and a signed receipt of service was attached to the Siting Application. Section 39.2(b) specifies *who* must be served, but not *where* they must be served or

the manner of personal service. The evidence is indisputable that the property owner was correctly identified and was actually served at its home office. This satisfies both the spirit and letter of the law.

In *Bishop v. Pollution Control Board,* the court held that the language in the pre-filing notice requirement is to be given its ordinary meaning and not expanded to require more than what is written. Specifically, the court stated: "Words used in a statute are to be given their plain and commonly understood meaning in the absence of an indication of legislative intent to the contrary. We cannot read Section 39.2(b) as requiring more of the applicant than is statutorily mandated. Generally, as long as notice is in compliance with the statute and places those potentially interested persons on inquiry, it is sufficient to confer jurisdiction on the County Board." 235 Ill. App. 3d 925, at 933 (5th Dist. 1992). This suggests some flexibility in evaluating service.

Furthermore, the City Council found that service of this notice was sufficient.

BURDEN OF PROOF

The Illinois Pollution Control Board's rules provide that the burden of proof is upon the Petitioner. 35 Ill. Adm. Code 105.112(a).

STANDARD OF REVIEW – MANIFEST WEIGHT OF THE EVIDENCE

A local decision finding an applicant has proven the siting criteria, conditionally or otherwise, will not be disturbed on review unless it is against the manifest weight of the evidence. In reviewing the local decision, the Pollution Control Board is not to reweigh the evidence. *Fox Moraine, LLC v. United City of Yorkville*, 2011 Ill. App. (2d) 100017. However, the Board is expected to apply its technical expertise to the review and its decision is likewise

subject to review using the manifest weight of the evidence standard. *Town and Country Authorities, Inc. v. PCB*, 225 Ill. 2d 103 (2007).

A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. *Turlek, et al. v. PCB,* 274 Ill. App. 3d 244, 249 (1st Dist. 1995). A province of the hearing body is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses. *City of Rockford v. PCB*, 125 Ill. App. 3d 384 (2d Dist. 1984). That a different conclusion may be reasonable is insufficient; the opposite conclusion must be clearly evident, plan, or indisputable. 274 Ill. App. 3d at 249. When there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits one group of witnesses and does not credit the other. *Waste Management v. PCB,* 187 Ill. App. 3d 79, 82 (2d Dist. 1989).

A determination on contested criteria is purely a matter of assessing the credibility of the expert witnesses. *File, et al. v. D & L Landfill, Inc.*, 219 Ill. App. 3d 897 907 (5th Dist. 1991). In a case such as that presented to this Board, where there is expert testimony on both sides of an issue, the manifest weight standard is particularly difficult for the petitioner to overcome. This is especially true when the local decision maker, which is best situated to do so, has made express findings regarding the relative credibility of the witnesses.

ENVIRONMENTAL JUSTICE

Both opponents raised the issue of environmental justice, and questioned how those considerations should factor into a local siting decision. The local hearing officer denied questions about environmental justice impact because the concept is not part of the nine siting criteria and is not found anywhere in Section 39.2 of the Act. 415 ILCS 5/39.2. While the legislature has not incorporated any environmental justice concepts or mandates into the

Environmental Protection Act, it has adopted an Environmental Justice Act, which establishes a statewide Environmental Justice Commission. This has nothing to do with local siting. However, the legislative finding is important: "The principle of environmental justice requires that no segment of the population, regardless of race, national origin, age, or income, should bear disproportionately high or adverse effects of environmental pollution." 415 ILCS 155/5(i). LRS supports this principle, but in the absence of definitions and regulations, applying the same to local siting is not completely practical. For reasons that will be explained shortly, it is also not necessary.

The Environmental Protection Agency has, however, adapted internally its own Environmental Justice Policy which can be found on the IEPA website at https://epa.illinois.gov/topics/environmental-justice/ej-policy.html (last visited Nov. 9, 2023). A copy of that policy is also attached hereto and made a part hereof as Exhibit "A." This policy further proves the position of LRS.

It is clear from a reading of the entire State policy that it is intended for use in the permitting process. Therefore, opposing counsels' concerns may be premature, as they will surely be revisited in depth by the Agency during the permitting process. The first goal of the State policy, "to ensure that communities are not disproportionately impacted by degradation of the environment or receive a less than equitable share of environmental protection and benefits" is, without using the term "environmental justice," addressed in the course of a local siting hearing. In fact, all the objectives of a good environmental justice policy are inherent in a Section 39.2 siting hearing. There are full participatory rights by the public, there is a locally elected decision maker, a tribunal that fairly represents the demographics of the surrounding community, and most importantly, there is the requirement that the applicant prove that a

proposed facility is so located, designed and proposed to be operated such that the public health, safety, and welfare will be protected.

The State policy also approvingly mentions local pollution control facility siting procedures: For "Pollution Control Facilities," or "PCF's," the State of Illinois requires a local siting approval process under the Illinois Environmental Protection Act (Act) (415 ILCS 5/1, *et seq.*) PCF's include landfills, commercial incineration facilities, wastewater treatment plants, and similar waste treatment, storage, or disposal facilities.

The local siting approval process requires that the developer of a new PCF demonstrate to the satisfaction of the governing body of a municipality or the county board of a county in which the proposed PCF is to be located that the project will meet nine specific criteria set forth in the statute. In addition, the application is subject to a public participation process that requires providing written notice of the application to certain adjacent property owners and state legislators from the district in which the facility is to be located, as well as notice to the general public by newspaper publication. At least one public hearing must be held by the local governing body, and any person may comment on the proposed facility. The decision of the governing body must be in writing, must state its basis, and may be appealed to the Illinois Pollution Control Board. The Illinois EPA is not a participant in this process, other than to ensure that a project that is a new PCF has the requisite siting approval prior to the issuance of a construction or development permit. (*See* 415 ILCS 5/39.2). Please note that the City of West Chicago is exempt from the local siting requirements.

The only thing the state policy adds to local siting requirements is a notation that need for and amount of foreign language accessibility services will be determined by the state EJ coordinator. No one in this case ever made such a request.

Returning then to the local hearing officer's refusal to allow environmental justice questions -- there is no harm because he allowed virtually unlimited questioning about the potential environmental impacts on the citizens of West Chicago. If there is no resulting pollution or threat of same, there can be no environmental injustice.

A prejudicial comment during the PCB hearing by Rob Weinstock, counsel for PODER, must be addressed. He stated: "This case is a textbook example of structural environmental racism..." (Tr. 34). The only evidence he has of any alleged harm was his unauthorized interpretation in his written closing argument before the City Counsel of some raw data presented by Ms. Alcantar-Garcia. The witness's testimony on this interpretation was disallowed for multiple reasons, the simplest of which is the absolute lack of evidence of the scientific validity of the data. So the witness's lawyer is no more entitled to opine on the data than the witness is.

So LRS is at a loss to understand what vital evidence the City Council disregarded. What Mr. Weinstock disregards is that the siting decision was a unanimous decision by what is effectively a jury of his client group's peers. He also disregards the fact that the proposed facility is located at the very western edge of West Chicago, far distant from concentrations of minority population. He also disregards the fact that the packer trucks which deliver waste to the transfer station are already on the roadway system and that the proposed route for the semi-tractor trailers is to the west and south, so not through the populated portion of West Chicago.

Most importantly, since the City Council found that LRS had met the public health and welfare requirements of Criterion #2, environmental justice concerns are rendered moot.

ARGUMENT

CRITERION #1: ***The facility is necessary to accommodate the waste needs of the area it is intended to serve.***

The City of West Chicago City Council's determination that Applicant has met Criterion #1 is supported by the manifest weight of the evidence.

What is important to consider in this matter is the distinction between landfills and transfer stations. Transfer stations do not dispose of waste, they only transfer, so disposal capacity is not relevant to siting of transfer stations. The benefits of landfills are that they provide disposal capacity. The benefits of transfer stations are that they provide efficiency and economic advantages in utilizing that capacity. The West Chicago City Council made such a finding when it determined that LRS had satisfied criterion one.

