BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C. Petitioner, vs. CITY COUNCIL OF THE CITY OF ROCHELLE, ILLINOIS Respondent.	)	Case No. PCB 03-218

AGREED MOTION TO EXCEED PAGE LIMIT FOR POST HEARING BRIEF

NOW COMES the Respondent, CITY COUNCIL OF THE CITY OF ROCHELLE, ILLINOIS, by and through its undersigned counsel of record, and for its Motion to Exceed Page Limit for Post Hearing Brief, state as follows:

1. 35 Il.Adm.Code 101.302(k) states as follows:

> Page Limitation. No motion, brief in support of motion, or brief may exceed 50 pages, and no amicus curiae brief may exceed 20 pages, without prior approval of the Board or hearing officer. These limits do not include appendices containing relevant material.

2. In order to fully and fairly present Respondent's case before this Board, Respondent's brief must exceed 50 pages as is allowed by 35 Il.Adm.Code 101.302(k).

3. Respondent previously agreed to allow Petitioner to exceed 50 pages in its Post Hearing Brief because of the many issues raised in this Appeal, and in fact, Petitioner's brief was 76 pages in length.

4. Respondents are now responding to Petitioner's 76 page Post Hearing Brief, which asserts that the landfill siting hearing was fundamentally unfair and that Respondent's denial of landfill

siting was against the manifest weight of the evidence based on the Respondent's findings regarding criteria i, ii, iii, vi and ix.

5. Because of the numerous issues involved in this Appeal and Respondent's need to set forth substantial factual and technical information relating to fundamental fairness and the contested statutory criteria, it will be necessary for Respondent's Post Hearing Brief to exceed 50 pages.

6. The Petitioner's counsel has agreed to allow Respondent to exceed page limits, but no contact has yet been made with Petitioner's counsel.

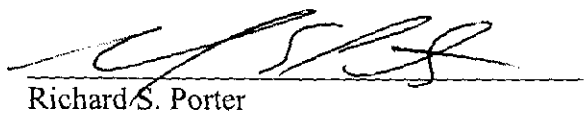
7. Therefore, Respondent requests this Board grant authority to exceed the 50 page limit in its Post Hearing Brief to approximately 75 pages.

WHEREFORE, the Petitioners herein respectfully request that the Pollution Control Board grant Petitioners authority to exceed the 50 page limit set forth by 35 Il.Adm.Code 101.302(k).

Dated: February 6, 2004

Respectfully submitted,
CITY COUNCIL OF THE CITY OF ROCHELLE, ILLINOIS,

By: HINSHAW & CULBERTSON



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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on February 6, 2004 , a copy of the foregoing was served upon:

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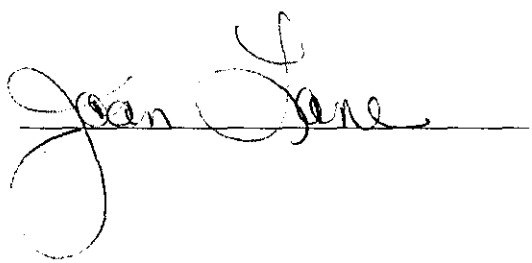
By depositing a copy thereof, enclosed in an envelope in the United States Mail at Chicago, Illinois, proper postage prepaid, before the hour of 5:00 P.M., addressed as above.



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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C. Petitioner, vs. CITY COUNCIL OF THE CITY OF ROCHELLE, ILLINOIS Respondent.	)	Case No. PCB 03-218

RESPONDENT'S POST-HEARING BRIEF

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I. INTRODUCTION

The Applicant, Rochelle Waste Disposal, L.L.C., (hereinafter "Rochelle Waste") first filed an application on January 21, 2000. That application went to a hearing in front of the City Council and was withdrawn after the hearing officer in that case issued a recommendation that there be a finding of failure to meet criteria i, ii, and vi. On November 22, 2002, Rochelle Waste Disposal re-filed its application. That application sought both horizontal and vertical expansion of an existing pollution control facility in Rochelle, Illinois. (C0001, 41). The proposed facility was designed to expand the existing 80-acre facility to a 320-acre facility and increase the elevation of the current facility by 84 feet. (*Id.*) The proposed facility is designed to receive ten times more waste than the current facility. (C0001, 103).

The proposed facility is to be located within the corporate limits of Rochelle, Illinois, but the Village of Creston, Illinois is located very near the site. The site is physically bounded by Mulford Road, Creston Road, the Union Pacific Railroad and Locust Road. (2/25/03 Tr. 139).[1] The current facility mainly serves Ogle County, and also serves some of the waste from the surrounding counties of Lee, Kane, DuPage and Winnebago. (C0001, 133). The service area for the proposed expansion is much larger, consisting of 21 counties in Northern Illinois. (2/25/03 Tr. 22). The landfill is proposed to accept an average of 2,500 tons of waste per year, but there is no yearly or daily tonnage cap, restricting waste to that amount. (3/3/03 Tr. 54).

The landfill siting hearing took place on February 24, 2003, through March 4, 2003, at which time approximately 1350 pages of testimony was taken. The application itself consisted of an eight volume, 6,122 page application, plus 11,980 pages of additional documents submitted to the City Council. (See Petitioner's Brief, p. 1). Following the siting hearing, the Hearing

[1] The City of Rochelle transcript will be cited by the date of the hearing and page number, for example, "2/24/03 Tr. ____". The IPCB transcript will be cited as "Tr. ____". The City Record will be cited according to the Index of Record as "C____".

Officer recommended approval of the application, as did the City staff. (C8155-8210; C8049-8150) However, the city staff proposed that any approval be subject to 49 conditions, which related to a variety of topics including each of the criteria that were ultimately denied by the City Council. (C8049-8150). Likewise, the Hearing Officer's recommendation was for approval only if 50 conditions were imposed. (C8155-8210). Rather than approving the application with such extensive conditions, the City Council found that criterion i, ii, iii, and vi were not met.

Initially at the April 24, 2003, meeting, the City Council found that criterion ix was not met, but it reconvened on April 28, 2003, and found that indeed criterion ix had been met. Also on April 28, 2003, the City Council motioned and voted that if for any reason the Illinois Pollution Control Board (IPCB) or an Appellate Court reversed the City's Council's decision and somehow found that the application is approved, the fifty conditions proposed by the hearing officer be imposed. (C8245).

The applicant filed a petition to review, which asserts that the City Council's findings as to criteria i, ii, iii, vi, and ix were against the manifest weight of the evidence and that its decision was fundamentally unfair. (C8218-8247). The applicant provides no basis for its assertion of fundamental unfairness within the petition. *Id.*

II. STATEMENT OF FACTS AS TO FUNDAMENTAL FAIRNESS

The applicant issued written Interrogatories, Production Requests, Requests to Admit, and took the depositions of eight different individuals, including past and present City Council members, members of the public, and the President of the Concerned Citizens of Ogle County (hereinafter "CCOC"), during discovery for the IPCB Section 40.1 hearing. The City took one deposition, John Holmstrom, who was the general counsel for the applicant. After all of this discovery, a hearing was held by the IPCB wherein the applicant examined the four City Council members who voted against at least one of the criteria; the current President of the CCOC, Frank

Bearden; a member of the public by the name of John O'Brien; and the Applicant's general counsel, John Holmstrom. The City of Rochelle called only Attorney Charles Helsten as a rebuttal witness. Pertinent portions of each of these individuals' testimony is summarized below.

A. Testimony of Donald Bubik

Ex-City Council member Donald Bubik was the first witness to testify. (Tr. 61). He was on the City Council from 2001 until May 1, 2003, at which time the new Council was sworn. *Id.* Mr. Bubik testified that after the application was filed and before a decision was rendered on April 24, 2003, he was only approached by three individuals from the public, Barb Renick, Frank Kranbuhl, and Richard Ohlinger. *Id* at page 63. Mr. Bubik did not know whether any of these individuals were members of CCOC which was an objector at the siting hearing. (Tr. 63-64). At the IPCB hearing, the Applicant's attorney did not ask what these individuals attempted to say, nor how Mr. Bubik responded. *Id.* However, on cross-examination by the City of Rochelle's counsel, **Mr. Bubik testified that when these individuals came up to him and started to express their opinion, he told them that "I was unable to discuss anything about the landfill. That was the end of our conversation."** (Tr. 81).

Rochelle's counsel attempted to ask Mr. Bubik whether or not those unsolicited statements had any impact on his decision; however, the Hearing Officer sustained the objection of the Applicant's counsel on the grounds that such would be an improper delving into the mental impressions of the decision-maker. (Tr. 82).[2] Indeed, the Hearing Officer was consistent in disallowing both sides from asking questions that delved into the mental impressions of the decision-makers, including whether or not a specific out of court statement prejudiced or impacted the decision of a City Council member. (Tr. 73-75, 77-78, 81-82, 120-121, 132-133,

[2] An offer of proof was made wherein Mr. Bubik indicated that his unsolicited out of court statements had no impact on his decision. (Tr. 82-83).

135-137). Mr. Bubik did concur that he made a statement to a newspaper reporter after the vote and stated "I voted the way the citizens wanted it to go" and "the people of this area do not want a landfill. The message I was getting was that we didn't want it." (Tr. 62). However, Mr. Bubik stated that the public voiced their opposition to the landfill (including their concerns about need, compatibility and traffic) during the hearing. (Tr. 87).

Mr. Bubik testified that on a Sunday, while the City hearings were taking place, Mr. Beardin, President of CCOC, came to the front door of his house (apparently Mr. Beardin had been in the neighborhood passing out signs) at which time he told Mr. Bubik "I have this tape I would like you to see, Touched by An Angel." (Tr. 64). He then gave it to Mr. Bubik and that was the extent of the conversation. Mr. Bubik did not watch the tape. (Tr. 64).

The only other purported communication that was brought out by the Petitioner was a newspaper article that Mr. Kenneth Roeglin gave to Mr. Bubik after the hearing ended, but before the decision was rendered. (Tr. 72). Mr. Bubik did not know whether Mr. Roeglin was a member of the CCOC. The article was put in the public record on March 28, 2003 as evidenced by the City Clerk's stamp of that date. (Tr. 88; Respondent's Ex. 1). There was no evidence admitted at hearing that the article was actually reviewed by Mr. Bubik as such would have been an improper delving into the mental impressions and deliberations of Mr. Bubik. (See Tr. 75).

Mr. Bubik testified that the attempted unsolicited statements (by the three members of the public) were no different than what he heard during the hearing and that were filed within the public comment period. (Tr. 84, 87).

B. Testimony of Ed Kissick

Mr. Kissick was, and is, a Rochelle City Council member. (Tr. 107). Mr. Kissick testified that after the application was filed he instructed his secretary to screen his calls and not to take any calls concerning the landfill after that date. (Tr. 110-111). He knows that the City

Council answered an interrogatory about how many times he was contacted after the application was filed and before the decision, indicating that Mr. Beardin attempted to contact Mr. Kissick on about half a dozen occasions; however, he actually does not remember the exact date that he received telephone calls from Mr. Beardin. (Tr. 113-116). He explicitly testified that in hindsight if his interrogatory answer indicates that he received the telephone calls after the application was filed and before decision such answer may be in error because he does not actually know the dates that he received the telephone calls. (Tr. 119-120).

Regardless, whenever Mr. Beardin would call (even if it was before the application was refiled in November of 2002) Mr. Kissick would tell Mr. Beardin that he **was not at liberty to discuss the application. (Tr. 117-118).** He does recall that none of those attempted conversations took place during the hearing. (Tr. 118). Mr. Beardin never offered Mr. Kissick the "Touched By An Angel" videotape, and Mr. Kissick never spoke to anybody about that videotape. (Tr. 118).

At no time did Mr. Kissick ever voice to the CCOC that he was going to vote one way or the other. (Tr. 121). At no time did Mr. Kissick ever agree to vote one way or the other in exchange for endorsement by the CCOC. (Tr. 121-122). As to his statements in the newspaper article after the vote, wherein he indicated that it was his job to listen to the public, he explained that he meant that his job was to listen to all of the pros and cons and to keep an open mind. (Tr. 123). He also stated that at the hearing itself the public voiced its opposition. (Tr. 123). **At no time did Mr. Kissick consider anything he heard outside of the hearing process as evidence at the hearing.** (Tr. 123-124).[3]

[3] In an offer of proof, Mr. Kissick testified that he kept an open mind throughout the siting process and did his best to impartially weigh the evidence. (Tr. 120, 121).

C. Testimony of Wendell "Pal" Colwill

At the time of the vote, Mr. Colwill was a member of the City Council for the City of Rochelle and he continues to be on that council. (Tr. 127). Mr. Colwill testified that he did not recall Mr. Beardin contacting him after the application was filed. (Tr. 128). When Mr. Beardin attempted to talk to him, Mr. Colwill **told him that he could not speak about the application because he was on the siting committee.** (Tr. 129). Mr. Colwill explained that all kinds of people attempted to talk to him about the application because he was campaigning for Mayor and people would ask him where he stood on the landfill. (Tr. 130). **He would tell the people that he could not discuss or comment about the landfill application because he was on the siting committee.** (Tr. 130). At no time did Mr. Beardin offer him a copy of a videotape of the television show "Touched By An Angel". **He did not believe that any of the statements (made by members or the public outside for the hearing) were evidence.** (Tr. 133-134).[4]

D. Testimony of Alan Hann

Mr. Hann is an ex-board member who voted on the application. (Tr. 137-138). There was no evidence that anyone attempted to speak to Mr. Hann about the application outside of the hearing. (Tr. 137-143). Mr. Hann testified that he received the unsolicited form letters which were marked as Petitioner's Exhibit No. 4. (Tr. 138). He did not read all of those letters. (Tr. 138). He received those letters after the application was filed, and before, during and after the hearing. (Tr. 139). He did not know whether the senders of the letters were members of the CCOC. (Tr. 139-140). **He did not consider those letters sent to his house to be evidence at the hearing.** (Tr. 142).

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[4] In an offer of proof Mr. Colwill testified that no statement made to him out of the hearing influenced his decision. (Tr. 132). In another offer of proof he testified that his decision was based on the Section 39.2 criteria and nothing outside of the record. (Tr. 135-137).

Mr. Hann also was offered a videotape of the "Touched By An Angel" program by Frank Beardin, but he did not take it. (Tr. 140, 142). Mr. Beardin did not say anything about the television program or the landfill hearings. (Tr. 141). He never watched the television program and never took the tape from Mr. Beardin. (Tr. 143).

E. Testimony of Kenneth Roeglin

Mr. Roeglin is a member of the public who was called by the Petitioner. He was not, and has never been, a member of the CCOC. (Tr. 95). He did give a Bradenton, Florida newspaper article to Donald Bubik sometime between March 25, 2003 and April 24, 2003. (Tr. 96). Mr. Bubik was the only City Council member to whom Mr. Roeglin recalled handing the article. (Tr. 96). Mr. Roeglin simply gave it to Mr. Bubik and turned around and left. (Tr. 104). He filed the newspaper article with the City Clerk for the City of Rochelle on March 28, 2003. (Tr. 104-105); Respondent's Ex. 1. At no time did Mr. Bubik discuss the landfill with Mr. Roeglin. (Tr. 106). At no time did a City Council member indicate his opinion regarding the application. (Tr. 104). **At no time did any City Council member discuss the application with him after it was filed on November 22, 2002.** (Tr. 104).

F. Testimony of John O'Brien

Mr. O'Brien is a member of the public who was called by the applicant. (Tr. 145). He believes he expressed his opinion after the application was filed and before the City Council rendered its decision to City Council members Colwill, Bubik and possibly Hann. (Tr. 145). He telephoned Mr. Bubik to offer to allow him to post his election signs in Mr. O'Brien's business window. (Tr. 153-54). During that conversation, he informed Mr. Bubik of his opinions regarding the landfill, but at no time did Mr. Bubik ever solicit those opinions. (Tr. 154). At no time did Mr. Bubik ever offer his own opinions regarding the landfill application. (Tr. 154). At

no time did Mr. Bubik ever indicate he had made up his mind in any way. (Tr. 154). As a matter of fact, Mr. Bubik did not respond at all when Mr. O'Brien voiced his opinion. (Tr. 154).

Though Mr. O'Brien made a statement to Mr. Bubik that Bubik could find himself in the back of the church, he was not in any way trying to threaten Mr. Bubik and, instead, was merely trying to impress upon him that he understood that Mr. Bubik had a difficult decision to make and that if he had to find in favor of the landfill it might be unpopular. (Tr. 155). He is not even a member of the same church as Mr. Bubik. (Tr. 155). To his knowledge, Mr. Bubik did not believe he was being threatened. (Tr. 155).

The unsolicited comments he made to city council members were no different than what Mr. O'Brien heard made by other members of the public at the hearing. (Tr. 156). Mr. O'Brien claimed that he made the comments to his public officials because "we feel as though we're living in a free country with the ability for free speech." (Tr. 157).

G. Testimony of Frank Beardin

Mr. Beardin is the current president of the CCOC. The CCOC participated in the siting hearing in front of the City Council. (Tr. 172). Mr. Beardin was present (apparently at a public meeting) when Charles Helsten informed the City Council members that if the public approached them to ask questions about the siting application that the City Council should not communicate with them concerning the pending application. (Tr. 173). Mr. Beardin testified that he did not recall contacting Edward Kissick after the application was filed. (Tr. 174).

The Petitioner's counsel inquired of Mr. Beardin about the content of various letters that he sent to the editor of the local newspaper. (Tr. 175-183). Counsel for City of Rochelle objected to this entire line of questioning on the grounds that it was irrelevant, as there was no evidence that any of the City Council members reviewed the letters to the editor or that they were ever sent to the City Council members. (Tr. 175-183). Mr. Beardin explained that a

majority of the letters were written in response to the letters to the editor which were issued by the Applicant, Rochelle Waste Disposal. (Tr. 175).

Mr. Beardin admitted that he did approach Mr. Bubik and give him a videotape. (Tr. 184). The Petitioner's counsel attempted to ask Mr. Beardin about the content of the videotape; however, the Hearing Officer appropriately sustained the City of Rochelle's objection as to relevancy because there was no evidence that any City Council member ever viewed the videotape or the episode. (Tr. 186). (In an offer of proof, the attorney for the applicant actually showed substantial portions of that episode of "Touched By An Angel" despite the fact that the testimony was clear that no City Council member ever saw the episode). The videotape does not even involve a landfill. (Tr. 202). To his knowledge no City Council member ever based his decision on the episode of "Touched By An Angel." (Tr. 202).

Mr. Beardin again reiterated that he had no recollection of contacting Mr. Kissick after the application was filed. (Tr. 197-198). He also did not recall ever attempting to contact Mr. Colwill. (Tr. 198). He explained that the CCOC did have form letters available for members of the public to send to their council members, if they so desired. (Tr. 199).

Mr. Beardin has no recollection of ever attempting to contact the City Council members after the application was filed and before a decision was made. (Tr. 201). **He does recall City Council members indicating that they could not discuss the application. (Tr. 201).** At no time did Mr. Colwill or Mr. Kissick ever indicate to anyone at the CCOC that they would vote against the landfill. *Id.*

H. Testimony of John Holmstrom

Mr. Holmstrom was the general counsel for one of the partners of Rochelle Waste. (Tr. 158). He admitted that he received a telephone call from Charles Helsten before the City Council met on April 28, 2003. (Tr. 158). He also admitted that Mr. Helsten, who represented

the staff for the City of Rochelle, informed Mr. Holmstrom that he intended to appear before the Rochelle City Council to request that the council take some action to incorporate the hearing officer's proposed conditions, so that if the City Council decision was reversed on appeal, the conditions which were recommended would be incorporated. (Tr. 159). Mr. Holmstrom also recalled that Mr. Helsten was concerned about the finding on criterion ix and would urge the Council to find that that the criterion had been met. (Tr. 159). Mr. Holmstrom's recollection is that Mr. Helsten informed him that "nothing would happen that evening, that if anything it would be necessary to have a special hearing on Wednesday." (Tr. 159). However, at his deposition, Mr. Holmstrom testified that he did not recall if Mr. Helsten simply said that he did not know if the City Council would take action that evening. (Tr. 160). He did know that consideration of criterion ix and the imposition of conditions if there was a reversal were going to be topics of conversation that evening. (Tr. 161).

He informed the attorney that handled the siting hearing for the Applicant, Attorney Michael O'Brien, that the issues were going to be topics at the meeting that night. (Tr. 161). Mr. Holmstrom himself had no scheduling conflicts that would have kept him from being able to attend that evening. (Tr. 161). Mr. Tom Hilbert, a representative of the applicant, was present that evening. (Tr. 161). At no time did Mr. Holmstrom voice any objection to Mr. Helsten about the meeting taking place concerning criterion ix or the conditions. (Tr. 162). He never informed Mr. Helsten he could not make it to the meeting, and indeed he could have made it if he had desired. (Tr. 162). Mr. Holmstrom also admitted that he was aware there was going to be a city council meeting that evening, even before Mr. Helsten telephoned. (Tr. 163).

Mr. Holmstrom also admitted he had no objection to the City Council finding that the application met criterion ix and that his only reason for now bringing up the issue is because he

did not feel there was any basis for the original finding that the criterion was not met. (Tr. 164). He also admitted that at the Section 39.2 hearing in front of the City Council, "recharge areas" were topics of discussion and he does not know if the recharge areas that were discussed at that hearing were confused by the City Council with a regulated recharge area as a referenced in criterion ix. (Tr. 165-166).

Mr. Holmstrom also admitted that his company is perfectly able and willing to comply with the conditions, had approval been granted subjected to those conditions. (Tr. 164). Mr. Holmstrom also admitted that at deposition he testified that as to the imposition of the conditions, "in a practical sense, it was not prejudicial." (Tr. 167) (emphasis added).

I. Testimony of Charles F. Helsten

Mr. Helsten is partner at the law firm of Hinshaw & Culbertson LLP and represented staff of the City of Rochelle. (Tr. 231). Mr. Helsten testified that on April 25, 2003, he contacted City staff and indicated that he would like to approach the City Council in a public meeting (so that there were no *ex parte* problems) and point out to them that there was only one regulated recharge zone in the State of Illinois as a matter of law, which is located in Tazwell County outside East Peoria and, therefore, the decision of the City Council on criterion ix was not supported by the evidence. (Tr. 232). In the interest of caution, he also wanted to ask the City Council to consider adopting the conditions in the event there was a reversal. (Tr. 232). He asked the City staff to put both of those items on the agenda, and to send notice to the parties. (Tr. 233).

On Monday, April 28, 2003, Mr. Helsten was in the Chicago area when he called the City staff by mobile telephone and learned that the matters were on the agenda but separate written notices had not been sent to the parties and participants, including Rochelle Waste and the CCOC. (Tr. 233). Mr. Helsten wanted to be sure that the applicant and objectors had actual

notice of the meeting, and, therefore, he telephoned the applicant's general counsel Mr. John Holmstrom. (Tr. 234). (Mr. Helsten had Mr. Holmstrom's phone number memorized, but did not have Mr. O'Brien's phone number memorized). (Tr. 234). Mr. Helsten informed Mr. Holmstrom of the matters that would be discussed at the City Council meeting that evening. (Tr. 234). Mr. Helsten informed Mr. Holmstrom, "I'm not sure that the City Council will even entertain it tonight. They may entertain it, they may not." (Tr. 234-35). Mr. Helsten told Mr. Holmstrom that it was possible that the City Council will continue the matter until Wednesday night in light of the notice issues. (Tr. 235). However, Mr. Helsten also told Mr. Holmstrom that the council would have to take action before May 1, 2003 as a new City Council, which did not hear the siting application, would be empaneled at that time. (Tr. 235). At no time did Mr. Helsten inform Mr. Holmstrom that no action would be taken on April 28, 2003. (Tr. 235). To the contrary, Mr. Helsten informed him that he was going in front of the City Council specifically to put the issues before the Council and whether they considered them or not was another matter. (Tr. 235). He then asked Mr. Holmstrom to contact Mr. O'Brien (Tr. 235). Mr. Helsten then provided notice to the objectors' counsel as well. (Tr. 235-36). The applicant attended the meeting through its agent, Tom Hilbert. (Tr. 236).

J. Testimony of Thomas Hilbert

Mr. Hilbert testified that he was employed by the applicant. (Tr. 244). He admitted that he attended the April 28, 2003 City Council meeting, wherein criterion ix and the imposition of conditions were discussed. (Tr. 244).

III. STATEMENT OF FACTS AS TO CRITERIA

A. Criterion i

With respect to criterion i, the Applicant provided the testimony of Ms. Smith. Ms. Smith prepared the need report for the application, and she concluded that the facility was

necessary to meet the waste needs of the service area. (2/25/03 Tr. 34). Ms. Smith based her conclusion on the following factors: 1) that the existing site is projected to be depleted by 2006; 2) that a capacity shortfall will exist in the service area; 3) that the expansion will create an additional 20 years of capacity to Ogle County, 4) that alternate landfills will be more costly for the City of Rochelle; and 5) that the expansion will provide economic benefits to Ogle County. Id. Ms. Smith concluded that there would be as much as 123 million tons of waste in the service area that would need to be disposed of, assuming a zero percent recycling rate. (*Id.* at 57).

On cross-examination, Ms. Smith admitted that she had been paid $35,000 to $40,000 to prepare her needs report and testify on behalf of the Applicant. (2/25/03 Tr. 43). She also admitted that out of the thirteen needs reports she has prepared for landfills, she has always found that a need existed. (*Id.* at 45). Ms. Smith also admitted on cross-examination that a nearby facility, Onyx, had capacity for an additional 16 years and is currently receiving waste from Ogle County. (*Id.* at 64).

Ms. Smith's conclusion that a need existed was also based on the premise that landfill capacity in Illinois is decreasing, but she admitted that landfill capacity in Region 1, where Ogle County is located, actually increased from 2001 to 2002. (2/25/03 Tr. 68). Her conclusion also assumed that no additional capacity would become available to the service area, but she admitted that siting approval had been granted to facilities in the service area, including a facilities in Will County and Streator and Bartlette (*Id.* at 72, 96-97, 98, 123). Furthermore, she admitted that Livingston Landfill, which serves approximately 55% of the proposed facility's service area has an application for expansion pending, as does Kankakee. (*Id.* at 103, 126).

In her testimony, Ms. Smith indicated that it is typically more expensive to transfer waste out of a county than rely on in-county disposal; however, she admitted that the proposed facility

will rely on approximately 80% of its waste coming from counties other than Ogle county, including 60% coming from the Chicago Metro area. (2/25/03 Tr. 99-100). Ms. Smith testified to the fact that the proposed facility would be beneficial economically to Ogle County and would be good for competition. (*Id.* at 76-78).

B. Criterion ii

Four witnesses testified regarding criterion ii, three on behalf of the applicant and one on behalf of CCOC. The first witness to testify regarding criterion ii was Mr. Daniel Zinnen, a licensed professional engineer and land surveyor. (2/25/03 Tr. 132-33). Mr. Zinnen explained that he believed the landfill was designed, located and proposed to be operated to protect the public health safety and welfare based on location standards, engineering and environmental control systems, operating procedures, closure and post-closure plans and monitoring of the site. (*Id.* at 141-42).

Mr. Zinnen testified that the liner was engineered to protect the public health, safety and welfare because the liner was designed to prevent leachate from leaking out of the landfill. (2/25/03 Tr. 147). The liner to be installed on the site was to be a three foot liner constructed of silt clay till soil underlying the site, overlined by 60 mils HDPE membrane. (*Id.* at 147-48, 155). Mr. Zinnen stated that although he had experience with HDPE for approximately 15 to 16 years, he did not know what the typical warranty on those types of liners typically was. (*Id.* at199-200). Mr. Zinnen admitted that that HDPE can be compromised by certain chemicals under certain conditions. (*Id.* at 202-205).

After testifying about the liner system, Mr. Zinnen testified about the leachate collection system beneath the bottom of the landfill. (2/25/03 Tr. 162). The purpose of that system is to collect leachate percolated through the waste material inside the landfill. (*Id.* at 162-63). The liquid leachate from the collection system is sent to collection sumps, which are then pumped

into large storage tanks in the southwest corner of the facility. (*Id.* at 164). Mr. Zinnen testified that the leachate collection pipe is surrounded by a granular layer and then wrapped in a geotextile, which Mr. Zinnen admitted could become clogged. (*Id.* at 210-11). Despite such anticipated clogging, Mr. Zinnen did not determine if the geotextile could be effectively unclogged and there was nothing in place to monitor the percentage of clogging in any particular location at any given time. (*Id.* at 211-212). Mr. Zinnen admitted that the same would be true of the geotextile proposed to be installed in the final cover. (*Id.* at 215). Mr. Zinnen testified that the leachate collection holding tank will hold 126,000 gallons of leachate, which Mr. Zinnen testified was more than adequate, but he admitted that he did not know the current leachate production at the facility and his calculations did not take into account leachate from cover runoff. (*Id.* at 219-23).