Demonstration of need is, therefore, not an absolute, but a relative requirement. The question then becomes – relative to what? This now becomes a cost/benefit analysis where the impact of a proposed facility must be weighed against the benefits. Because transfer stations have minimal impact compared to landfills, the need demonstration need not be as rigorous. The need determination for transfer stations is therefore more of an economic determination. This makes perfect sense because all waste in a service area could conceivably be directly hauled to a landfill, so that the only need for transfer stations is purely economic and environmental.

Garbage in the streets and waiting lines for trucks into a landfill facility is clearly a worst-case scenario since municipal solid waste has been and continues to be managed. More importantly, however, transfer stations are not like landfills, and the determination of whether they are needed is fundamentally different. So long as there is disposal capacity in the form of landfills, garbage can be directly hauled to those landfills even if there are no transfer stations. The real purpose then of transfer stations is to get the garbage to the landfills more efficiently. In

this context, more efficiently means less fuel used, less wear and tear on the roadways in the service area, less carbon emissions, less vehicle wear and tear, less man hours and less money spent. Due to the fundamental differences between landfills and transfer stations, the analysis as to whether transfer stations are necessary should be fundamentally different than a landfill necessity analysis and should instead focus on the efficiency related benefits.

The benefit of economic savings to residents and businesses in the proposed service area from increased competition has not been rebutted.

The need of a facility as that term is defined in criterion I is established when the evidence shows that the facility is *reasonably required* by the waste needs of the service area. *File v. DNL Landfill*, 219 Ill. App. 3d 897 (5th Dist. 1991) (emphasis added). This needs analysis has been interpreted by our courts to require a showing that the facility is expedient, or reasonably convenient. *Clutts v. Beasely*, 185 Ill. App. 3d 543 (5th Dist. 1989).

John Hock of Civil and Environmental Consultants, Inc. testified on behalf of LRS regarding criterion one. Mr. Hock has over 35 years of experience in the solid waste industry, during which time he has been involved with the development of a variety of solid waste management facilities, including the design and permitting of numerous transfer stations.

Mr. Hock identified the proposed service area for the West DuPage Recycling and Transfer Station as consisting of the western two-thirds of DuPage County (generally west of I-355), the eastern portion of Kane County (generally east of the Fox River), and the far northern portion of Will County (generally communities partially within or directly adjacent to the southern boundary of DuPage County). He evaluated waste general and disposal trends in the service area and considered the benefits of the proposed transfer station. He estimated the service area to generate 2,985 tons per day as of 2020, estimated to increase to 3,569 tons per

day by the year 2040. Mr. Hock testified there are no existing landfills in the service area and only two active MSW transfer stations in the service area (DuKane Transfer Station in DuPage County and Batavia Transfer Station in Kane County).

He testified that the facility proposes to handle a maximum of 1950 tons per day of material, of which no more than 65- tons per day will be municipal solid waste, no more than 300 tons per day will be hydro-excavation waste, no more than 750 tons per day will be construction or demolition debris, and no more than 250 tons per day will be single stream recyclables. The facility will not accept hazardous waste. The site is currently permitted and acting as a construction or demolition debris recycling and transfer facility, while much of the municipal solid waste is hauled outside the service area.

When discussing landfill trends in the industry, Mr. Hock stated there are a decreasing number of landfills, with that number decreasing by nearly 40% since 1995. The only three remaining active MSW landfills in the nine county northeast Illinois region are located in Lake County (2) and Will County (1). The two busiest landfills in Illinois are located near Rockford.

Insofar as trends regarding transfer stations, Mr. Hock testified that as of 2020, 14 additional transfer stations have been permitted in or proximate to the proposed service area, namely one each in DuPage, Kane, Kendall, and McHenry Counties, two in Will County, one in Cook County north of the service area, and seven in Cook County east/southwest of the service area.

Mr. Hock testified there are no landfills in the service area and two transfer stations (Dukane and Batavia), and that collectively they are permitted to accept more than 3,000 tons per day, but do not. LRS does not dispute there is adequate physical capacity to handle the waste generated in the service area. As Mr. Hock mentioned, the design capacity of the service area

transfer stations is adequate to manage the MSW generated in the area, *if negative economic and environmental impacts are not considered.* Quite simply, the needs analysis in this case is not based upon such a simplistic formula of waste generation, as compared to disposal or transfer capacity, as Petitioners would have you believe.

Mr. Meza incorrectly interprets the case law to require a shortfall/capacity analysis, including facilities outside the service area. All of the cases that support this standard are *landfill* cases and all result from an appeal of a local denial on criterion one. Transfer stations do not dispose of waste, they only transfer it, so disposal capacity is not relevant to siting of transfer stations. John Lardner, the expert witness for PWC, made the same mistake when he concluded no new transfer stations were needed in the proposed service area and therefore LRS as applicant had failed to demonstrate need. Following their logic, no transfer station could ever be approved in a service area that had a landfill providing available disposal capacity.

Mr. Lardner agreed with Lakeshore's expert, John Hock, that looking strictly at capacity, without regard to factors such as pricing and environmental impact and benefits, there is excess capacity in the proposed service area. However, the analysis cannot end at capacity. In *Will County v. Village of Rockdale*, the Court held that criterion 1 is not determined exclusively by reference to capacity analysis, and instead stated that the "waste needs of the area" could include other factors such as improving competition, benefits through host agreements, operational concerns and hours, and positive environmental impacts. 2018 IL App (3d) 160463, ¶ 58.

In this case, need is based upon competitive, economic, and environmental factors. Mr. Hock testified the two existing transfer stations located in the service area are owned by vertically integrated companies which utilize their duopoly to drive up prices and choke off competition. As an example, Mr. Hock testified that Waste Connections and Republic Services

had previously had an asset swap, the result of which is that Waste Connections does not compete with Republic east of I-355 and Republic likewise does not compete with Waste Connections west of I-355. These companies can do this because they are vertically integrated, meaning they own hauling routes in the community, the transfer station to which the waste is taken, and the landfill to which the material is taken from the transfer station. Mr. Hock demonstrated by citing the decline in the number of competitors, including a letter in support of the transfer station from George Strom of Roy Strom Companies who sold the company to ORS in December of 2020 due to the diminished ability to compete in the market due to rising disposal costs caused by a lack of competition.

Mr. Hock pointed out that the development of this proposed facility would provide another option to haulers in the area and generally have the benefit of increasing competition. In addition, the facility would allow for increased operational flexibility through longer work hours and by taking in hydro excavation waste. Letters in support of the transfer station came from various contractors who provide hydro excavation services, noting that such services are grown exponentially in recent years and is anticipated to continue to increase in demand, with utility companies such as Nicor and Commonwealth Edison, indicating increased need for these specific services. Currently, the only known facility within ten miles of the proposed service area that accepts hydro excavation waste is the Woodridge-Greene Valley Wastewater Facility. Lakeshore owns and operates the Heartland Recycling facility in Forest View that provides for transfer of similar hydro excavation waste, but that site in Forest View is approximately 40 miles (by vehicle) from this proposed facility and 15 miles by distance. Additionally, the Woodridge-Greene facility only accepts hydrovac wastes until 3:00 p.m. and then only in limited volumes.

The primary argument of Petitioners is the overlap of the competing transfer stations that service the area. Yet PWC's own expert, John Lardner, admitted during his testimony he did not consider benefits of increased competition or reduced highway mileage for garbage trucks, nor did he consider competitive factors or environmental impacts when he concluded there was sufficient capacity in the service area. The evidence offered by PWC consisted of the testimony of their expert, Mr. Lardner, who opined that the proposed facility was not necessary from a competition standpoint, yet he went on later in his testimony to admit that he prepared a report for a second transfer station in the Bloomington/McLean County area which stated that a *competitive* transfer station was necessary to serve the waste needs of the area, *even though* the existing transfer station did an adequate job. In fact, Mr. Lardner admitted not only that criterion 1 now includes environmental factors, impacts on competition, and operational concerns, but also that the second transfer station was necessary to handle hydro-excavation waste.