Mr. Zinnen next testified regarding the final cover system. (2/25/03 Tr. 168). According to Mr. Zinnen, the purpose of that system is to keep water from seeping into the landfill and keeping leachates from escaping from the top of the landfill. (*Id.)* The cover consists a of one foot thick compacted soil liner and a 40 mil LLPDE membrane. (*Id.* at 169-70). On top of the membrane is a one foot sand drainage blanket and perforated tile pipes that collect water. (*Id.* at 170).

Mr. Zinnen also testified that the site is equipped with a gas management system that works in conjunction with the final cover and bottom liner systems and is designed to prevent the release of landfill gas. (2/25/03 Tr. 171-72). The main components of the landfill gas system are a series of extraction wells in the disposal unit itself. (*Id.* at 172). Mr. Zinnen also testified that the landfill is equipped with a storm water management system. (*Id.* at 173-74).

Mr. Zinnen also provided testimony regarding the operating plan and the post-closure care plan. (2/25/03 Tr. 178-82). Specifically, he explained that the facility has a litter control plan, dust control plan and noise control plan. (*Id.* at 178). He also testified that the hours of operation for the facility were proposed to be 4:30 a.m. to 7 p.m. on weekdays and 4:30 a.m. to 12:00 p.m. on Saturdays. (*Id.* at 178-89). After providing his testimony, Mr. Zinnen concluded that criterion ii was met based on all of the features he described. (*Id.* at 182-83).

On cross-examination, Mr. Zinnen admitted that waste located on the site would settle and compact, but he did not know what amount of deformation the recompacted clay in the final cover could withstand before it cracked. (2/25/03 Tr. 228). Mr. Zinnen also admitted that the model he used improperly calculated the slope for the final cover because Mr. Zinnen used a 33% figure for the slope of the cover even though no part of the cover has a 33% slope. (*Id.* at 231-33). Modeling the cover at the appropriate slope increased the depth of water sitting on top of the final cover and increase the amount of leakage into the landfill. (*Id.* at 291). Although Mr. Zinnen did create a new model using a 25% slope instead of the 33% slope, Mr. Zinnen admitted that only a fraction of the facility would be at a 25% slope. (2/26/03 Tr. 185). Using the minimum design slope for the facility, which is 6%, resulted in 4.6 times as much water percolating through the drainage layer. (*Id.* at 186).

Mr. Zinnen explained that the landfill design calls for exhumation of Unit 1; however, Mr. Zinnen admitted that the vertical extent of leachate seepage into the underlying soils is unknown and that there is no method identified in the application for determining whether soil below the unit has been impacted by leachate. (2/25/03 Tr. 244). Furthermore, Mr. Zinnen testified that his conclusion that criterion ii was met was based on the exhumation of Unit 1. (*Id.* at 267). However, the IEPA has to provide a permit before that exhumation can take place. (*Id.*)

Mr. Zinnen agreed that his opinion that the facility is designed to protect the public health, safety and welfare is reliant on the functioning of the groundwater monitoring system in detecting leaks. (*Id.* at 212).

The next witness to testify regarding criterion ii was Clyde Gelderloos, who is the owner of Rochelle Disposal Service. (2/26/03 Tr. 9). He testified regarding the operating plan of the facility. (*Id.* at 36). He testified that the facility has a litter control program and order control plan. (*Id.*). He also testified that the current facility was equipped with a water wagon to control dust, which would be increased, and a sweeper would be used to help control dust as well. (*Id.* at 37-38). He stated that there would not be a problem with vectors because rodents "don't do well in modern landfills" and because birds would be controlled by the daily cover. (*Id.* at 38). According to Mr. Gelderloos, the vegetation along Mulford Road serves as the facility's noise control plan. (*Id.* at 39). The hours of operation of the current facility are 6:00 a.m. to 4:00 p.m. on weekdays, and 11:00 a.m. to 3:30 p.m. on Saturdays, but the new facility is requesting to have hours of operation from 4:30 a.m. to 7:00 p.m. weekdays and 4:30 a.m. to 3:00 p.m. on Saturdays. (*Id.* at 39-40). Mr. Gelderloos has closed the current facility due to inclement weather in the past, but there are no formal guidelines for doing so. (*Id.* at 55).

According to Mr. Gelderloos, the facility also has two types of load checking programs, an accident prevention plan and a spill control plan. (2/26/03 Tr. 40-41). Based on the load checking program, less than a dozen loads have been turned away because of improper contents. (*Id.* at 46). The only safety equipment required of employees are safety toe boots, hard hats and safety glasses. (*Id.* at 42). Mr. Gelderloos testified that there are fire extinguishers and fire-suppressing materials on the site. (*Id.* at 42-43). He also testified that the current facility has experienced a fire in the past. (*Id.* at 43). According to the facility's spill control plan, when a

spill occurs, the area where the spill occurred should be immediately roped off. (*Id.* at 43). Mr. Gelderloos concluded that the facility was proposed to be operated so that the public health, safety and welfare would be protected. (*Id.* at 44).

During his testimony, Mr. Gelderloos admitted that the Rochelle facility had many violations or deficiencies in its past. (2/26/03 Tr. 23). Many of those incidents related to blowing litter and an inadequate daily cover. (*Id.* at 26). Mr. Gelderloos also testified about other operating problems that had occurred, including repeated failures to cover exhumed waste, leachate spills and seepages, receiving unpermitted solids and having waste in standing water (*Id.* at 52-53, 64-67). Based on environmental deficiencies occurring while Mr. Gelderloos was running the facility, Mr. Gelderloos received several administrative citations and was required to pay fines. (*Id.* at 67-68).

The next witness to testify regarding criterion ii was Steven Stanford, a hydrogeologist. (3/3/04 Tr. 56). Mr. Stanford testified that a hydrogeologic investigation is necessary for a landfill in order to assess the performance of the proposed landfill with regard to potential impacts on groundwater quality. (*Id.* at 59). Based on his hydrogeologic investigation, Mr. Stanford concluded that the site was good for a proposed landfill and stated that the site characterization of the facility was the most extensive he had ever seen for a landfill. (*Id.* at 79-81). On cross-examination, Mr. Stanford admitted that he has only been the lead geologist on one other landfill. (*Id.* at 140-41).

Mr. Stanford reached the conclusion that the facility is located to protect the public health, safety and welfare from a geologic and hydrogeologic standpoint because: 1) the site is underlined by thick and continuous depositions in the Tiskilwa formation, which serves as an aquitard and separates the based of the landfill and the top of the uppermost aquifer, 2) the

uppermost aquifer is separated from the sandstone aquifer by the lower dolomite aquitard or the fine grain fills in the valley, 3) the development of the landfill will reduce the already low rates of vertical recharge and further slow the rates of groundwater movement, and 4) the landfill is separated form the sandstone aquifer by several confining units, which can be monitored before potential releases reach the sandstone aquifer. (3/3/03 Tr. 116-17).

Mr. Stanford performed a groundwater impact assessment on the site, in which he stated he used "conservative assumptions. (3/3/03 Tr. 118, 120-24). Based on that assessment, Mr. Stanford found no impact on the groundwater 100 feet from the waste boundary 100 years after closure of the facility. (*Id.* at 124-35). Mr. Stanford also performed a sensitivity analysis and found that all of the water-bearing units will comply with the required groundwater protection standards. (*Id.* at 127). Next, Mr. Stanford explained the groundwater monitoring plan, which is designed to have monitoring and opinioned that the proposed groundwater monitoring plan would provide for reliable protection of potential releases from the proposed expansion. (*Id.* at 130-31).

On cross-examination, Mr. Stanford admitted that he had previously only testified at one siting hearing and has only been the responsible geologist for one other landfill. (3/3/03 Tr. 140-41). He also admitted that he had only performed three groundwater impact assessments on his own. (*Id.* at 242-43). He also admitted that in performing his groundwater impact assessment, he assumed only two pinhole defects in the HDPE per acre, even though Mr. Zinnen assumed twice as many in his model. (*Id.* at 150). Mr. Stanford admitted that changing the inputs to the groundwater impact model changes the results. (*Id.* at 151). Mr. Stanford also admitted that he did not consider any leaks in the clay liner when he performed the groundwater impact assessment. (*Id.* at 151). Furthermore, Mr. Stanford admitted that he did not determine the

permeability of the Tiskilwa layer through which the contaminants would move but instead simply assumed that contaminants would move at the same speed as they did in the liner system. (*Id.* at 152-53).

In performing his groundwater impact analysis, Mr. Stanford admitted that he did not take into account an initial concentration of a measured constituent as a background level and instead assumed all concentrations to be zero. (3/3/03 Tr. 154-55). Factoring in the actual background level of ammonia, instead of assuming a zero concentration level, resulted in a concentration level of ammonia higher than what is allowable based on applicable groundwater quality standards. (*Id.* at 154).

Mr. Stanford admitted that he was not familiar with the details of the leachate wells located in Unit 1 even though those wells could be relevant to the conditions and configurations of that unit. (3/3/03 Tr. 197-98). Mr. Stanford also admitted that he did not know the actual potentiometric surface of flow direction at the site below the upper portions of the site. (*Id.* at 198-99). Because the data was insufficient to determine the flow in the St. Peter layer, a potentiometric surface map could not be created. (*Id.* at 199).

Despite Mr. Stanford's opinion that the movement of contaminants was only a fraction of an inch per year, he agreed that a well located approximately 100 feet away from the waste boundary may have been impacted by leachate withdrawals in Unit 1. (3/3/03 Tr. 229). In fact, that well was found to be full of methane, which Mr. Stanford concluded could only reasonably come from Unit 1. (*Id.*)

The final witness to testify regarding criterion ii was Charles Norris, who testified on behalf of CCOC. Mr. Norris is a licensed professional geologist, who has worked in the area of geology for 30 years and specializes in hydrogeology. (3/4/03 Tr. 36, 39). Mr. Norris has

bachelor's and master's degrees in geology and has completed all of the requirements for a doctorate except for his dissertation. (*Id.* at 39). He is a member of a number of professional associations, including the National Groundwater Association and the Illinois Groundwater Association. (*Id.)* Mr. Norris has a great deal of experience in reviewing landfill applications and has reviewed approximately eleven of them. (*Id.* at 41-42).

Mr. Norris readily admitted that he has not specifically used the "Migrate" model to model groundwater impact; however, he has worked with analogous programs and has worked with computer modeling for many years. (3/4/03 Tr. 40-41). He has used the "Help" model, which was also used by the Applicant to model the site. (*Id.* at 41). Based on his review of the Applicant's groundwater model, he concluded that "the calculations made in the GIA demonstrate that this facility built on this site in this geologic and hydrogeologic setting will not always meet the performance criteria." (*Id.* at 55). He found this to be the case because the amount of ammonia in the intra-well till sand aquifer will exceed the applicable groundwater quality standards when the background concentration is calculated into the final concentration. (*Id.* at 56). Mr. Norris found that it was necessary to include the background concentration for ammonia into the model to achieve the correct final concentration of that substance. (*Id.)*

Mr. Norris also found that the groundwater impact model was inappropriate because it did not fully incorporate site-specific data regarding stratigraphy and gradients. (3/4/03 Tr. 59). According to Mr. Norris, instead of using the actual permeabilities contained in the zones below the site, the Applicant simply substituted a flow number that he calculated representing leakage from the bottom of the landfill and assumed water would continue to move down at the same rate through the entire system. (*Id.* at 60). Mr. Norris explained that it was necessary for the Applicant to model the site using a three-dimensional groundwater model to determine the

magnitude of recharge and what flow conditions will exist after the site is in place. (*Id.* at 65-66). Because of its deficiencies, Mr. Norris concluded that the groundwater impact model assessment did not accurately model the existing site conditions. (*Id.* at 66).

Mr. Norris also disagreed with Mr. Stanford that the Tiskilwa till was an impermeable layer because he found groundwater contained in an interceptor trench on the facility as well as a monitoring well in Unit 1, were impacted by contaminants. (3/4/03 Tr. 70-71, 74). According to Mr. Stanford, the fact that there were impacts in the interceptor trench and monitoring well establishes that the Tiskilwa till was improperly characterized in the Applicant. (*Id.* at 77). In fact, Mr. Norris disagreed with the Applicant's characterization of the Tiskilwa till as being a major geologic component that enhances the protection of the public health, safety and welfare because the Tiskilwa is not capable of retarding the flow to the extent that the Applicant suggested. (*Id.* at 77-78).

Mr. Norris also explained that the flow system under the site is much more complex than the Applicant appreciated and required more investigation. (3/4/03 Tr. 85-86). Specifically, Mr. Norris concluded that the flow systems were more interconnected that the Application showed in terms of vertical flow and efficiency of vertical connections. (*Id.* at 90). He also concluded that it was inappropriate for the Applicant to use an average vertical gradient for the site because multiple changing gradients actually exist. (*Id.* at 90-92). According to Mr. Norris, the presence of the changing gradients establishes that the conceptual model and interpretation of the geology and hydrogeology contained in the application is "absolutely contradicted." (*Id.* at 92-93). Based on the actual hydrogeology of the site, Mr. Norris concluded that travel times through the Tiskilwa till are much quicker than Mr. Stanford calculated. (*Id.* at 153).

Mr. Norris also suggested that the modeling performed by the Mr. Stanford was not conservative, in part because the sand lens was modeled as being continuous. (3/4/03 Tr. 211). Mr. Norris also had problems with the data set at the site and cross sections, potentiometric and contour maps because he thought they contained inaccurate information. (*Id.* at 98-102). He further found other irregularities and problems with the Application, including its omission of important leachate levels. (*Id.* at 103-11). Mr. Norris explained that while some of those data irregularities were not very significant, others were critical and presented an inaccurate picture of the site. (*Id.* at 112). Finally, Mr. Norris concluded that the monitoring program proposed by the Applicant does not adequately monitor potential escapes of contaminants from the proposed facility. (*Id.* at 113).