Economic benefits of a new pollution control facility are properly considered as part of the need determination. Though not controlling, the economics of greater hauling distances can be germane to a need analysis. *Waste Management of Illinois, Inc. v. PCB*, 122 Ill. App. 3d 639, 642 (3d Dist. 1984).

Petitioner's argument is that the transfer station must be "absolutely necessary," a concept condemned by the courts, with the Pollution Control Board weighing in about the negative effects of this approach:

> The Board notes that Gallatin's claim that Fulton County did not consider the Gallatin facility seems to imply because a large landfill has been sited and permitted, and intends to serve the same area, no need for another facility can ever be demonstrated. For this Board to find that no need can exist if another landfill, with much capacity, is serving or will serve the proposed service area, would result in the creation of landfill monopolies, at least within specific service areas. We do not believe that the legislature, in requiring local decision makers to consider the waste needs of the intended service area, meant to establish de facto

> monopolies. In this case, Fulton County presented an analysis of need, and the County Board found that the facility is necessary. The proper inquiry before the Board is whether the County Board's decision is against the manifest weight of the evidence, not whether there is another landfill which could serve the intended service area. We do not find the County Board's decision to be against the manifest weight of the evidence. *Gallatin National Company v. The Fulton County Board and The County of Fulton*, 1992 WL 142713 (Ill. Pol. Control Bd.).

To summarize, demonstration of need is therefore not an absolute, but a relative requirement. Because transfer stations have minimal impact upon the public compared to landfills, the need determination need not be as rigorous as Petitioners would have you believe. The need determination for transfer stations is mainly an economic determination, as the Pollution Control Board and Illinois Courts have held. This makes absolute sense because all waste in a service area could conceivably be direct hauled to a landfill, so the only need for transfer stations is purely economic and environmental.

CRITERION #2: ***The facility is so designed, located, and proposed to be operated that the public health, safety, and welfare will be protected.***

With regard to Criterion #2, the City Council's decision is likewise supported by the record. In fact, there has been no evidence presented whatsoever that "the proposed transfer station will have a deleterious effect on public health, safety, welfare, or the property values of surrounding property. *Tate v. PCB*, 188 Ill. App. 3d 994, 1025 (4th Dist. 1989).

To prove that Criterion #2 has been satisfied, LRS has shown through the testimony and reports of their experts that the facility is designed, located and proposed to be operated so as to protect the public health, safety, and welfare. 415 ILCS 5/39.2(a)(ii). In brief summary, this particular criterion requires a demonstration that the proposed facility does not pose an unacceptable risk to the public's health and safety. *Industrial Fuels & Resources/Illinois v. PCB,* 227 Ill. App. 3d 533, 546 (1st Dist. 1992). There was no evidence presented by Petitioners to

demonstrate the design of Lakeshore's facility is somehow flawed from a public safety standpoint or that its proposed operations pose a threat to the public's health, safety and welfare.

John Hock, a professional engineer, described the proposed site plan and operations. The expanded site will handle a maximum of 1950 tons of material per day comprised of 650 tons of municipal solid waste, 300 tons of hydro-excavation waste, 750 tons of construction and demolition debris, and 250 tons of single stream recyclables. The transfer building itself will be a "fully enclosed" facility (required to protect the airport) with fast opening doors which only open when vehicles are entering or leaving the building.

As his testimony reflects, all unloading, transferring, and reloading is all done indoors, with the loaded transfer trailers or larger vehicles being tarped prior to exiting the loading ramp. Yet Lakeshore will have employees who would patrol the area to collect small amounts of litter that may escape. As part of Lakeshore's host agreement with West Chicago, they would sweep Powis Road with their street sweeper to keep the roadways clean. Mr. Hock further testified regarding the requirement of Lakeshore to leave no waste on the floor for anything more than 24 hours. Water sprays and vacuum systems will be used at least once a day with a high-capacity pressure washer located inside the building.

With this particular property of approximately 28 acres, it is the perfect location to expand Lakeshore's operations. Mr. Hock submitted a very detailed traffic plan and discussed the use of site staff, referred to as "spotters" who will tell the trucks where to go to make certain they are moving in the right direction at all times during operations.

Mr. Hock testified that with the location of the DuPage Airport located directly west of the site, an agreement was executed with the DuPage Airport Authority which required that the proposed site comply with certain design and operation features. With those conditions in place,

the Airport Authority concluded that the proposed site did not pose a threat to the safety of the airport. Petitioners presented no expert testimony to rebut that determination by the Airport Authority. Addressing another concern of the airport, Lakeshore agreed to assist the airport in minimizing any potential impact on wildlife by creating a site-specific wildlife management plan. Mr. Hock testified the staff would be trained in anti-perching devices located on the property to discourage or prevent birds from wanting to land on the building and others would walk the sites to deter water foul from wanting to use the ponds which exist on the property. In addition, game cameras would be located on the property to allow for a better determination of where animals may be.

Petitioners did not seriously challenge Lakeshore's design and operations plan. The stormwater management plan and features were previously approved by both DuPage County and West Chicago, as was the agreement with the DuPage Airport Authority. PWC continued to harp on what constitutes an enclosed transfer station and the dangers an open transfer station and bird attraction posed for airplanes landing at the nearby DuPage Airport. Mr. Hock credibly testified that the facility was a completely enclosed facility and that Lakeshore's proposed operations underwent serious negotiations with the DuPage Airport Authority to assure the continued safety of airplanes coming in and out of the airport.

Petitioners further argue LRS has failed in its analysis of emissions from trucks entering and leaving the proposed expanded facility. This is despite Lakeshore presenting credible evidence that emissions would, in fact, be reduced because of less mileage in using this proposed location. The expert called by PWC, John Powell, an individual who has never testified at a 39.2 siting hearing, testified regarding the two methods utilized to consider emissions. Mr. Powell opined that monitoring emissions is more accurate than modeling due to having real data at hand.

(Tr. 1184). Mr. Powell took no position regarding Lakeshore's findings on reduced emissions (Tr. 1186), yet he "models" there will be increased emissions and that Lakeshore has failed to meet Criterion #2. Lastly, when asked whether the proposed site is located so as to protect the public health, safety and welfare, Mr. Powell stated there was nothing wrong with the site. (Tr. 1193).

With regard to actual monitoring, rather than call an *expert*, PODER called a local resident, namely Juliette Alcantar-Garcia, who testified she utilized a phone app and sensor that monitored the air quality of the site. Ms. Garcia was not allowed to testify regarding the science of the readings as she was not qualified to do so. This testing is not and has not been recognized in any court and should be entirely discounted in this proceeding. The Hearing Officer did not find the testimony of either Mr. Powell or Ms. Garcia particularly compelling regarding emissions since he failed to even mention it in his findings, once again confirming the analyses by Illinois courts that determinations regarding Section 39.2(a)(ii) are generally a matter of assessing the credibility of expert witnesses. *File v. D & L Landfill, Inc.*, 219 Ill. App. 3d 897, 907 (5th Dist. 1991). In addition, regarding Criterion #2, the City Council held that "Mr. Hock's testimony was the more thorough and credible testimony on this issue."

Mr. Hock concluded that in his expert opinion this facility will be a premier state-of-the-art waste management facility, with no others having the diversity of operations such as this nor as protective. He further concluded that the proposed operations will allow for improved recycling of construction and debris materials (already provided for on the site), more efficient management and transportation of recyclables to a MRF, additional capacity and more efficient transportation of hydro-excavation waste, and additional capacity and more efficient

transportation of municipal solid waste to a final disposal facility, this fully satisfying Criterion #2.

The opponents claim that the proposal violates the thousand-foot setback from residentially zoned property as set forth in section 22.14 of the Act, which provides as follows: "No person may establish any pollution control facility for use as a garbage transfer station, which is located less than 1000 feet from the nearest property zoned for primarily residential uses or within 1000 feet of any dwelling..." 415 ILCS 5/22.14.

The most important rule of statutory construction is to ascertain the intent of the legislature when it adopted the operative statute. In this case, the context of the Environmental Protection Act makes it clear that the legislature intended to protect residential land uses from nearby pollution control facility development. There is no indication in the statute or anywhere else in the Environmental Protection Act that the legislature ever intended this setback requirement to be an absolute prohibition on pollution control facility development in the absence of actual or even possible nearby residential development and land uses.

This issue first came up in a recent transfer station siting case in Southern Illinois, and the Pollution Control Board was unequivocal in its finding that the ***impossibility*** of residential development negates the applicability of the 1000 setback requirement to properties that are zoned for primarily residential uses. In the Caseyville Transfer Station case, the Board held:

> Petitioners argue that the residential setback requirement of Section 22.14 of the Act has not been met. Rox. Br. at 5. This is because there are four parcels of property zoned Single Family District - Manufactured Home District, and two parcels of property zoned Manufactured Home Park District, located within 1,000 feet of the Site. Id. The Application includes a description of land uses surrounding the Site. R. at A-0016, A-0031-32. Further, Application Figure 2 shows land uses within 1,000 feet of the Site. See Area Land Use Map (App. Fig. 2). The Application also includes a list of parcels located within 1,000 feet of the Site, including owners and land use. See List of Parcels Within 1,000 Feet (App. Exh. I). Regarding the parcels zoned for residential use, CTS states in the

> Application that those parcels were purchased by St. Clair County under a Federal Emergency Management Agency (FEMA) buy-out program and that the parcels are encumbered by permanent deed restrictions prohibiting any future residential land use. R. at A-0016, citing Deeds of Parcels within 1,000 Feet of Site (App. Exh. J). The warranty deeds state that the Grantee "agree to conditions which are intended to restrict the use of the land to open space in perpetuity" and that the Grantee "agrees that no new structures or improvements shall be erected on the premises other than a restroom or a public facility that is open on all sides and functionally related to the open space use." *Roxana Landfill, Inc., Petitioner v. Village Board of the Village of Caseyville, Illinois, et al.*, 2014 WL 12740295 (Ill. Pol. Control Bd.).

This unanimous decision was affirmed by the Appellate Court, which reviewed the PCB decision and found in an unpublished opinion:

> With regard to residential setback provisions of section 22.14 of the Act (415 ILCS 5/22.14 (West 2014)), the IPCB noted that the permanent deed restrictions in the parcels purchased by St. Clair County under the FEMA buy-out program provided that the grantee "agree[d] to conditions which [were] intended to restrict the use of the land to open space in perpetuity" and that the grantee "agree[d] that no new structures or improvements shall be erected on the premises other than a restroom or a public facility that [was] open on all sides and functionally related to the open space use.... Although not a criterion under section 39.2 of the Act (415 ILCS 5/39.2 (West 2014)), the petitioners reference Alley's affidavit to assert that CTS's proposed transfer station failed to meet the residential setback required under section 22.14 of the Act. See 415 ILCS 5/22.14(a) (West 2014) ("[n]o person may establish any pollution control facility for use as a garbage transfer station, which is located less than 1000 feet from the nearest property zoned for primarily residential uses or within 1000 feet of any dwelling"). The petitioners argue that CTS's proposed facility violates the 1000 foot setback requirements of the four parcels of property zoned Single Family District-Manufactured Home District and the two parcels zoned Manufactured Home District. As the IPCB found, however, pursuant to a FEMA program, St. Clair County purchased the parcels within 1,000 feet of the site that were zoned residential use and placed permanent deed restrictions on them barring any residential use. See *Boschelli v. Villa Park Trust & Savings Bank*, 23 Ill. App. 3d 82, 85 (1974) (if restrictive covenants are more restrictive than zoning requirements, they prevail as to purchasers). Accordingly, the evidence supported the IPCB's determination that the facility was located so as to minimize incompatibility with the character of the area and to minimize the effect on the value of surrounding property. Accordingly, we find that the IPCB's determination was not against the manifest weight of the evidence. *Roxana Landfill, Inc. v. Illinois Pollution Control Bd.*, 2016 IL App (5th) 150096-U, ¶¶¶ 60, 132, 133.

So, clearly the actual, real-world possibility of residential development on a particular parcel supersedes the language of the statute, language which does not mention exceptions or qualifications even though it implies the same within its implied directive that "primarily" residential uses be considered. The logical point is that the language in the statute, while not creating explicit exceptions to the setback requirement, mandates a factual inquiry into the subject property's actual use and its possibility of residential development.

In this case, the zoning at issue is Estate Residence zoning only over the active railroad tracks which run east of the site. More specifically, two railroad properties are present directly east of the site, zoned Estate Residence District (ER-1). The West Chicago Municipal Code indicates that the purpose of the ER-1 classification is to establish regulations for larger lot single-family residential areas, and that neighborhoods in this district shall consist of very low-density single-family homes. Permitted uses are single-family detached dwellings, home occupations, small community residences, forest preserves, and parks and recreational areas when publicly owned. Accessory buildings may include swimming pools, bathhouses, tennis courts, green houses, guesthouses, and horses/stables. Allowable "special uses" are golf courses, including driving range, bar, restaurant, meeting and banquet rooms; country club; site reclamation and cleanup plan areas; and above ground service facilities.

The western railroad property is currently owned by the Union Pacific Railroad and the eastern railroad property is currently owned by Canadian National Railway. The railroads have been present for over seventy years and remain active today. The properties are each approximately 100 feet wide, have steep banks that rise approximately 10 feet above surrounding grade, and have no nearby vehicle access. The lot requirements for a residence in an ER-1 district include the following:

Minimum lot area: 40,000 square feet;
Minimum lot width: 100 feet at front, lot line and 200 feet at building line; and
Minimum setbacks:
Front yard: 50 feet;
Corner side yard: 50 feet;
Side yard: 30 feet;
Rear yard: 50 feet; and
Maximum lot coverage: 30%.

The physical features of the property, the lack of access, and the above lot requirements make it physically impossible to construct a residence on the railroad property. Accordingly, this zoning classification on an active rail right-of-way seems to make no sense. The City of West Chicago explained this apparent contradiction and confirmed the impossibility of residential development when they stated in a recent letter:

> Both the Union Pacific Railroad and the Canadian National Railroad operate parallel tracks on land running northwest to southeast, east of and adjacent to the subject property. The right-of-way for these rail lines carries a remnant zoning classification of Estate Residential, which is the classification assigned upon annexation. No effort was made to reclassify the property. As an active rail corridor, there can be no residential development. Furthermore, there is insufficient room to construct homes on one-acre minimum lots and no convenient way to access what would be a narrow string of properties. Residential development on this property is physically impossible. As such, the City concludes that the 1,000-foot setback requirement in 415 ILCS 5/22.14(a) is not applicable.

There was substantial controversy regarding the authorship and content of this letter. Tom Dabareiner, the West Chicago Director of Community Development and Chief Zoning Officer, testified he wrote the original version of this letter in 2019 in order to explain the unusual situation with the Residence Estate zoning of the railroad tracks adjacent to the site and to point out that, in his professional opinion, the Section 22.14 setback did not apply. In August of 2023, he made some minor edits at the request of John Hock. He called them benign. He testified these edits were for clarification, were non-significant, and did not change his original

meaning that residential development on the railroad tracks was physically impossible. He continues to believe that residential development on the property is impossible.

The City's letter confirms the impossibility of estate residential development now on the property based on its active use by trains, but also in the future, because the lots would be legally too small and would lack legal access. The fact that this is a zoning remnant from a previous annexation further explains the anomaly.

If you read the whole statute, the focus is on actual residences within the setback area, which is consistent with the legislature's intent to protect people. The impossibility of ever developing residences in the ER-zoned area answers that question definitively.

PWC took the position that the statute is an absolute bar to siting. In light of the foregoing discussion, that would be an absurd result, and there are legions of case law abhorring absurd results and indicating that otherwise plain statutes cannot be literally enforced in those situations.