C. Criterion iii

With respect to criterion iii, two witnesses testified, both in support of the Application. The first witness to testify was Christopher Lannert, a landscape architect and urban planner. (2/24/03 Tr. 65). Mr. Lannert concluded that the proposed facility is compatible with the character of the surrounding area because: 1) more than 80% of the surrounding land use is either agricultural or open space, 2) the nearest residential unit is over 520 feet from the boundaries of the site, 3) the railroad to the north and surrounding roadways provide setback and buffer, 4) the is located in the I-2 district, which allows landfills as a special use; and 5) the facility is adequately screened. (*Id.* at 84-85). One of the screens Mr. Lannert relied upon to reach his conclusion that the facility was compatible with the surrounding area was a screen on the east of the site, which is planned to be constructed on land that is not owned or controlled by the Applicant. (*Id.* at 110-12).

On cross-examination, Mr. Lannert admitted that out of 35 landfill siting hearings in which he has testified, in 34 of those hearings, he has testified that the facility was compatible

with the surrounding area. (2/24/03 Tr. 86). He also admitted that he was hoping to do the landscaping for the site if it was sited. (*Id.* at 97-98).

Mr. Lannert also admitted that while the while the area immediately surrounding the site is industrial and open land, approximately 100 residential properties within a mile of the facility, which was the distance that he used to examine the compatibility of the landfill. (2/24/03 Tr. 93, 101). Mr. Lannert provided photos to the City Council depicting what the proposed facility would look like after development, but he admitted that he did not provide photos from the backyards of any homes within a mile of the facility and did not provide a photo to the City Council from the home nearest the landfill. (*Id.* at 88, 92, 94).

Next, Peter Poletti testified on behalf of the Applicant regarding criterion iii. Mr. Poletti is a real estate appraiser. (2/24/03 Tr. 120). Mr. Poletti concluded that the facility was so located to minimize any effect on the value of surrounding property. (*Id.* at 144). In determining whether there was a negative effect on the value of surrounding property, Mr. Poletti created two groups of properties, a target group, consisting of homes located within a one and a half mile radius from the site, including those located in the Village of Creston, and a control group, consisting of homes, located beyond one and a half miles, including homes mainly in Rochelle. (*Id.* at 128-29). Thereafter, Mr. Poletti excluded many various properties, including older homes, homes on large lots, outlots, bi-levels, tri-levels and split-levels, and was left with 10 sales in the target area and 80 sales in the control area. (*Id.* at 134-36). After performing further analysis and removing two more properties from the target area based on their size, Mr. Poletti concluded that price per square foot in the target area was $77.19, and the price per square foot in the target area was $78.59 per square foot. (*Id.* at 137-38). Based on those prices, Mr. Poletti concluded that there "was no statistical difference between those two averages." (*Id.* at 138).

Mr. Poletti admitted that he did not examine the lot sizes to determine if that made a difference in the analysis. (2/24/03 Tr. 161). Mr. Poletti also did not perform any studies or research regarding what percentage of their asking price homeowners received in the control area versus the target area. (*Id.* at 158).

Mr. Poletti also performed an appreciation rate analysis comparing the target group and control group properties. (2/24/03 Tr. 132). Using the prices from 27 properties in the control group and 4 properties in the target group, Mr. Poletti found that the control group houses appreciated at a rate of 4.2%, and the target group houses appreciated at a 7.2% rate. (*Id.*). On cross-examination, Mr. Poletti admitted that because the study analyzed so few properties in the target group, no real conclusion could be drawn from that study. (*Id.* at 167).

On cross-examination, Mr. Poletti admitted that out of the twenty to twenty-five times, he has testified in a landfill siting hearing, he has always found that a facility is located to minimize the effect on the value of the surrounding property. (2/24/03 Tr. 146). Mr. Poletti stated that he did not believe that the vast expansion of the facility would adversely affect property values and cited Livingston Landfill as an example of a large facility where property values had not dropped significantly, but he admitted that there was not a village the size of Creston in close proximity to Livingston Landfill. (*Id.* at 164-65).

Mr. Poletti further admitted that the house sale prices in Creston, which is very near the landfill, are lower than houses farther from the landfill even though Creston residents have a higher income. (2/24/03 Tr. 152, 158). Mr. Poletti provided possible reasons for the low prices aside from the location of the landfill, but he did not conduct any studies or perform any research to determine why that was the case. (*Id.* at 153-58).

Based on appreciation statistics, Mr. Poletti agreed that the two most recent sales in the target area had the lowest rate of appreciation. (2/24/03 Tr. 167). He also admitted that a review of the appreciation rates of the homes in the target area revealed that each sale had a lower appreciation than the last. (*Id.* at 168-69). Furthermore, he admitted that target area sale prices for houses sold since the first application for expansion was filed were significantly lower than the average. (*Id.* at 172).

D. Criterion vi

The only witness to testify regarding criterion vi was Michael Werthman, a traffic and transportation engineer. (2/24/03 Tr. 182). Mr. Werthman concluded that the traffic patterns to and from the facility have been designed to minimize the impact on the existing traffic flows. (*Id.* at 211). Mr. Werthman admitted that his conclusion was based on an assumption that there would be a widening and improvement of Mulford Road and 38, allowing for a left turn and right turn lane, which was planned by the IDOT but not yet existing at the time of the siting hearing. (*Id.* at 248).

Mr. Werthman explained that he reached his conclusion based on a traffic study he performed in which he analyzed traffic based on the facility taking 3,500 tons of garbage each day. (2/24/03 Tr. 199, 220). Based on its receipt of 3,500 tons of garbage each day, the landfill would generate 221 inbound trips and 221 outbound trips, including 19 to 25 outbound and inbound trips each during the morning and evening peak hours. (*Id.* at 199-200). Mr. Werthman admitted that he relied on the applicant to supply him with information regarding the number of trucks exiting and leaving the facility, the traffic patterns of those trucks, the number of employees working at the proposed facility and the peak hour distribution of traffic to the facility. (*Id.* at 223-25, 244).

Mr. Werthman also admitted that he did not consider construction traffic on the site even though there will be additional truck traffic due to construction. (2/24/03 Tr. 225-26, 250). Mr. Werthman admitted that he did not know if any of his studies were done in snowy or rainy conditions even though he is aware that traffic conditions usually degrade with snow and/or rain. (*Id.* at 215). He also admitted that he did not specifically calculate additional truck traffic that will result from the intermodal facility that is being developed in Rochelle. (*Id.* at 216-17).

Mr. Werthman explained that the worst movement of traffic currently at the intersection of Route 38 and Mulford is currently graded a "C" for level of service, but when the new facility is added, the intersections will be operating at a D level of service, which is the lowest acceptable grade in the industry. (2/24/03 Tr. 240-42). Mr. Werthman admitted that a lower level of service generally means that drivers will have to wait longer at the intersection. (*Id.* at 242-43).

E. Criterion ix

The City Council concedes that its decision with respect to criterion ix was against the manifest weight of the evidence because the testimony established that the proposed facility would not be located in a regulated recharge area. (2/25/03 Tr. 133). The City Council found that this criterion had not been met, likely because it was confused by the testimony of Ms. Stanford, who testified about "recharge areas" and, therefore, thought that criterion ix applied. (3/3/03 Tr. 108-09, 145). However, because it is clear that criterion ix does not apply, the City Council concedes that its decision with respect to criterion ix was against the manifest weight of the evidence.

IV. ARGUMENT

A. The Siting Process Was Fundamentally Fair

Section 40.1 provides that if the County Board refuses to grant siting approval, an applicant may file an appeal with the Illinois Pollution Control Board (IPCB) wherein the applicant is the petitioner, and the City Council is the respondent. 415 ILCS 5/40.1(a) (2002). At such hearing, "the burden of proof shall be on the petitioner". *Id.* The IPCB shall consider "the fundamental fairness of the procedures used by the. . .municipality in reaching its decision." *Id.* However, landfill siting proceedings are not entitled to the same procedural safeguards as adjudicatory proceedings. *Southwest Energy v. Pollution Control Board,* 275 Ill.App.3d 84, 92, 655 N.E.2d 304, 309 (4th Dist. 1995).

The basis of the applicant's fundamental fairness claims merely revolve around public opposition to the landfill. Specifically, the applicant argues that this public opposition led to the City Council basing its decision on "political considerations rather than the evidence". Similarly, the applicant argues that the public opposition amounted to "inappropriate *ex parte* communications between council members and opponents of the application". (Petitioner's Brief, p. 2-3).

The leading case on communications between a decision-maker and a party to a siting hearing is *E&E Hauling v. Pollution Control Board,* 116 Ill.App.3d 586, 607, 451 N.E.2d 555, 571 (2nd Dist. 1983), *aff'd.*, 107 Ill.2d 33, 481 N.E.2d 664 (1985). In *E&E Hauling*, after a Section 39.2 hearing was held, but before the County approved the application, numerous meetings took place between the County Board members and the applicant to negotiate terms of an application. The Appellate Court held that these communications were *ex parte*, however, it affirmed the County Board's decision approving the application as there was insufficient

evidence that prejudice resulted from those contacts. 116 Ill.App.3d at 607, 451 N.E.2d at 572.

E&E Hauling held that the issue is:

> ...whether, as a result of improper *ex parte* communications, the agency's decision making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect. In making this determination, a number of considerations may be relevant: [1] the gravity of the *ex parte* communication; [2] whether the contacts may have influenced the agency's ultimate decision; [3] whether the party making the improper contacts benefited from the agency's ultimate decision; [4] whether the contents of the communications were unknown to the opposing parties, who, therefore had no opportunity to respond; and [5] whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose....*A court will not reverse an agency's decision because of improper ex parte contacts without a showing that the complaining party suffered prejudice from these contacts.*
>
> *Id.* (emphasis added).

The Second District, where this case resides, addressed the issue of communications by members of the public with the decision-maker and held that "a court will not reverse an agency's decision because of *ex parte* contacts to members of that agency absent a showing that prejudice to the complaining party resulted from these contacts." *Waste Management of Illinois v. PCB,* 175 Ill.App.3d 1023, 1043, 530 N.E.2d 682, 697 (2d Dist. 1980). That Court explicitly held:

> The various telephone calls, letters, and personal contacts were merely expressions of public sentiment to County Board members on the issue of Waste Management's landfill application. Moreover, existence of strong public opposition does not render a hearing fundamentally unfair, where as here, the hearing committee provides a full and complete opportunity to offer evidence in support of its application. (Citation omitted). Further, *ex parte* communications from the public to their elected representatives are perhaps inevitable, given a County Board's perceived legislative position, albeit in these circumstances, they act in an adjudicative role. Thus, although personal *ex parte* communications to County Board members in their adjudicative role are improper, there must be a showing that the complaining party suffered prejudice from these contacts. There is no showing of prejudice here, particularly in light of the extensive record developed during the local hearing. *Id.* at 697-698.

In a case considering the denial of a siting application in which there was alleged pervasive and hostile public opposition to site a landfill, the Second District held:

> It is true that the tone of these contacts was adverse to the granting of the site application. However, the existence of strong public opposition does not invalidate the [County] Board's decision where the applicant was given an ample opportunity to present its case and where the applicant has not demonstrated the[County] Board's denial was based upon the public opposition rather than the record.

City of Rockford v. County of Winnebago, 186 Ill.App.3d 303, 542 N.E.2d 423, 431 (2d Dist. 1989).

1. The Applicant was given ample opportunity to present its case.

The *City of Rockford* and *Waste Management* cases make it clear that the primary issue in determining whether the proceedings were fundamentally fair is whether an applicant has been given ample opportunity to present its case. The application itself was eight volumes and over 6,000 pages. After the application was filed, there was a five day hearing in front of the City Council which resulted in 1350 pages of testimony. The City Council hired an independent hearing officer to preside over the hearing (Mr. Glen Sechen). The City Council staff also hired engineering and environmental law consultants to review the application and participate in the hearing. The public, and the Applicant, then had 30 days to provide additional written material as public comment. The Applicant submitted a 116 page closing argument and proposed findings to the City Council, and the objectors submitted a similar brief. The City staff also prepared a written report as did the hearing officer who made recommendations and proposed findings. All of this information was made available to the City Council for review. Obviously the applicant was provided every opportunity to present its case, and it has offered no evidence to the contrary.

2. The decision was based on the record.

It is clear that the decision was based on the record rather than public opposition. *City of Rockford*, 542 N.E.2d at 431. Each and every City Council member that voted against a criterion testified at the IPCB hearing that he did not consider any communication from outside of the hearing process to be evidence. The *City of Rockford, Waste Management,* and *E&E Hauling* cases establish that if a decision is derived from the evidence in the record, the communications from the public to the City Council are not prejudicial, and remand would serve no purpose. Each and every City Council member testified that the very few unsolicited statements they heard from members of the public, including the form letters which were sent to the Council members, were no different than the evidence and public comments that were admitted during the Section 39.2 hearing. Furthermore, Mr. Colwill testified that he filed some form letters in the record. All of the City Council members testified they did not see the "Touched By An Angel" videotape, which is so ridiculously and heavily relied upon by the Applicant. Furthermore, the Bradenton Herald article, which was given to Mr. Bubik by Mr. Roegland, was filed with the City Clerk on March 28, 2003 and, thus, was part of the public record. Therefore, it was obviously appropriate for the City Council members to review the article.

The applicant's only argument that the decision was based upon something other than the record are some statements made in a newspaper article after the vote was taken by Mr. Kissick and Mr. Bubik that indicated the City Council decision was consistent with the public's opinion. Mr. Kissick explained that the statements he made in the newspaper article were only to indicate that he kept an open mind when considering the evidence. Furthermore, Mr. Bubik explained that the public opposition to the landfill was voiced during the hearing. Obviously, the applicant was well aware of the public opposition that was voiced during the hearing and had every

opportunity to present evidence and testimony to rebut that public opposition. Furthermore, the public opposition that was voiced during the hearing was often grounded upon concerns over need, safety, compatibility, and traffic, which are the very criteria that the City Council found were not met. (C6166-6652, 2/24/03 Tr. 251-740; 2/26/03 Tr. 5-7, 156-63; 3/3/03 Tr. 5-17, 170-85, 263-267; 3/4/03 Tr. 5-30, 162-73, 244-308). Therefore, the record is absolutely clear that the City Council decision was based on the record.

3. The Applicant has not met its Burden Showing "Irrevocable Taint" using the *E&E Hauling* Factors.

Like the *City of Rockford* case, *E&E Hauling* establishes that there must be evidence that the alleged *ex parte* communications prejudiced the City Council decision (in other words the decision was based upon the communications rather than the record). *E&E Hauling*, 116 Ill.App.3d at 607. The *E&E Hauling* factors were specifically designed to consider a variety of fairness principles. Even the applicant acknowledges that "the five part test is a reasonable outline of factors to be considered". (Petitioner's Brief, 18).

The applicant argues that somehow the *E&E Hauling* factors were not applied appropriately by the courts and the PCB in *E&E* Hauling itself and in cases such as *Land and Lakes Company v. Randolph County Board of Commissioners*, PCB 99-69 (2000), which found no evidence of prejudice. Undoubtedly, the applicant is seeking to distinguish *Land and Lakes Company* because the nature of the contacts from the public were much more pervasive in that case, and yet the IPCB came to the conclusion that there was insufficient evidence of prejudice. Specifically, in *Randolph County*, of which the undersigned counsel represented the County, the IPCB found that County Board members were subjected to numerous contacts outside of the proceedings. *Id.* at Slip. Op. 23. In *Randolph County* there were only three County Board members who voted on the application, and one of those three received several telephone calls

about the hearing (including telephone calls from the vice-president of a citizens group opposed to the application) to the point where he placed a "trap and trace" on his phone line. He also received several written comments regarding the landfill and was approached in person about the landfill and told that it would not be good for his business if the landfill were sited. He received threatening telephone calls, and his business' construction equipment was vandalized. He even received a package in the mail full of garbage. He was also the target of various pranks related to the landfill. *Id.* Despite the fact that the County Board member had received numerous telephone calls, threats, vandalism, and pranks, the Board found that there was insufficient evidence of prejudice because the record was clear that these communications were not considered to be evidence. *Id.*[5]

a. The communications by the public were not grave.

Communication to a member of a decision-making body, which relates to non-substantive matters and does not discuss the merits of the case, is not grave. *Gallatin National Bank v. Fulton County*, PCB 91-256 (June 15, 1992). In this case, the Applicant makes an unsupported conclusion that "With respect to the 'gravity' of the communication, it is certainly relevant that many of the ex parte communications of this proceeding were via a party to the proceedings – the CCOC." (Petitioner's Brief, 19). First, the statement is simply erroneous as there has been absolutely no evidence submitted in the record that there were any *ex parte* communications between the CCOC and a decision maker after the application was filed and before decision. Once again, Mr. Beardin testified that he did not recall having any such

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[5] In the *Randolph County* case, as here, it is the position of the undersigned counsel that communications from members of the public cannot by definition be *ex parte* communications as the public is not a party before the tribunal. See *Town of Ottawa v. Pollution Control Board*, 129 Ill.App.3d 121, 126, 472 N.E.2d 150, 154 (3d Dist. 1984). However, the Pollution Control Board has been consistent on this issue and pursuant to the doctrine of *stare decis*, the undersigned counsel understands the IPCB will continue to be consistent in its rulings.

communications after the application was filed and before decision. All of the City Council members testified that whenever someone would speak to them about the landfill, the City Council member would refuse to discuss the issue. Likewise, when Mr. Beardin gave the videotape to Mr. Bubik, this was once again merely, at most, an attempted communication which was ineffective as Mr. Bubik did not watch the videotape and nothing was said about the landfill application. Finally, there is no evidence that any of the form letters were sent by a party to the proceeding, and rather, the evidence was they were sent by the public (though the form was passed out by the CCOC). Therefore, even a communication was from a party could be an element in determining gravity, which the Applicant provides no authority for, there simply is no basis for that claim in this case.

Furthermore, the fact that a communication took place by a party cannot be an element in determining whether or not there is prejudice from an *ex parte* communication because, by definition, the communication must have occurred by a party (without an opposing party being present) in order to be an *ex parte* communication. *Residents Against Polluted Environment v. County of LaSalle Land Comp Corporation*, PCB 96-243 (September 19, 1996) provides the basis for the Pollution Control Board's definition of an *ex parte* communication. In that case, the IPCB found that communications between a decision maker and "constituents" who were clearly in support of a position held by various objectors who were parties to the proceedings, constituted *ex parte* contacts. *Id.* In essence, the IPCB stated that as long as the communication is were made by someone advocating a position of a party it can be considered *ex parte.* Only after a condition is considered *ex parte* does one then employ the *E&E Hauling* factors to determine if prejudice occurred. Obviously, the mere fact that the communication is by, or on

behalf of a party, which is a necessary element to a finding of "*ex parte*" communication, cannot be a basis for an allegation that the communication was grave.

Employing the proper analysis of "gravity" (as it is described in *Gallatin*) the issue is whether the communication involved a substantive matter addressed and the merits of the case. The only arguably consummated communications which took place outside of the hearing were the unsolicited form letters, which contain absolutely no substantive evidence or a discussion of the merits but merely state that the sender of the form does "not support the expansion of the dump". Clearly this is mere lay opinion, which is not grave. This is not a situation where the City Council accepted substantive evidence on an issue without the knowledge of the Applicant. Therefore, clearly these were no "grave" *ex parte* communications in this case.

b. The communications did not influence the decision.

In this case, each and every decision-maker testified that any statement that was made outside the public record, including the form letters which may have been received in the mail, were not considered to be evidence. Furthermore, each of the City Council members testified that if they heard or received any statement outside the record it was nothing more than a reiteration of general opinions of opposition to the landfill that were voiced during the public hearing. There is simply no evidence that any substantive testimony was received by a City Council member outside the hearing process.

The primary emphasis of the Applicant's case revolves around a video tape of "Touched By An Angel" which each and every City Council member testified they did not view. Obviously the "Touched By An Angel" video could not have affected their decision.

The Applicant also argues that the decision must have been legislative, rather than adjudicative, partially on the grounds that the City Council did not follow the recommendations of its staff and the hearing officer. (Petitioner's Brief, page 4). However, it is well established

that a siting authority's consultant report or staff recommendation is not binding on the decision maker. *CDT Landfill Corporation v. City of Joliet*, PCB 98-60 (March 5, 1998); *Hedinger v. D&L Landfill Incorporated*, PCB 90-163 (December 20, 1990); *McClean County Disposal Company v. County of McClean*, PCB 89-108 (November 15, 1989). Furthermore, a consultant's report in a siting hearing (which would include the City staff and hearing officer's reports) need not be part of the public record or provided to an applicant, although the reports were so provided in this case. *Sierra Club v. Will County Board*, PCB 99-136, 99-139 (August 5, 1999). The *Sierra Club* case establishes that if a consultant's report is primarily a summary of the testimony and public comments and a recommendation of the author of the report, it need not be filed during the public comment period. *Id.* Therefore, it is clear that the City Council, as the decision-maker, does not have to follow its consultant's recommendations as those recommendations do not even have to be filed as public comment. The City Council was allowed, and actually required, to exercise its own independent judgment. There is no evidence that it failed to do so in this case. *Fairview Area Citizens Task Force v. IPCB*, 198 Ill.App. 3d 460, 555 N.E. 2d 1172 (Ill.App. 3d Dist. 1990) establishes that even when the decision-makers have contacts with constituents of a party and members of the general public outside the hearing process there still must be evidence of prejudice, because "elected officials presumed to act objectively." *Id.* at 1182. The Plaintiff has presented no evidence to overcome that presumption.

The IPCB has also held that *ex parte* communications upon a minority of board members which do not affect the vote of the majority of the members, are irrelevant. *Waste Management of Illinois v. Lake County Board*, PCB 88-190 (April 6, 1989); *National Company v. Fulton County Board and County of Fulton*, PCB 91-256 (June 15, 1992); *Town of St. Charles v. Kankakee County Board and Elton Sanitary District*, PCB 83-228, 229, 230 (March 21, 1984).

In this case, it appears that the Applicant is primarily complaining about the communications to City Council member Donald Bubik, as he is the only City Council member that was given a tape by Mr. Beardin and given a newspaper article by Kenneth Roeglin. (Once again, those communications were certainly not grave, as Mr. Bubik did not view the video tape and the newspaper article was made part of the public record during the public comment period). Nonetheless, 4 out of 5 of the City Council members found that criterion i and vi were not met, and, therefore, a majority would still exist even if Mr. Bubik's vote was discarded.

c. No Party Benefited From the Alleged *Ex Parte* Communications.

A third factor enumerated in *E&E Hauling* is "whether the party making the improper contacts benefited from the Agency's ultimate decision." *E&E Hauling*, 116 Ill.App. 3d 607, 415 N.E. 2d of 572. Once again, there is no evidence that any party to the hearing communicated with a City Council member. Mr. Roeglin was not a party, there is no evidence that the form letters that were sent to the City Council members were sent by parties, and there is no evidence that Mr. Beardin ever effectuated an actual communication with any City Council member. Therefore, no party benefited from the alleged communications.

d. The Applicant Was Aware of the Public Opposition to its Application and Had an Opportunity to Respond.

Once again, the only communication that actually occurred in this case, outside of the hearing, was the receipt of unsolicited mailings by members of the public to the City Council members. These mailings were form letters that merely contained one sentence opinions opposing the expansion. There was no substantive evidence contained within these statements and similar statements were made throughout the hearing and filed in the public comments. Therefore, the Applicant had ample opportunity to respond to any public opposition to its

proposed application and did so in the five days of hearings, closing argument and post hearing briefs.

e. No Useful Purpose Would be Accomplished by Reversing or Remanding the City Council Decision.

The fifth *E&E Hauling* factor to be considered is whether remanding the proceedings back to the City Council would serve a useful purpose. The Applicant requests a remand if the Pollution Control Board finds that the proceedings were fundamentally unfair. (Petitioner's Brief, pg. 76). However, *E&E Hauling* and the *City of Rockford* cases establish that the appropriate remedy, if indeed, proceedings were fundamentally unfair based on *ex parte* communications, is merely to place the purported *ex parte* communications on the record. That has already been accomplished in this case, wherein extensive discovery has been conducted during the 40.1 IPCB review, and it has been discovered that there were little to no improper communications. All of the communications of which the Applicant complains have been placed in the record. Accordingly, there would be absolutely no purpose in remanding this matter.

Since there has been no showing of prejudice or irrevocable taint to the siting hearing as a result of any alleged *ex parte* communication, and, instead, there has only been evidence that the communications were the same inevitable statements of opposition to a landfill that occur in each and every landfill siting case. Therefore, the decision of the City Council should be affirmed.

4. The Hearing Officer did not Allow any Testimony Regarding the Mental Impressions of the Decision-Makers by Either the Petitioner or Respondent.

The Petitioner argues that Illinois case law "has led to the 'catch 22'...[that] the victims of *ex parte* communications have been required to prove resulting 'prejudice' without being permitted to explore the decision maker's internal thought processes, but decision-makers have been improperly permitted to testify that the *ex parte* communications did not affect their decision." (Petitioner's Brief, p. 6). While this is an interesting argument raised by the

applicant, it is completely irrelevant to these proceedings. Hearing Officer Halloran did not allow any of the decision-makers to testify regarding whether or not an alleged *ex parte* communication affected their decision. Therefore, the Petitioner and Respondent were on equal footing. The Petitioner was able to depose all of the City Council members and came to find that no substantive evidence was submitted to the City Council outside of the hearing process.

Though the hearing officer did not allow any testimony by the City Council members that any out-of-court statements had no affect or prejudice on their decisions as they indicated in offers of proof, that testimony could have been allowed pursuant to *E&E Hauling* and *Land and Lakes Company v. Randolph County*. In both of those cases, the decision-makers were allowed to so testify, and, thus, the IPCB should find that the objections by the Applicant should have been overruled. Regardless, the Applicants have not met their burden of proving prejudice.

5. There is no evidence of prejudice.

The applicant has wholly failed to meet its burden in this case. After extensive discovery, it was found that there were actually very limited unsolicited communications from the public to the City Council members. Three individuals attempted to talk to Mr. Bubik, but he refused to discuss the landfill. Mr. Kissick could not recall exactly when Mr. Beardin attempted to make telephone calls to him, and Mr. Beardin denied ever speaking to a City Council member after the application was filed.

The Applicant argues that the statement made in the interrogatory responses by the City of Rochelle (that Mr. Beardin attempted to contact Mr. Kissick on six occasions after the application was filed and before decision) is a binding judicial admission against Mr. Kissick. Mr. Kissick explained at the IPCB hearing that to the extent the interrogatory answer indicates that those communications took place during that time period, the answer may be mistaken, as he actually does not recall when Mr. Beardin made the telephone calls. The Applicant did not

object to Mr. Kissick's testimony at trial or move to strike it, and, thus, any objection is waived, and the IPCB may consider the testimony. *E&E Hauling, Inc. v. Pollution Control Board*, 107 Ill.2d 33, 38 (1985).

Nonetheless, the Applicant cites *In Re: Estate or Rennick*, 181 Ill. 2d 395, 692 N.E. 2d 1150, 1156 (1998), and *Van's Material Company v. Department of Revenue,* 173 Ill. App. 3d 284, 527 N.E. 2d 515, 518 (1st Dist. 1988) for the proposition that an interrogatory answer is a binding admission, which may not be contradicted at trial (Petitioner's Brief, pgs. 13 and 14). However the *Rennick* case only provides that a discovery response "may" constitute a judicial admission and acknowledges it is within the discretion of the hearing officer to allow the witness to explain his answer.

The interrogatory answer also cannot be considered to be an admission of any *ex parte* communication because it explicitly provided that "Mr. Kissick informed Mr. Beardin that Mr. Kissick was not at liberty to discuss the pending application." (Petitioner's Ex. 1, pg. 2). Therefore the Applicant's statement that Frank Beardin "contacted councilman Ed Kissick on approximately six occasions after the application was filed to express the CCOC's opposition" (Petitioner's Brief pg. 13) is not supported by the interrogatory answer, nor any of the testimony at hearing. The interrogatory answer explicitly provided that no communication took place as Mr. Kissick informed Mr. Beardin he would not discuss the matter. Therefore, even if the Applicant had not waived the objection to Mr. Kissick's testimony, there simply is no judicial admission that Mr. Beardin personally spoke with Councilman Kissick after the application was filed about his opposition to the landfill and Petitioner's assertion to the contrary is a complete mischaracterization of the evidence and testimony.

Therefore, the applicant has failed to meet its burden of showing that any communication took place after the application was filed, which prejudiced the decision. The City Council members told anyone who attempted to discuss the application that they would not do so. The applicant also was unsuccessful in establishing the form letters were sent by a party (CCOC) and instead they were made available by the CCOC for various members of the public to send if they so desired. Because there is no evidence that these form letters were sent by a party they, by definition, cannot be *ex parte* communications. Regardless, there is no evidence that these communications prejudiced the decision of the City Council members. To the contrary, every witness testified that these form letters were no different than what was testified to at the City Council hearings.