In giving effect to the statutory intent, the court should consider, in addition to the statutory language, the reason for the law, the problems to be remedied, and the objects and purposes sought. *People v. Donoho*, 204 Ill. 2d 159, 171-72 (2003). It is also true that statutes must be construed to avoid absurd results. *Evans v. Cook County State's Attorney*, 2021 IL 125513, ¶ 27. When a proffered reading of a statute leads to absurd results or results that the legislature could not have intended, courts are not bound to that construction, and the reading leading to absurdity should be rejected. *Id.* It is also well settled that issues necessitating statutory interpretation are questions of law subject to *de novo* review. *Id.* (citing *People v. Manning*, 2018 IL 122081, ¶ 16; *Dawkins v. Fitness Int'l, LLC,* 2022 IL 127561, ¶ 27.

The most reliable indicator of legislative intent is found in the language of the statute itself (*Michigan Avenue National Bank v. County of Cook,* 191 Ill.2d 493, 504 (2000)), and that language should be given its plain, ordinary and popularly understood meaning (*Carver v. Sheriff of La Salle County,* 203 Ill.2d 497, 507 (2003)). However, where a plain or literal reading of a statute produces absurd results, the literal reading should yield: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. * * * If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity." *Church of the Holy Trinity v. United States,* 143 U.S. 457, 459–60 (1892). See also, *e.g., Public Citizen v. United States Department of Justice,* 491 U.S. 440, 453–55 (1989); *Watt v. Alaska,* 451 U.S. 259, 266 (1981); *Croissant v. Joliet Park District,* 141 Ill.2d 449, 455 (1990) ("Statutes are to be construed in a manner that avoids absurd or unjust results"); *People ex rel. Cason v. Ring,* 41 Ill.2d 305, 312–13 (1968) (when the literal construction of a statute would lead to consequences which the legislature could not have contemplated, the courts are not bound to that construction); V. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation,* 44 Am. U.L.Rev. 127, 127–28 (1994) ("The absurd result principle in statutory interpretation provides an exception to the rule that a statute should be interpreted according to its plain meaning"); *People v. Hanna*, 207 Ill. 2d 486, 497–98 (2003).

More recently, Judge Posner has explained the rule that absurd results are to be avoided, even in the face of plain language:

> Usually when a statutory provision is clear on its face the court stops there, in order to preserve language as an effective medium of communication from legislatures to courts. If judges won't defer to clear statutory language, legislators will have difficulty imparting a stable meaning to the statutes they enact. But if the clear language, when read in the context of the statute as a whole or of the commercial or other real-world (as opposed to law-world or word-world) activity

> that the statute is regulating, points to an unreasonable result, courts do not consider themselves bound by 'plain meaning,' but have recourse to other interpretive tools in an effort to make sense of the statute. E.g., *Public Citizen v. U.S. Dept. of Justice,* 491 U.S. 440, 453–55 (1989); *Green v. Bock Laundry Machine Co.,* 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *AM Int'l, Inc. v. Graphic Management Associates, Inc.,* 44 F.3d 572, 577 (7th Cir.1995); Veronica M. Dougherty, Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation,' *44 Am. U.L.Rev. 127* (1994).

They do not want to insult the legislature by attributing absurdities to it." *Krzalic v. Republic Title Co.,* 314 F.3d 875, 879–80 (7th Cir. 2002)

Lastly, in addition, the City's interpretation of the statute leads to anomalous results when applied to a bicycle path located in a recreational area such as a public park. In construing statutory language, we may consider the consequences that would result in interpreting the statute one way or the other. *County of Du Page v. Illinois Labor Relations Board*, 231 Ill. 2d 593, 604 (2008). We also presume that the legislature did not intend absurdity, inconvenience, or injustice. *Brucker v. Mercola*, 227 Ill. 2d 502, 514, (2007); *Corbett v. County of Lake*, 2017 IL 121536, ¶ 35.

Based on the foregoing, the 1000-foot setback does not apply to the two railroad properties east of the West DuPage Recycling and Transfer Station.

The only evidence presented by the opponents and related to negative public health and safety impacts related to hypothesized, feared health impacts from diesel truck emissions. This evidence was barely better than rank speculation, and it is clear that citizen concerns focused on existing truck traffic from *all* sources in the area. Additionally, the emissions concerns disregard two key facts: the first being that total new truck traffic associated with the operation of this site is *de minimus*, and the second being that the truck routes take truck traffic *away* from West Chicago. PODER and PWC both claim LRS has failed in its analysis of emissions from trucks entering and leaving the existing facility. This is despite Lakeshore presenting unrebutted and

credible evidence that total emissions would, in fact, be reduced because of less road mileage in using this proposed location. The expert called by PWC, John Powell, again an individual who has never testified at a 39.2 siting hearing, opined that monitoring emissions is more accurate that modeling due to having real data at hand. (Tr. 1184). Mr. Powell took no position regarding Lakeshore's findings on reduced emissions (Tr. 1186), yet he "models" there will be increased emissions and that Lakeshore has failed to meet Criterion #2. Lastly, when asked whether the proposed site is located so as to protect the public health, safety and welfare, Mr. Powell stated there was nothing wrong with the site. (Tr. 1193).

Lastly, despite these alleged citizen safety concerns, a member of the Sierra Club, Connie Schmidt, testified during citizen comment as follows: "We advocate for aggressive monitoring to ensure that LRS is compliant with commitment they are making in this process. With very careful consideration and respect for the concerns of the citizens of this community, the group of the Sierra Club is determined that we will not oppose this permit request and, in fact, we support it". (Tr. 973)

The City's unanimous finding that Criterion #2 has been satisfied is not against the manifest weight of the evidence.

CRITERION #3: ***The facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of surrounding property.***

In support of its Application regarding Criterion #3, LRS called Dale Kleszynski, a licensed Illinois real estate appraiser and member of the Appraisal Institute. Mr. Kleszynski prepared a detailed power point presentation which was submitted as an Exhibit. His testimony consisted of the historical use of the subject property and surrounding area, and he found that the property was "industrial in character" and segregated from other uses, namely residential.

In determining whether Criterion #3 had been met, this involves two separate issues, namely whether the facility is located so as to minimize incompatibility with the character of the surrounding area *and* whether the proposed facility is located to minimize the effects on the value of the surrounding property. The issue is not whether there is *no* impact on the surrounding area, but instead whether the facility will be located to *minimize* any potential incompatibility and effect on value. *See Fairview Area Citizens Task Force v. Illinois Pollution Control Board*, 198 Ill. App. 3d 541 (3rd Dist. 1990) (*abrogated on other grounds*).

Mr. Kleszynski testified his analysis began with a survey or inspection of the subject property, which he determined was approximately 27.66 acres of land. Looking to the history of the surrounding area, he opined that the area, since 1998, has been consistent airport and manufacturing activity, with DuPage Airport to the west, a closed landfill and industrial facilities to the south, railroad rights-of-way to the east, and industrial facilities to the north. He further testified such use has either remained consistent or increased throughout the history of the area.

Mr. Kleszynski determined it significant (and reflected through slides in his presentation) the location of the existing building as well as the intended building. Both would be located in the southern portion of the property adjacent to a vacant parcel of land. (Tr. at 261). He also testified that the property has a buffer area that separates the staging areas for the ongoing operations, with DuPage Airport on the west, a large multilane roadway on the north, and the railroad right-of-way on the east. (Tr. at 262-263). This supports the requirement of Criterion #3 that the property is not incompatible with the surrounding area, which Kleszynksi testified was a historically industrial area, both historically and presently.

Petitioner challenges this determination based upon his perceived belief that Mr. Kleszynski's lacked the necessary qualifications to discuss zoning and compatible uses. He

bases this belief, in part, upon the admission by PWC's appraiser, Kurt Kielisch, that he personally did not perform an analysis of the first prong of Criterion #3 because "as a licensed appraiser in over 21 states, even with 39 years of experience, he was not qualified to give an opinion on computability." (Tr. 920-921 and 931-932). Mr. Kielisch did testify, however, that as a real estate appraiser he would have some sense of whether something fits into the area or sticks out like a sore thumb. (Tr. 941). He did state on cross-examination that the existing LRS facility appeared to fit into the area. (Tr. 941). Petitioner presented not even a scintilla of evidence, either through the testimony of Mr. Kielisch or anyone else, that LRS's proposed facility met the first prong of Criterion #3. Instead, Mr. Kielisch testified that the only question he was presented was whether or not the highest and base use analysis equates to whether or not it minimizes impact on property values. (Tr. 948). Mr. Kielisch also testified that LRS's expert, Dale Kleszynski, was a qualified real estate expert. (Tr. 954). Instead, Mr. Kielisch ironically opined, with no scientific or empirical data, that Mr. Kleszynski's data was insufficient to support his conclusion.