The form letters provided *in toto*:

> I appreciate the work you do for the City and the time you spent researching this expansion project. I do not support the expansion of the dump. Please take my opinion into consideration when you vote on this issue. Thank you for your time and attention.

(See Petitioner's Exhibit 4, form letter; record cite)

Obviously, these form letters were "merely expressions of the public sentiment . . .on the issue of [the] landfill application" just like the contacts at issue in *Waste Management of Illinois v. PCB*. 175 Ill.App.3d at 1043, 530 N.E.2d at 627. The same nature of communications were made at the public hearing and in the public comments.

Furthermore, the applicant acknowledged it was present at the hearing and was aware that there was a strong public sentiment against its application. (See 2/24/03 Tr. 251-74; 2/26/03 Tr. 5-7; 156-63; 3/3/03 Tr. 5-17, 170-85, 263-71; 3/4/03 Tr. 5-31, 162-73; 244-308, Public Comment letters, C6166, C6652; and page 1 of Applicant's Closing Argument and Law, C7913). The Applicant had ample time and opportunity to respond to this public opposition, if it so

desired. The Petitioner's argument that the mere fact that there was strong public opposition should lead to overturning the City Council's decision is ludicrous. In this case, the City Council was very concerned about the traffic; health, safety and welfare; compatibility and need. Numerous members of the public were also very concerned about these considerations in regard to the mega-landfill proposed to be built by the Applicant in the city of Rochelle. It is a complete non-sequitur to argue that strong public opposition based upon the inappropriateness of a proposed location should, in and of itself, lead to another chance for the Applicant to present its case.

In *E&E Hauling,* the Second District actually found that the decision-maker's unequivocal public pronouncements in favor of the proposed expansion amounted to a sufficient pre-judgment on the merits of the case to warrant a finding of "disqualifying bias." 451 N.E.2d at 566. Nonetheless, the IPCB found that because the County Board was the entity authorized to hear the application, and the petitioner failed to show that the decision-making process was "irrevocably tainted" as to render the proceeding fundamentally unfair, the County Board decision would be affirmed. In this case, the alleged improper communications amounted to no more than three attempted statements to Mr. Bubik, some possible attempted statements to Mr. Kissick and Mr. Colwill, and receipt of form letters stating opposition to the landfill. (Once again, the videotape and the Florida newspaper articles should be completely disregarded as there is no evidence that any City Council member ever saw the videotape and the Florida newspaper article was part of the public record). Obviously, these extremely minor and inevitable contacts do not rise to the level of "irrevocable taint" requiring a remand of the hearing, and the applicant has failed to meet its burden of proof.

6. The Applicant's claim that the Standard Should be Changed from Requiring an Applicant to show Actual Prejudice to a mere Appearance of Impropriety Should be Disregarded as it is not Supported by Illinois Law.

In an entirely unique and creative argument, the applicant's counsel asks the IPCB to ignore the controlling Illinois precedents and find that actual prejudice need not be shown, and, rather, there merely needs to be an "appearance of impropriety". (Petitioner's Brief, 4-12). To come to this conclusion the petitioner sites a variety of completely irrelevant non-controlling precedents from the District of Columbia, the Western District of Wisconsin, the Iowa Supreme Court, the Second District of New York, the Kentucky Court of Appeals and various Federal trial judge opinions. This is undoubtedly because the Applicant is aware it has absolutely no legal leg to stand on under Illinois law.

Rochelle Waste wants the IPCB to ignore the concept of *stare decisis*, which provides that it is the policy of the courts to stand by precedent and leave settled points of law undisturbed. *Charles v. Seigfried,* 651 N.E.2d 154, 165 at Ill.2d 42 (Ill. 1995). The concept of *stare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled, than it be settled right. *State Oil Company v. Kahn*, 119 U.S. 275 (1997). The concept of *stare decisis* is equally applicable to the IPCB, which has long recognized that Illinois appellate decisions are controlling precedent over the Board. See *Land and Lakes Company v. Randolph County Board of Commissioner*, PCB 99-69 (Sept. 21, 2000).

The Applicant specifically argues that a "long line of authority" establishes that no such actual prejudice needs to be established and that the real question is whether there has been an appearance of impropriety if a local siting authority is acting in a quasi-judicial capacity, as opposed to quasi-legislative capacity. (Petitioner's Brief, pg. 11). However the alleged "long line of authority" turns out to merely be a Wisconsin federal trial court order concerning a

discovery motion *Sokaogon Chippewa Community v. Babbit*, 929 F.Supp. 1165, 1174 (WD Wis. 1996), reconsidered in part, 961 F.Sup. 1276 (WD Dis. 1997). (Petitioner's Brief, 11).

A trial court's finding on a specific motion is in no way precedential or controlling upon the Illinois Pollution Control Board, the Illinois state courts, the Illinois federal courts, or even another district court in the Western District of Wisconsin. There simply is no legal obligation to follow earlier trial court decisions even in the same district. Moore's Federal Practice, par. 134.02[1][d] 3rd Ed. (1999) (a decision of a federal district judge is not binding precedent in the same judicial district); *Threadgill v. Armstrong World Industry, Inc.* 928 F.2d 1366, 1371 Note 7 (3rd Cir. 1991) (there is no such thing as "the law of the district"); *United States v. Articles of Drug, Consisting of 203 Paper Bags*, 818 F.2d 569, 572 (7th Cir. 1987) (a single district court decision, especially one that cannot be appealed, has little precedential effect). It should also be noted that *Sokaogon* decision, which is so heavily relied upon by the Petitioner, is apparently not even a final decision, as it was never appealed and a portion of it was even reconsidered by the trial judge who issued the decision in the first place. *Sokaogon*, 961 F.Sup. 1276 (W.D. Wis. 1997).

The *Sokaogon* case involved a suit brought under the Administrative Procedure Act for violation of the Indian Gaming Regulatory Act and Indian Reorganization Act and, thus, is clearly irrelevant to an Illinois Section 39.2 siting hearing. Furthermore, the *Sokaogon* case involved alleged congressional or presidential communications with agency decision-makers (i.e. government officials to government employees) and in no way involved the general inevitable contacts of members of the public to their elected officials. Even the *Sokaogon* case held that "in the absence of clear evidence to the contrary, courts should presume that public officials have discharged their duties properly" and "it is still necessary to analyze whether the possibility of

legislative and executive contacts with the department so tainted the decision on the plaintiffs' application as to warrant extra-record discovery." *Id.* at 1176. Finally, *Sokaogon* is also irrelevant because it only involved the question of whether or not depositions of public officials should have been allowed (the Court found they should not be allowed because there was no strong showing of bad faith), and in this case the applicant was allowed to depose all of the city council members.

In *MIG Investments, Inc. and the United Bank of Illinois v. IEPA*, PCB 85-60 (Aug. 15, 1985) the IPCB had the opportunity to discuss *stare decisis* as it related to circuit court decisions. The Board found that "it is well settled Illinois law that each trial court is bound by decisions of all Illinois Appellate Courts (except in cases of conflict between Appellate districts in which case a trial court is bound by decisions in its own district), and that Appellate Courts are bound by decisions of the Supreme Court; this is the case even if the inferior tribunal believes the superior one has made 'bad law'." *Id.* at Slip. Op. pg 5. The IPCB found that a trial court was an equal, rather than superior tribunal to the Pollution Control Board. The IPCB also noted that Section 41(a) has vested the Appellate Courts with the authority to review the IPCB, which makes the appellate courts a superior tribunal. *Id.* Accordingly, the IPCB has acknowledged that Illinois Appellate Court decisions must be followed, even if the Board does not consider them to be well reasoned, and trial court decisions are not precedential.[6] Therefore, even if one would somehow conclude that *E&E Hauling, Waste Management, City of Rockford,* and *Fairview Area Citizens*

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[6] The following cases cited in the Petitioner's Brief are not controlling precedents and should be disregarded as they are either from trial courts and/or completely different jurisdictions, which do not interpret the laws of Illinois. *U.S. v. Hooker Chemicals & Plastics Corp.*, 123 F.R.D. 3 (W.D.N.Y. 1988); *U.S. v. Ferguson*, 550 F.Supp. 1256 (S.D.N.Y. 1982); *State v. Mann*, 512 N.W.2d 528 (In. S.Ct. 1994); *Sokaogon Chippewa Community v. Babbitt*, 929 F.Supp.1165 (W.D. Wis.1996), reconsidered 961 F.Supp. 1276 (W.D. Wis. 1997); *D.C. Federation of Civic Associations v. Volpe*, L159 F.2d 1231 (D.C. Cir. 1971); *Peter Kiewit Sons. Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163 (D.C. C.F. 1983); *Pillsbury Co. v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966); *Jarrot v. Scrivener*, 225 F.Supp.827 (D.D.C. 1964); *Koniag, Inc. v. Andros*, 580 F.2d 601 (D.C. Cir. 1978); *ATX Inc. v. Dept. of Trans.*, 41 F.3d 1522 (D.C. Cir. 1994); *Patco v. Federal Labor Relations Authority*, 685 F.2d 547 (D.C. Cir. 1982); *Louisville Gas and Electric Co. v. Commonwealth of Kentucky*, 862 S.W.2d 897 (Ky. Ct. Apps. 1993).

Task Force v. IPCB, 198 Ill.App.2d 541, 555 N.E.2d 1178 (Ill.App.3d Dist. 1990) (which all require a showing of actual prejudice) are ill-reasoned, they must still be followed, and have been, by the Illinois Pollution Control Board. See e.g. *Land and Lakes Company v. Randolph* County, PCB 99-69 (Sept. 21, 2000). The Applicant has all but acknowledged that there is no actual prejudice in this case and, therefore, the decision of the City of Rochelle City Council should be affirmed.

Finally, even if the IPCB could ignore the controlling precedents which require a showing of actual prejudice; there is not even a "possibility" of prejudice here or an "appearance of impropriety". The record is absolutely clear that all of the alleged out-of-court statements were non-substantive and merely repetitive of the opinions voiced during the hearing; therefore, there is no "possibility" of prejudice. Furthermore, each City Council member refused to discuss the application outside of the hearing process and, thus, there obviously cannot be any appearance of impropriety.

The Applicant suggests that Mr. Beardin's possible unsuccessful attempts to communicate with Mr. Kissick and his unsuccessful attempt to get Mr. Bubik to watch a videotape (that had nothing to do with landfills) somehow results in an appearance of impropriety. However, even if Mr. Beardin's conduct was improper, he was not a decision-maker. The City Council followed the highest standard of propriety by refusing to discuss the application. They were so diligent in dissuading such communications that Mr. Colwill even refused to discuss the issue while campaigning for Mayor, which was undoubtedly a detriment to his campaign. Therefore, even if the standard urged by the Applicant was the law (which it is not) there is no possibility of prejudice or any appearance of impropriety in this case.

The applicant also alleges that the case of *People ex. rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 183, 781 N.E.2d 223, 234 (2002) is somehow relevant to or controlling in a Section 39.2 hearing and that the case somehow suggests that "actual prejudice" need not be shown. (Petitioner's Brief, 8, 17). First, *Klaeren* is limited to special use zoning hearings. Second, that case merely held that interested parties should have a right to cross-examine witnesses, and there is no dispute that the applicant in this case had ample opportunity to cross-examine witnesses. There is no discussion in *Klaeren* about *ex parte* contracts, political influence over decision-makers, or the necessity of showing actual prejudice.

The applicant also sites the *Klaeren* case as authority for its unique proposition that the counsel's decision should be overturned on the grounds that the City Council members allegedly did not have discussions with each other, legal counsel, or environmental consultants concerning the application. (Petitioner's Brief, 18). This is the first time of which we are aware that an Applicant has argued the lack of *ex* parte communication is fundamentally unfair. We have scoured the *Klaeren* case and do not see that it in any way discusses how a public body must deliberate. Rather, the only issue was whether a land owner whose property abuts a parcel subject to a proposed annexation and special use rezoning can be wholly denied the right to cross-examine witnesses. *Klaeren*, 781 N.E.2d at 224.

The Applicant also inappropriately suggests that *Klaeren* overruled the *E&E Hauling* case when it argued "although some cases in this area have suggested such procedures [allowing a decision-maker to testify that his opinion was unaffected by *ex* parte communication] pass muster (see for example, *E&E Hauling*, 116 Ill.App.3d at 616, 451 N.E.2d 577-78, 71 Ill.Dec. at 609-10), these cases pre-date *Klaeren.*" (Petitioner's Brief, pg 17). The *Klaeren* case in no way overruled *E&E Hauling,* and, to the contrary, *Klaeren* explicitly acknowledged that "to what

extent the full panoply of due process rights commonly associated with quasi-judicial proceedings must be afforded to interested parties depends upon the purpose of the hearing." *Id.* at 234. *Klaeren* at no time held that every right afforded at trial must be afforded at a special use zoning hearing and, rather, it only held that there should be a right of cross-examination for parties in such cases. Therefore, *Klaeren* is clearly irrelevant to the present case and in no way changes the long standing acknowledgment by the courts that all of the elements of due process that would be allowed at a trial need not be allowed at the Section 39.2 siting hearing. Furthermore, the applicant has not cited even one Illinois case that states that actual prejudice need not be shown to determine if an *ex parte* contact should result in remand to the trier of fact.

In conclusion, the Applicant's assertion that actual prejudice need not be shown is erroneous, and, regardless, there is no evidence of even a possibility of prejudice, an appearance of impropriety.

7. The Petitioner has Admitted that it Suffered No Prejudice as a Result of the Council's April 28, 2003 Meeting.

Surprisingly, the applicant takes issue with the April 28, 2003 meeting of the City Council, wherein the City Council changed its decision of April 24, 2003 that criterion ix had not been met, to a finding that indeed that criterion had been met. The Petitioner has admitted that the only reason it takes issue with this change in decision is because it wanted to use the fact that the City Council found against it on criterion ix to somehow argue the proceedings were fundamentally unfair. (Tr. 164). First, the applicant has not been barred from making such an argument. Second, if the Applicant so desires, the original decision on criterion ix can be reinstated, and the IPCB can issue a finding that it was against the manifest weight of the evidence. Of course, such a finding should have no import because the IPCB should affirm the City Council's decisions as criterion i, ii, iii, and vi. By way of explanation, there was discussion

at the underlying hearing regarding recharge areas, which may be an explanation as to why the City Council members were confused by the regulated recharge areas referenced in criterion ix. (Tr. 165).