The Hearing Officer relied upon the fact that Mr. Kielisch is not a licensed Illinois appraiser, he had never testified in a Section 39.2 siting hearing, and also Kielisch readily admitted he is not knowledgeable about the siting process. Clearly, the Hearing Officer made a credibility determination in this regard and discounted much, if not all, of his testimony due to his lack of familiarity with the siting criterion.

With regard to the highest and best use of the property, LRS's expert, Mr. Kleszynski, found that the subject site is zoned M-Manufacturing and that the surrounding uses are both compatible and similarly zoned. His analysis continued that there were no physical conditions that existed that prohibited this development, there was adequate infrastructure to support the

proposed development, and there were no obvious issues which would prevent the property from being developed as proposed. With regard to financial feasibility, Mr. Kleszynski testified that properties in the immediate market area tended to be owner occupied and/or leased in third party transactions, that the total industrial space in West Chicago has remained generally consistent at approximately 17,000,000 square feet over the past five years, and that the market condition for general industrial space is considered strong in this market area, with approximately 300 sales transactions occurring for the period from 2013 to the present date, with the great activity found in the light industrial districts of West Chicago. With regard to maximum productivity, he found that improved industrial sites, such as the subject property, has greater value than vacant land and achieves its highest value. He concluded that developing the property as a solid waste transfer station was the highest and best use of the property, meeting the four-pronged test of legal permissibility, physical possibility, financial feasibility, and maximum productivity as reflected hereinabove.

Criterion #3 has been satisfied through the detailed analysis provided by Mr. Kleszynski that the location minimized incompatibility with the character of the surrounding area and minimizes the impact on property values.

CRITERION #4: ***The facility is located outside the boundary of the 100 year flood plain.***

Applicant provided unrebutted testimony that that the proposed site is outside the 100-year floodplain. No challenge to Criterion #4 has been raised.

CRITERION #5: ***The plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills and other operational accidents.***

This criterion is heavily linked with Criterion #2, and the related evidence on that criterion is reincorporated herein by reference. No direct challenge to Criterion #5 has been raised on review.

CRITERION #6: ***The traffic patterns to and from the facility are so designed as to minimize the impact on existing traffic flow.***

Section 39.2(a)(vi) of the Act requires that the Applicant establish that "the traffic patterns to or from the facility are so designed as to minimize the impact on traffic flows." 415 ILCS 5/39.2(a)(vi). An applicant is not required to demonstrate no impact or eliminate any problems; an applicant need only show that any impact has been minimized. *Fairview Area Citizens Task Force v. PCB*, 198 Ill. App. 3d 541, 554-555 (3d Dist. 1990) (*abrogated on other grounds*).

Michael Werthmann, a registered professional engineer and certified professional traffic operations engineer with more than 33 years of experience in both the private and public sectors and having testified in over 25 solid waste related projects was called by LRS with regard to Criterion #6.

Mr. Werthmann performed a three-phase study, first examining the existing physical and operating characteristics of the roadway system. He then looked at the facility's traffic characteristics and determined the type and volume of traffic generated by the facility. His analysis then concluded with the impact of the facility generated traffic on the existing roadway system. Mr. Werthmann studied traffic volumes, distributions, and movements at the site entrance and the potentially affected intersection. He testified unequivocally that the location, existing operations, and proposed route for the transfer trailers all minimized the impact on existing traffic flows. He testified the only road improvements needed for this project are planned improvements at the access drives to the facility.

There was no challenge to this Criterion, but it is noted that both the City and PODER have proposed a special condition concerning the traffic routes which has been appended to the Hearing Officer's Report.

CRITERION #7: ***Hazardous Waste Emergency Plan.***

It was the testimony of John Hock and the Application that the Facility will not be treating, storing, or disposing of hazardous waste. Thus, Criterion #7 is not applicable and there has been no challenge by the objectors.

CRITERION #8: ***The facility is consistent with the Solid Waste Management Plan enacted by the County of DuPage.***

John Hock testified regarding the contents of the DuPage County Solid Waste Management Plan from its inception to its most recent update. He testified the proposed facility is consistent with that Plan. He noted that the Plan included various five-year updates, particularly as they related to the possibility of developing future transfer stations in DuPage County. With only one transfer station in DuPage County, the Plan consistently has recognized the need for more transfer stations, additional recycling, and more competition.

It is noteworthy that DuPage County has entered into a secondary host agreement with LRS, finding that the proposed site appears consistent with the County's Plan. Even PWC's own expert, John Lardner, testified the County's Plan *does* call for more transfer stations, more recycling, and more competition. He reviewed DuPage County's official letter finding that the Siting Application appeared to be consistent with their Solid Waste Management Plan. Logic dictates that since the County drafted the Management Plan and its updates, their planning staff would be best qualified to interpret its meaning and contents. That logic notwithstanding, Mr. Lardner testified with a straight face that the phrase "appears to be consistent" (used in the County's letter) means that the application is NOT consistent. (Trans. 1010). The only thing that LRS can respond to Lardner's more than unusual parsing of the language in the County's letter of support is that is is embarrassing.

CRITERION #9: ***The facility will be located within a regulated recharge area, and any applicable requirements specified by the Board for such areas have been met.***

This criterion is not applicable. No challenge to Criterion #9 has been raised.

THE PROCCEDINGS WERE FUNDAMENTALLY FAIR

The Board must determine whether the siting hearing and the procedures used were fundamentally fair. Fundamental fairness does not require a perfect, error-free proceeding. A non-applicant who participates in a local pollution control siting hearing has no property interest at stake entitling him to the protection afforded by the constitutional guarantees of due process. *Land & Lakes Co. v. Illinois Pollution Control Board*, 319 Ill. App. 3d 41, 47 (3d Dist. 2000 (overruled by *Peoria Disposal Co. v. Illinois Pollution Control Board*, 385 Ill. App. 3d 781 (3d Dist. 2008)). Procedures at the local level must comport with adjudicative due process standards of fundamental fairness. *E & E Hauling, Inc. v. Ill. Poll. Control Board*, 116 Ill. App. 3d 586, 596 (2d Dist. 1983) (hereinafter *E & E Hauling*, (2d Dist. 1983); *aff'd* 107 Ill.2d 33 (1985); hereinafter *E & E Hauling* (1985).

The "fundamental fairness" standards are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. *Waste Management of Illinois, Inc. v. PCB*, 175 Ill. App. 3d 1023, 1037, (2d Dist. 1988). These standards consist of "minimal standards of procedural due process, including the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence." *Land & Lakes*, 319 Ill. App. 3d at 48.

In its Petition for Review, PWC raises a number of issues that have been previously adjudicated by the Board, and these can be dealt with quickly. But the first issue raised by PWC, along with PODER, has not previously been litigated. Both objectors complain that the

proceedings should have been conducted in Spanish. The allegation is based on the assertion that West Chicago has a 50% ethnic Latino population. There was no evidence presented on this, but the point is not worth disputing, especially because we don't know the more important statistic, the percentage of West Chicago residents who are unable to meaningfully communicate in English.

Responding specifically to the Spanish language argument, LRS first notes there is no requirement in the Act for documents such as the siting application to be translated into Spanish. There is also no requirement in the Act that proceedings be translated into Spanish. Secondly, and most importantly, the argument was waived during the local hearing. Neither PWC nor PODER ever filed a motion or made an oral motion for any Spanish language accommodation. The record reveals that the first time any mention of Spanish translation was made in public comment was on January 12, 2023, day 5 of the public hearing, and long after LRS had rested its case. (Tr. 939, 974).

LRS asserts there is no requirement either in Section 39.2 or elsewhere in the Act for siting hearings to be conducted in Spanish.

Additionally, PODER and PWC waived the issue by not timely raising it. "There is substantial law holding that the waiver rule applies in Illinois, applies to the issue of standing, applies to Pollution Control Board review of proceedings below and applies to the SB–172 process. Within the context of today's proceeding, the waiver rule would preclude raising a defense to standing for the first time before this Board if it could have been raised at the county board hearing below." *Valessares and Heil v. Cty Board of Kane County and Waste Management of Illinois,* PCB 87-36 (July 16, 1987).

PODER's choice of a witness to illustrate their concept of a "language impairment" is illustrative. Their counsel, Rob Weinstock, stated before calling his witness: "I would appreciate the advanced patience and flexibility, particularly for our first witness, Ms. Garcia, which English is not her first language, but Ms. Garcia *has been forced* to participate in this hearing without the aid of Spanish interpretation at any point in the process. I would just ask for a little leeway. Ms. Garcia is ready and will do her best." (Tr. 1232) (emphasis added).

When she took the stand, the first words out of Ms. Garcia's mouth were: "Actually I was born here." (Tr. 1232). Ms. Garcia then testified at length, and quite articulately, about her role in community organizations and her site observations. (Tr. 1232-1290)

At the hearing, Ms. Garcia was allowed to read a sworn statement in Spanish; but because she was born and educated in West Chicago, counsel was allowed to cross examine her in English. She had no difficulty understanding or responding.

PWC raises multiple other fundamental fairness issues. None of these have merit. PWC complains the City deliberated on the Siting Application in closed session. This is an innocent and well-accepted practice. See *Citizens Opposed to Additional Landfills v. Greater Egypt Environmental Complex,* PCB 97-233, Nov. 6, 1997. Similarly, pre-filing review is a routine practice.

PWC complains the City disregarded Aptim's negative comments from early in the pre-filing review process. The significance of experts and their reports in local siting hearings has been extensively litigated. Expert and staff reports are not evidence. *Fairview Area Citizens Taskforce v. PCB,* 198 Ill. App. 3d 541, 548 (3d Dist. 1990). It is undisputed that a hearing officer in proceedings before the county board is not a decision maker. *Citizens Against Regional Landfill v. PCB*, 255 Ill.App.3d 903, 907 (3d Dist. 1994). A village board is free to select from

multiple reports and recommendations it may receive from different parties and sources in making its own findings. *Timber Creek Homes, Inc., Petitioner v. Village of Round Lake Park, Round Lake Park Village Board and Groot Industries, Inc., Respondent* 2014 WL 4249954 (Ill. Pol. Control. Bd.). It's pretty obvious that PWC has never been through a pre-filing review because if they had, they would understand that identifying weaknesses in an early draft of an application is the essence of the pre-filing review process.

Most of the fairness issues raised by PWC involve contacts before the Siting Application was filed. One of those is the allegation that West Chicago and Lakeshore entered into a host agreement. Host agreements are a well-accepted part of the larger siting process. This Board has previously held that "the Board agrees with the assessment of the County and Waste Management that all of the contacts of which STMD complains between County Board Members that occurred prior to the filing of the application-filings were permissible under prior Board precedent. They were not, by definition, *ex parte* contacts. The Ordinance authorized the County to negotiate a Host Agreement." *Stop the Mega-Dump v. DeKalb County,* PCB 10-103, March 17, 2011.

CONCLUSION

For the foregoing reasons, LRS respectfully prays that the Petitions of PWC and PODER be denied.

Respectfully submitted,

LAKESHORE RECYCLING SYSTEMS, LLC.,
Respondent

BY: /s/ George Mueller
George Mueller
Attorney for Respondent

BY: _____
Karen Donnelly
Attorney for Respondent

George Mueller
Attorney at Law
1S123 Gardener Way
Winfield, IL 60190
(630) 235-0606
george@muelleranderson.com

Karen Donnelly
Attorney at Law
501 State Street
Ottawa, IL 61350
(815) 433-4775
Donnellylaw501@gmail.com

Environmental Justice (EJ) Policy

Léalo en Español

Introduction

The Illinois Environmental Protection Agency (Illinois EPA) is committed to protecting the environment and the health of the residents of Illinois, and to promoting environmental equity in the administration of its programs. This document carries out that belief in written policy and provides specific parameters for the Illinois EPA's bureaus, divisions, and offices to implement the policy to reduce environmental inequities.

EJ policies and activities will continue to be developed through the normal course of the Illinois EPA's regulatory and programmatic duties. Illinois EPA recognizes that this policy alone will not achieve environmental equity. Moreover, public and private commitment to the implementation of this policy is needed to achieve the goals of this policy and to promote environmental equity in this State.

Key goals of this policy:

- to ensure that communities are not disproportionately impacted by degradation of the environment or receive a less than equitable share of environmental protection and benefits;
- to strengthen the public's involvement in environmental decision-making, including in permitting and regulation, and where practicable, enforcement matters;
- to ensure that Illinois EPA personnel develop common practices when implementing EJ concepts into Agency programs; and
- to ensure that the Illinois EPA continues to evaluate and adapt its EJ strategy to safeguard the environment and the health of the residents of Illinois, promote environmental equity in the administration of its programs, and be responsive to the communities it serves.

Definition

The Illinois EPA defines EJ as follows:

"Environmental Justice" is based on the principle that all people should be protected from environmental pollution and have the right to a clean and healthy environment.

Environmental justice is:

- Protecting the environment of Illinois and the health of its residents
- Equity in the administration of the State's environmental programs
- Opportunities for meaningful involvement of all people with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

Elements of The Policy

1. Responsibilities of the Office of EJ

The Office of Environmental Justice has the primary responsibility for coordinating all EJ efforts on behalf of the Illinois EPA. This includes acting as the liaison for the Illinois EPA on EJ, remaining current on all national developments on EJ, and coordinating, reviewing and signing off on responses to EJ complaints in accordance with the **Illinois EPA EJ Grievance Procedure**. The EJ Coordinator may review the following elements for consistency with this policy:

- Outreach strategies
- Permits
- Plans
- Rulemaking
- Enforcement

The EJ Coordinator is the contact person for members of the public, community leaders and EJ groups who believe their health or surrounding environment is at risk. The EJ Coordinator will serve as a liaison between the member of the public, community leaders and EJ groups, and the relevant Illinois EPA personnel concerning an Agency action or potential action.

The EJ Coordinator will also facilitate and coordinate the continued development of the Illinois EPA's approach to EJ. This includes assisting the Office of Community Relations with public outreach, responding to complaints, inquiries regarding permitting, and coordinating plans to address EJ throughout the agency. The EJ Coordinator will also review the proposed response to EJ comments raised at a hearing or in written comments, and coordinate this response among the Bureaus, Division of Legal Counsel, and the Office of Community Relations.

2. Scope of EJ Activities

The EJ Coordinator will coordinate the following EJ activities on behalf of the Illinois EPA:

- Conduct enhanced public outreach in areas of EJ concern*;
- Respond to general inquiries concerning EJ;
- Respond to public comments received on proposed permitting actions raising EJ concerns;
- Respond to EJ questions concerning the Illinois EPA's enforcement program or a specific enforcement matter;
- Assist and enforce rulemaking activities that involve areas of EJ concern.

*The Illinois IEPA defines "area of EJ concern" as a census block group with a low-income and/or minority population greater than twice the statewide average. The Agency uses a geographic information system (GIS) mapping tool called EJ Start to determine where areas of EJ concern are within the state. When a permitting action or other issue arises in an area of EJ concern, the Illinois EPA conducts enhanced public outreach.

3. Managing EJ Concerns or Inquiries

When an Illinois EPA staff person receives an EJ inquiry or concern, they should promptly brief the EJ Coordinator. The EJ Coordinator will meet with the appropriate Illinois EPA staff to formulate the Agency's actions and responses. Once they have met with the appropriate Illinois EPA staff, the EJ Coordinator will

apprise the initial inquirer(s) of the determined action and response such as no inspection or referral to another agency if activity is not regulated by the Illinois EPA.