As to conditions if there is ever a reversal, the Applicant has admitted that it is ready and willing to meet those conditions and that the April 28, 2003 contingent imposition of conditions caused them no prejudice. (Tr. 167). Furthermore, the imposition of the conditions only becomes an issue if somehow the IPCB overturns the City Council decision, completely ignores the City Council's concerns about need, health and safety, compatibility and traffic, and issues an unprecedented "automatic approval" to the applicant. This scenario is highly unlikely and, thus, the April 28, 2003 meeting was merely an extremely cautious measure of the City Council. The mere fact that the City staff and hearing officer felt that the imposition of 50 conditions was necessary if the City Council found that the siting criteria were met, evidence that it would be improper for the IPCB to grant siting approval without imposing said conditions. Furthermore, the only recognized remedy for a violation of fundamental fairness is remand. *E&E Hauling v. Pollution Control* Board, 116 Ill.App.3d 586, 607, 451 N.E.2d 555, 571 (2nd Dist. 1983). Therefore, if the IPCB somehow finds that the City Council decisions as to the criteria were against the manifest weight of the evidence, and the preceedings violated fundamental fairness, then the only appropriate remedy would be to remand for further hearing rather than automatic approval without the imposition of the conditions.

Furthermore, the April 28, 2003 decision of the City Council regarding the conditions was not a "reconsideration" because the matter had never been brought up before April 28, 2003. Therefore, the cases relied upon by the Applicant to suggest that the City Council's reconsideration was void do not apply to the imposition of conditions. On April 24, 2003, the

City Council merely voted on each of the criteria and found that several of them were not met. At no time did the City Council entertain a vote that the conditions should be imposed if the City Council on April 24, 2003 decision was reversed. Therefore, the April 28, 2003 meeting on this aspect was an initial consideration and not a reconsideration.

Finally, as to the applicant's assertion that the April 28, 2003 meeting was "*ex parte*" such a statement is simply erroneous. An *ex parte* communication is a communication of a tribunal "with a party before it" without the presence or knowledge of another party. *Town of Ottawa v. PCB*, 129 Ill.App.3d 121, 126, 417 N.E.2d 150, 154 (3rd Dist. 1984). The Applicant was made aware of the meeting and they even attended the meeting, and, therefore, the applicant cannot complain that the communication was *ex parte*.

B. The City Council's Findings that Criteria i, ii, iii and vi were not met are not Against the Manifest Weight of the Evidence.

The Applicant bears the burden of establishing each and every criteria set forth in section 39.2(a). *Fairview Area Citizens Taskforce v. Illinois Pollution Control Board*, 198 Ill.App.3d 541, 550, 555 N.E.2d 1178, 1184 (3d Dist. 1990). If any one of the criteria are not met, the application must be denied. *See Waste Management of Illinois, Inc. v. Pollution Control* Board, 187 Ill.App.3d 79, 81, 543 N.E.2d 505, 507 (2d Dist. 1989). In this case, the City Council correctly found that not one, but four criteria, namely criteria i, ii, iii, and vi were not met.

The PCB must review the City Council's decisions on each of the above criteria under a manifest weight of the evidence standard and only reverse those decisions if they are against the manifest weight of the evidence. *Fairview*, 198 Ill.App.3d at 550, 555 N.E.2d at 1184. 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. *Id.*

If any evidence supports the decision of the local siting authority that decision is not against the manifest weight of the evidence and must be affirmed. See *EPA v.* PCB, 252 Ill.App.3d 828, 830, 624 N.E.2d 402, 404 (3d Dist. 1993). It is the province of the hearing body to weigh the evidence, resolve conflicts in testimony, and assess the credibility of witnesses. *Id.* Merely because there is some evidence on the record which, if accepted, would support a contrary conclusion, does not mean that this Board can substitute its judgment for that of the local siting authority. *Wabash and Lawrence Counties Taxpayers and Water Drinkers Assoc. v. Pollution Control Board*, 198 Ill.App.3d 388, 393, 555 N.E.2d 1081, 1086 (5th Dist. 1990).

Although the Applicant contends that it presented a "prima facie" case on each criteria based on "unrebutted testimony," such an assertion is clearly untrue. There was not only testimony contradicting the Applicant's testimony as to criterion ii, but the testimony provided by the Applicant with respect to criterion i, iii and vi was based on erroneous data and improper assumptions, as specifically pointed out by the CCOC in its Closing Argument and Proposed Findings of Fact. (C7818-7836). Therefore, it is clear that the Applicant did not present a prima facie case, as it suggests, and in fact, the Applicant failed to carry its burden of proof on four criteria.

The Applicant erroneously contends that there was no testimony contradicting their witnesses with respect to criterion ii simply because CCOC's witness, Charles Norris, did not specifically conclude that the facility was not protective of the public health, safety and welfare. However, Mr. Norris was not required to provide such testimony because the applicant bears the burden of proof in establishing all of the statutory criteria, including criterion ii, are met. *See Fairview,* 198 Ill.App.3d at 550, 555 N.E.2d at 1184. Therefore, Mr. Norris was only required to establish that the applicant did not meet its burden of proving that the public health safety and

welfare would be protected by the proposed facility, which Mr. Norris clearly did by pointing out deficiencies in the applicant's groundwater impact assessment and inadequate well monitoring program. Such testimony clearly conflicted with the testimony of the Applicant's witness who specifically testified that the groundwater impact assessment and groundwater monitoring program were more than adequate, and the City Council was the appropriate body to resolve that conflict. *See Land and Lakes Co. v. Illinois Pollution Control Board*, 319 Ill.App.3d 41, 53, 743 N.E.2d 188, 197 (3d Dist. 2000) (explaining that the County Board was in the best position to resolve a conflict in testimony about whether applicant's groundwater assessment model and groundwater monitoring program were adequate and whether the applicant sustained its burden of proof).

Because there was conflicting evidence presented at the siting hearing, this case is not analogous to *Industrial Fuels*, 227 Ill.App.3d 533, 546, 592 N.E.2d 148, 157 (1st Dist. 1992) as the Applicant asserts. It was only because of a complete lack of evidence that the Court reversed the County Board's decision in *Industrial Fuels*, finding that the County Board's decision was based on unsubstantiated fear, rather than facts or evidence. 227 Ill.App.3d at 547, 592 N.E.2d at 157. In this case, unlike *Industrial Fuels*, the City Council's decision was not based on fear, but was based on evidence, in the form of testimony from Charles Norris with respect to criterion ii, and a lack of evidence presented by all of the other witnesses, leading to the City Council's proper and appropriate conclusion that the Applicant failed to carry its burden of proof with respect to criteria i, ii, iii and vi. It was certainly appropriate for the City Council to find that criteria i, ii, iii and vi were not met because the Applicant's own experts admitted that their conclusions were based on certain assumptions that may or may not actually exist, and the credibility of each of the witnesses was questionable.

Even where no conflicting expert testimony was presented, the City Council was free to find that the Applicant failed to meet the criteria set forth in Section 39.2 of the Act because the trier of fact determines what weight should be accorded to expert testimony. *In re Glenville*, 139 Ill.2d 242, 251, 565 N.E.2d 623, 627 (1990). As explained by the Illinois Supreme Court: "Even if several competent expert witnesses concur in their opinion, and no opposing expert testimony is offered, it is still within the province of the trier of fact to weigh the credibility of the expert evidence and decide the issue." *Id.* While the trier of fact is not allowed to arbitrarily reject expert testimony, it is within the province of the trier of fact to disbelieve such testimony. *Id.* In this case, it is clear that the City Council reviewed the testimony and found that despite the testimony of the Applicant's witnesses, criteria i, ii, iii and vi were not met. That decision should be affirmed because it is the province of the local siting authority, and not this Board, to weigh the evidence and assess the credibility of the witnesses. *Fairview,* 198 Ill.App.3d at 550, 555 N.E.2d at 1184.

Finally, this Board should disregard the Applicant's implication that the City Council's decision was against the manifest weight of the evidence merely because it was contrary to the recommendations of its environmental consultants and the hearing officer. Pursuant to section 39.2(a) of the Act, it is the City Council that is granted the authority to approve or disapprove a request for local siting approval for a pollution control facility. 415 ILCS 5/39.2(a). It is well-settled that "the decision-making authority rests solely with the local government. A local government's consultant report or a staff recommendation is not binding on the decision maker." *CDT Landfill Corp. v. City of Joliet*, PCB 98-60, *citing Hediger v. D&L Landfill, Inc.*, PCB 90-163 (Dec. 20, 1990); *see also Sierra Club v. Will County Board*, PCB 99-136, 139 (Aug. 5, 1999) (explaining that "a consultant report or staff recommendation is not binding on the

decision-maker"); *McLean County Disposal Co v. County of McLean*, 207 Ill.App.3d 477, 566 N.E.2d 26 (4th Dist. 1991) (holding that a local siting authority is not obligated to follow an expert's recommendation). Therefore, it is only the City Council's decision that is relevant and is to be reviewed by the Board to determine if it is against the manifest weight of the evidence. Therefore, any and all references by the Applicant to the recommendations made by the hearing officer and environmental consultant should be disregarded by this Board.

Even if the reports of the staff and hearing officer were considered, those reports do not establish that the Applicant clearly met all of the statutory criteria. Those records actually establish that the Applicant's presentation was quite lacking, as both the staff and hearing officer recommended that 49 to 50 conditions be placed on approval. (C8155-8210; 8049-8150) Instead of imposing all of those conditions, the City Council could have reasonably found as they did, that the Applicant failed to sustain its burden of proof.

As explained more thoroughly below, the City Council's decision with respect to criteria i, ii, iii and vi were clearly not against the manifest weight of the evidence but were supported by the evidence. As a result, the City Council's decision to deny siting approval to the proposed facility must be affirmed.

1. The City Council's Decision that the Proposed Facility was not Necessary was not Against the Manifest Weight of the Evidence.

Section 39.2(a)(i) requires that an applicant for local siting approval demonstrate that the proposed facility "is necessary to accommodate the waste needs of the area it is intended to serve." 415 ILCS 5/39.2(a)(i). This criterion requires that the applicant show that a facility is "reasonably required by the waste needs of the area intended to be served, taking into consideration the waste production of the area and the waste disposal capabilities, along with any other relevant factors." *Waste Management of Illinois, Inc. v. Illinois Pollution Control Board*,

122 Ill.App.3d 639, 645, 461 N.E.2d 542, 546 (3d Dist. 1984). Where other available facilities are sufficient to meet the future waste needs of the service area, expansion is not "reasonably required." *Id.* at 546-47.

The Applicant bears the burden of establishing need. *Waste Management*, 123 Ill.App.3d 1075, 1087, 463 N.E.2d 969, 979 (2d Dist. 1984). Where an applicant establishes nothing more than that a landfill will be convenient, the applicant fails to establish that criterion i is met. *See Waste Management*, 123 Ill.App.3d 1075, 1085, 463 N.E.2d 969, 976 (2d Dist. 1984).

While Ms. Smith testified that the proposed facility was necessary, her credibility was called into question during the siting hearing. First, Ms. Smith admitted that she had been paid $35,000 to $40,000 to prepare her needs report and testify on behalf of the Applicant. (2/25/03 Tr. 43). Based on this testimony, the City Council could have concluded that Ms. Smith's testimony was simply not credible or should not be given much, if any, weight. *See Ballin Drugs, Inc. v. Illinois Dept. of Registration and Education*, 166 Ill.App.3d 520, 519 N.E.2d 1151 (1st Dist. 1988) (explaining that a witness being paid to testify goes to the weight of the testimony presented, which is to be decided by the fact finder); *Kiewert v. Balaban & Katz Corp.*, 2512 Ill.App. 342 (holding that a witness being paid to testify may have a bearing on the witness' credibility). To further diminish her credibility, Ms. Smith admitted that out of the thirteen needs reports she has drafted, she has never prepared a report in which she did not find a need existed. (2/25/03 Tr. 45). Ms. Smith's credibility was further called into question because her computations on distances between the proposed facility and other facilities were contradicted by Mapquest, which found each of those facilities to be approximately 7 to 8 miles closer than what Ms. Smith indicated in her needs report. (2/25/03 Tr. 104-08). Therefore, the City Council could have understandably concluded that no matter whether the proposed facility

was necessary or not, Ms. Smith would determine that the facility necessary and would manipulate the data in order to reach such a conclusion.

Furthermore, the basis for Ms. Smith's conclusion that the proposed facility was necessary was also called into question because while Ms. Smith asserted that as much as 123 million tons of waste in the service area may require disposal, that figure was based on a zero percent recycling rate even though all counties are recycling above zero percent and some counties, including Ogle county, are actually exceeding their recycling goals. (2/25/03 Tr. 57). Ms. Smith's conclusions were also questionable because she did not know how much of Ogle County's waste was currently being transported to the Onyx facility, which has capacity for 16 years. (2/25/03 Tr. 64). Therefore, Ms. Smith clearly did not fully consider the fact that the Onyx facility could provide waste disposal to a great deal of the area intended to be served by the proposed facility.

Ms. Smith's conclusion regarding criterion i is also questionable because, as pointed out by CCOC in its Closing Argument and Proposed Findings of Fact, it is based on the premise that landfill capacity in Illinois is decreasing, but in fact, landfill capacity in Region 1, where Ogle County is located, actually increased from 2001 to 2002. (C7821-22). In reaching her conclusion, Ms. Smith also made the erroneous assumption that no additional capacity would become available to the service area despite the fact that siting approval has been granted to facilities in the service area, including a facilities in Will County, Streator and Bartlette. (2/25/03 Tr. 72, 96-97, 98, 123). Furthermore, Livingston Landfill, which serves approximately 55% of the proposed facility's service area has an application for expansion pending, as does Kankakee. (2/25/03 Tr. 103, 126).

While the Applicant contends that it is not appropriate to consider facilities that are not yet permitted, this is not necessarily true. In fact, the appellate court in *Waste Management* explained that it is appropriate "to consider proposed facilities, whether in or out of the county, if such facilities will be capable of handling a portion of the waste disposal needs of the county and will be capable of doing so prior to the projected expiration of current disposal capabilities within the county such that the needs of the county will continue to be served." 175 Ill.App.3d at 1032, 530 N.E.2d at 690. However, Ms. Smith did not do so in this case because she did not adequately consider the Onyx facility, which is located just a short distance from the proposed facility, and she failed to consider proposed and approved facilities that could serve all or part of the service area. Because it would have been appropriate for Ms. Smith to consider such facilities in determining whether a need existed for the proposed expansion, the City Council could have found Ms. Smith's analysis was incomplete because she did not do so, therefore, establishing that the Applicant did not meet its burden of establishing need.