Strategies to Implement EJ Activities

1. Environmental Justice (EJ) Notification Process

The Office of Environmental Justice utilizes EJ Notifications to reach out to people located in areas of EJ concern and their corresponding advocacy groups/ and local government officials to notify them of a permit application in their area. Upon receiving a permit application, the permit reviewer will check the **EJ Start** mapping tool to determine if the site is in an area of EJ concern. If it is, they will submit a review request through the Illinois EPA EJ Tracking system to be reviewed by the EJ staff. EJ staff then determines whether to draft an EJ notification letter, which is the first step in conducting enhanced public outreach. The decision whether to draft an EJ notification letter is based on the type of facility, nature of the permit transaction, past interest in the facility, and any other relevant factors.
If the EJ Staff decides that enhanced public outreach is necessary, they will compose a letter based on information provided by the permit reviewer that contains the following information:

- Facility name
- Facility address
- The Bureau ID number
- The permit application reference number
- A short summary of the project
- Public notice details if the permit is subject to state or federal public notice requirements
- EJ Coordinator's contact information

Illinois EPA sends the EJ Notification Letter to elected officials (federal, state, county, and local), community groups, and individuals who request to be notified. Some people opt to receive notifications for the entire state, while others want only notifications for certain areas such as zip codes, cities, and counties. If an individual, elected official, or community group has a follow up question or concern or wants to request a public hearing or meeting, they may contact the EJ Coordinator. The Office of EJ has an online sign-up form for EJ Notification Letters located at: **https://www2.illinois.gov/epa/topics/environmental-justice/Pages/default.aspx**.

More information about this process can be found in Illinois EPA's **EJ Notification Infographic** and **Public Participation Policy.**

2. Public Notices, Meetings, and Hearing and Local Siting Approval

Community Outreach

The Illinois EPA has developed and implemented the EJ Public Participation Policy (**https://www2.illinois.gov/epa/topics/environmental-justice/Documents/public-participation-policy.pdf**) for permits, programs, and actions in areas of EJ concern. The Illinois EPA's Office of Community Relations (Community Relations) works in conjunction with the EJ staff and communities to identify and

address environmental concerns regarding proposed facilities and projects of significant interest. Together, Community Relations and EJ staff also preemptively identify environmental issues affecting areas of EJ concern in Illinois prior to the permitting or action stage. The Agency may hold meetings or hearings in the potentially affected communities.

Community Relations is charged with the following tasks:

- Preparing and issuing public hearing and meeting notices
- Identifying community questions and concerns
- Preparing and distributing fact sheets
- Responding to questions from the public
- Establishing local repositories containing documents such as the permit application
- Conducting small group meetings
- Conducting public hearings
- Arranging bilingual publication of public notices or other materials, where appropriate
- Arranging bilingual or multi-lingual hearings, where appropriate
- Working with other Agency staff to prepare Responsiveness Summaries following public hearings

The Illinois EPA has found that when it conducts a dialogue with interested and potentially affected communities, the permit application process runs more smoothly for the applicant, the Illinois EPA, and the public.

Often, the public seeks information within the following categories:

- permit process
- nature and operation of the facility
- technical aspects of pollution control
- applicable legal requirements
- opportunities for public input to influence outcomes
- risks to public health and the environment
- monitoring of facility's operation
- enforcement of alleged violations
- translation of information in preferred language

Community Relations and the Office of Environmental Justice maintain contact lists of interested individuals, community leaders and organized groups. Individuals may request to be added to distribution lists or, based on prior contact and interest, the Illinois EPA may add these individuals or groups to a distribution list. These individuals or groups receive notices of hearings on regulations, permit applications, or any other significant Agency action likely to impact the community in which the individual lives, or in which the group has

expressed an interest. For individuals in areas of EJ concern, individuals or groups may also receive EJ notification letters regarding permitting actions at the Agency.

Public Meetings

For permits or other actions that garner significant public interest and do not require a formal hearing, the Illinois EPA will often hold a public meeting. The purpose of these meetings is to open a dialogue with the affected community regarding the specific permit or action. This type of forum encourages greater participation and informal dialogue and more time can be spent addressing the issues of concern. Through these efforts, the Illinois EPA attempts to encourage public participation and help bring awareness of environmental concerns. In situations where a public meeting cannot be held in person, Illinois EPA will use virtual video meeting tools to provide a dialogue with the affected community.

Public Hearings

The Illinois EPA holds public hearings for permitting actions or other actions and must follow specific requirements (See: 35 Ill. Adm. Code 166 for permit hearing requirements and 35 Ill. Adm. Code 164 for non-permit action hearing requirements). The purpose of a public hearing is to receive oral comments from the public to be transcribed into a written record by a court reporter. Written comments may be submitted throughout a notice and comment period. Laws and regulations for certain permits require a public hearing to be offered to the public. If significant public interest is expressed regarding a facility applying for a permit, a hearing may be held regarding a permit or other action at the discretion of the Director, even if the permit or action would not usually require one. For example, under Illinois law, the Director of the Illinois EPA may determine whether the construction of an emission unit (or the revision to a permit for such a unit) is of public interest and allow for public participation in the permitting process where such participation is not otherwise required (See: 35 Ill. Adm. Code 252.102(a)(6) & (a)(8)). The criteria that the Director may consider in determining whether an emission unit is of public interest include:

- The type of permit for which the application is made;
- The nature and amount of pollutants that will be emitted by the source;
- Possible effects of the emissions on health and the environment;
- The location of the source;
- The interest in the source exhibited by the public, based on comments and inquiries received by the Illinois EPA;
- Other factors that are distinctive to the source; and
- The proposed action by the Illinois EPA.

The public participation process includes: providing the public with notice of its intent to issue a permit; providing the public with a copy of the proposed permit and supporting documentation for comment; electing to hold a public hearing on the proposed permitting action without waiting for a request to do so in matters where a hearing is not statutorily required; providing for a written comment period following the hearing; and preparing a detailed responsiveness summary addressing all significant public comments on the proposed permitting action. (See: 35 Ill. Adm. Code 166)

Local Siting Approval

For "Pollution Control Facilities" or "PCFs" the State of Illinois requires a local siting approval process under the Illinois Environmental Protection Act (Act) (415 ILCS 5/1 et seq.) PCFs include landfills, commercial incineration facilities, wastewater treatment plants, and similar waste treatment, storage or disposal facilities.

The local siting approval process requires that the developer of a new PCF demonstrate to the satisfaction of the governing body of a municipality or the county board of a county in which the proposed PCF is to be located that the project will meet nine specific criteria set forth in the statute. In addition, the application is subject to a public participation process that requires providing written notice of the application to certain adjacent property owners and state legislators from the district in which the facility is to be located as well as notice to the general public by newspaper publication. At least one public hearing must be held by the local governing body, and any person may comment on the proposed facility. The decision of the governing body must be in writing, must state its basis, and may be appealed to the Illinois Pollution Control Board. The Illinois EPA is not a participant in this process, other than to ensure that a project that is a new PCF has the requisite siting approval prior to the issuance of a construction or development permit. (See: 415 ILCS 5/39.2). Please note that the City of Chicago is exempt from the local siting requirements.

Language Accessibility

As part of the Illinois EPA's EJ Policy, the Office of Community Relations and the EJ Coordinator will determine when public notices should be translated into other languages, where these notices should be published, and when translators should attend meetings and hearings.

Any questions or requests for translation services should be directed to the EJ Coordinator.

Formal EJ Complaints

The Illinois EPA has developed, implemented and published an **EJ Grievance Procedure**. The EJ Grievance Procedure defines the procedural and substantive standards utilized by the Illinois EPA to evaluate allegations of discrimination based on race, color, national origin, religion, disability, income, age, or gender. Specifically, the EJ Grievance Procedure provides a process for filing a timely complaint to the Illinois EPA and describes the process that is used to investigate and resolve the complaint. However, the procedures described therein do not apply to administrative actions that are being pursued in another forum (e.g., a permit appeal or a civil rights complaint filed with the United States Environmental Protection Agency Office of Civil Rights).

Revised October 2021