Ms. Smith's conclusion became even more questionable because she contradicted her own opinions. While Ms. Smith stated that it is typically more expensive to transfer waste out of a county than rely on in-county disposal, the proposed facility will rely on approximately 80 percent of its waste coming from counties other than Ogle county. (2/25/03 Tr. 99-100).

Moreover, Ms. Smith's conclusion was properly rejected by the City Council because it was based on improper considerations, including economics and competition. Although Ms. Smith found that there were economic advantages to the landfill (2/25/03 Tr. 72-75, 78), such a consideration is irrelevant when considering need. In fact, Ms. Smith admitted that economic benefit or revenue is not a criteria that is to be considered at all in a section 39.2 siting hearing. (2/25/03 Tr. 81). Another improper consideration made by Ms. Smith was that expansion of the

landfill would lead to competition, which she thought was "a good thing." (2/25/03 Tr. 75-78) While Ms. Smith contends that it is favorable to have competition among landfills, this is clearly not the intent of the Act, which specifically requires that pollution control facilities be "necessary to accommodate the waste needs of the service area." 415 ILCS 5/39.2(a)(i). If landfills were meant to be competitive, criterion i of section 39.2(a) of the Act would not exist. Because Ms. Smith's testimony was based at least partly on considerations that are not relevant or appropriate under the Act, her testimony was appropriately rejected by the City Council.

Even though there was not an expert witness contradicting Ms. Smith's conclusion, it was still appropriate for the City Council to find that the Applicant to establish that the proposed facility was necessary based on the witness' insufficient and inappropriate conclusions. In *Waste Management of Illinois, Inc. v. Pollution Control Board*, 234 Ill.App.3d 65, 600 N.E.2d 55 (1st Dist. 1992), this Board and the appellate court upheld the Village's denial of the landfill siting application based on criterion i. Even though the only witness to testify regarding criterion i concluded that "the waste transfer station was necessary," the court and the Board found the Village's contrary finding was not against the manifest of the evidence because the witness' testimony did not take into consideration sufficient facts and circumstances. 234 Ill.App.3d at 69, 600 N.E.2d at 57-58. Despite the testimony provided in support of criterion i, the appellate court concluded that "the evidence presented by Waste Management was insufficient to show that the waste transfer station was reasonably required by the waste needs of the area and did not adequately address the waste production and disposal capabilities of the service area." *Id.* at 69-70. The same is true in this case because Ms. Smith clearly exaggerated the need for the facility by overestimating the amount of waste that would be provided in the service area and by failing

to consider facilities that currently exist or will exist that can handle some or all of the service area's waste.

Likewise, in *CDT*, only the Applicant, *CDT Landfill Corp. v. City of Joliet*, PCB 98-60 (March 5, 1998), provided testimony regarding the need criterion. Despite the lack of conflicting expert testimony, the City Council found that criterion i was not met, and the PCB affirmed that decision. *Id.*, slip op. at 9-10. This Board held that although CDT provided expert testimony, "the City has shown that the testimony, and the RCAA report upon which the majority of the testimony is based, is deficient." *Id.* at 9. The Board explained that although it was not convinced by all of the City's arguments, it found "enough merit therein so that a result opposite to the City's decision is not clearly evident, plain or indisputable." *Id.* Therefore, the Board concluded that "the City's decision that CDT did not meet its burden of proof on the need criterion is not against the manifest weight of the evidence." *Id.* Likewise, in this case, the Applicant failed to meet its burden of proof, and the City Council's finding on criterion i is not against the manifest weight of the evidence.

2. The City Council's Finding that the Proposed Facility was not Designed, Located or Planned to be Operated to Protect the Public Health, Safety and Welfare was not Against the Manifest Weight of the Evidence.

Section 39.2(a)(ii) of the Act requires that an applicant for local siting approval demonstrate that "the facility is so designed located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii). The determination of whether criterion ii is met is "purely a matter of assessing the credibility of expert witnesses." *Fairview*, 198 Ill.App.3d at 552, 555 N.E.2d at 1185. As long as there is evidence to support the City Council's decision, it should be upheld because it is not the function of the reviewing court to reweigh evidence or reassess credibility. *Id.*

In this case, there was testimony from a geologist, with significant experience in hydrogeology, asserting that there were problems with the proposed site, specifically that the site had not been adequately characterized geologically because of an improper groundwater impact assessment and, further, that the monitoring system was not adequate to monitor and protect against possible contamination. Although the Applicant somehow contends that such testimony was not "contradictory," it clearly was because it directly refuted the testimony of the Applicant's own witness who concluded that the site was protective of the public health, safety and welfare specifically based on his geologic hydrogeologic characterization of the site and the groundwater monitoring system. (3/3/03 Tr. 116-17).

It was not necessary for Mr. Norris to specifically state that the proposed facility did not meet criterion ii, but it was enough for him to assert that the applicant failed to properly characterize the geology of the site and had not created an adequate groundwater monitoring system. In fact, in *Land and Lakes*, the same testimony (that the applicant's groundwater assessment model and groundwater monitoring program were inadequate) was provided by an expert witness, and the court found that such claims were "based on interpretations and criticisms of technical data that conflict with interpretations put forward by [the applicant's] expert witnesses." 319 Ill.App.3d at 53, 743 N.E.2d at 197. The Court held that local siting authority was "in a far better position than this court to resolve this conflict." *Id.* As a result, the court upheld the county board's decision because it was not against the manifest weight of the evidence. *Id.* Likewise, in this case, the City Council was faced with contradictory and conflicting testimony regarding criterion ii, and it was the role of the City Council to resolve that conflict. Because there was evidence supporting the City Council's decision, that decision is not against the manifest weight of the evidence.

The testimony of Mr. Norris was clearly sufficient to establish that the applicant did not meet its burden of proof with respect to criterion ii, as several courts have affirmed decisions of local siting authorities denying siting approval where there is testimony that the applicant's geologic characterization of the site was inadequate. *See McLean County Disposal, Inc. v. County of McLean*, 207 Ill.App.3d 477, 566 N.E.2d 26 (4th Dist. 1991); *McHenry County Landfill, Inc. v. Illinois Environmental Protection Agency*, 154 Ill.App.3d 89, 506 N.E.2d 372 (2d Dist. 1987); *A.R.F. Landfill, Inc. v. Pollution Control Board*, 174 Ill.App.3d 82, 528 N.E.2d 390 (2d Dist. 1988). Consequently, despite the Applicant's contentions otherwise, the testimony of Mr. Norris was clearly sufficient to establish that criterion ii was not met.

In re-hashing the testimony of the various witnesses who testified with respect to criterion ii, the Applicant is doing nothing more than asking this Board to reweigh their credibility, which this Board has no authority to do. *See City of Rockford v. County of Kankakee,* 186 Ill.App.3d 303, 542 N.E.2d 423 (2d Dist. 1989). Rather, it is the role of the City Council to weigh the evidence, and the City Council clearly found that the Applicant failed to meet its burden.

Even without Mr. Norris' testimony, the City Council could have concluded that the Applicant failed to meet its burden of proof with respect to criterion ii because the conclusions of the Applicant's witnesses were based on incorrect data and improper assumptions. For example, when calculating the amount of contaminated water that would come through the final cover, he used an improper slope, and when the appropriate slope was finally used, there was 4.6 times as much water percolating through the drainage layer than what Mr. Zinnen had previously indicated. (2/25/03 Tr. 231-33; 2/26/03 Tr. 186). Furthermore, Mr. Zinnen's conclusion that the landfill was designed to protect the public health, safety and welfare was based on the

assumption of exhumation of Unit 1; however, the IEPA has to provide a permit before that exhumation may take place, which has not yet been done. (2/25/03 Tr. 267). Finally, in reaching his conclusion that the facility was designed to protect the public health, safety and welfare, Mr. Zinnen was relying on the functioning of the groundwater monitoring system. (2/25/03 Tr. 212). As set forth by Mr. Norris, such an assumption could not appropriately be made because the groundwater monitoring system in place was insufficient. (3/4/03 Tr. 113).

Furthermore, the Applicant's contention that its landfill was "designed well beyond what is required by the minimum state standard" (Petitioner's Brief, p. 30, fn. 8) should be rejected by this Board because the Applicant's own witness, Mr. Zinnen admitted that several important features of the landfill did not exceed standards. For example, Mr. Zinnen testified that the liner proposed to be used for the facility is the most basic type and does not exceed regulations. (2/25/03 Tr. 155, 197-98). Mr. Zinnen further testified that the leachate collection system was the "standard design" used in Illinois. (2/25/03 Tr. 167). Therefore, it is clear that the Applicant and its witnesses were simply exaggerating when they alleged that the design of the proposed facility was beyond state standards. As such, the City Council was free to reject such testimony and properly find that the facility was not adequately designed to protect the public health, safety and welfare.

In support of its assertion that the facility was located to protect the public health safety and welfare, the Applicant repeatedly cites the testimony of Mr. Stanford, who stated that the facility was an excellent location for a landfill and that the site geology and hydrogeology were the best he had ever seen. However, the Applicant failed to point out Mr. Stanford's limited experience in reviewing the geology of landfills, which makes his testimony much less reliable. Furthermore, the fact that Mr. Stanford concluded that the site's characterization was the "most

extensive" he has ever seen was refuted by Mr. Norris who explained that although the data available for characterization may have been more than that available for other sites, that does not mean that the site was well-characterized or properly characterized. (3/3/03 Tr. 143). This is especially true because Mr. Stanford did not even use site-specific data in the model at all times. (3/4/03 Tr. 59). For example, Mr. Stanford did not use actual permeabilities in determining how fast contaminants would move under the site but instead assumed that contaminants would move at the same speed throughout the entire system. (3/3/03 Tr. 151; 3/4/03 Tr. 59-60).

Furthermore, Mr. Stanford's credibility and opinions were called into question because although he testified that he used "conservative assumptions" in his groundwater impact model (3/3/03 Tr. 120-124), his own testimony revealed that to be untrue. In fact, Mr. Stanford's assumptions in the model were less conservative than Mr. Zinnen's because in the model, Mr. Stanford assumed only two pinhole defects in the HDPE liner per acre, while Mr. Zinnen assumed twice as many in his model. (3/3/03 Tr. 150). Mr. Stanford did not supply any justifiable reason for decreasing the amount of defects assumed in the liner. Furthermore, Mr. Stanford's model was not "conservative" because as it pointed out by CCOC (C7825), (3/3/03 Tr. 151) it did not assume any leaks in the clay liner.

The Applicant spends a great deal of time in its brief attacking the credibility of Mr. Norris, which is clearly inappropriate because this Board is not in a position to reweigh the credibility of witnesses. *See City of Rockford,* 186 Ill.App.3d 303, 542 N.E.2d 423. Furthermore, the Applicant takes Mr. Norris' testimony out of context and twists it to support their assertions. For example, the Applicant provides a quotation of Mr. Norris' testimony where he admitted that the data available for characterization of the site was more than he has ever seen. However, the Applicant failed to point out that Mr. Norris stated that the availability of

such evidence does not mean that a site is well-characterized or properly characterized and specifically found this site was not. (3/4/03 Tr. 143).

Finally, the Applicant attempts to downplay Mr. Norris' concerns about the inadequate characterization of the site and inadequate monitoring system. However, it is entirely disingenuous for the Applicant to do so because Mr. Stanford testified that a hydrogeologic investigation is necessary to assess the performance of the proposed landfill with regard to potential impacts on groundwater quality. (3/3/03 Tr. 59). Therefore, it is very important that site was not properly characterized.

Furthermore, Mr. Norris' concerns are significant because they directly refute the bases upon which Mr. Stanford concluded that the facility was located to protect the public health, safety and welfare. This is true because Mr. Stanford concluded that the facility met criterion ii because: 1) it is underlined by the Tiskilwa formation, which serves as an aquitard, 2) the upper aquifer was separated from the sandstone aquifer, 3) the groundwater moves slowly under the site, and 4) the monitoring system is adequate to monitor for problems. (3/3/03 Tr. 116-17). Mr. Norris found each of these conclusions to be unfounded because he believed: 1) that the Tiskilwa layer was not impermeable and retardant, 2) that the flow systems were more interconnected than the Application showed, 3) that the flow was not as slow as Mr. Stanford calculated, and 4) that the monitoring program did not adequately monitored for potential escapes of contaminants. (3/4/03 Tr. 70-78, 113, 153). Therefore, this is a clear battle of the experts, which was appropriately decided by the City Council. See *Fairview*, 198 Ill.App.3d at 552, 555 N.E.2d at 1185.

In addition to finding that the location and design of the facility was not protective of the public health, safety and welfare, the City Council could also have appropriately concluded that

the plan of operations for the facility was not protective of the public health, safety and welfare based on the testimony of Mr. Gelderloos. Although he testified that the facility had programs in place to deal with litter, odor, fire, dust, spills, accidents and load-checking the City Council could have found that these programs were inadequate and could have concluded that based on the substantial problems that the operator has had in the past with violations and deficiencies, the facility would not be operated in a way that would protect the public health, safety and welfare.

As set forth above, there was more than enough evidence to support the City Council's conclusion that the location, design and plan of operations were not protective of the public health, safety and welfare. Therefore, the City Council's finding regarding criterion ii is not against the manifest weight of the evidence.

3. The City Council's Finding that the Facility was not Located so as to Minimize Incompatibility with the Character of the Surrounding Area and to Minimize the Effect on the Value of the Surrounding Property is not Against the Manifest Weight of the Evidence.

Section 39.2(a)(iii) requires that an applicant for local siting approval establish that "the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property." 415 ILCS 5/39.2(a)(iii). Fulfilling this condition requires an applicant to demonstrate more than minimal efforts to reduce the landfill's incompatibility. *Waste Management*, 123 Ill.App.3d at 1090, 463 N.E.2d at 980. Rather, an applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. *Id.* Although an applicant may introduce some evidence on minimization of incompatibility, such evidence may be insufficient to establish that criterion iii is met. *Id.*

Two witnesses testified regarding criterion iii, Christopher Lannert and Peter Poletti. Mr. Lannert's credibility, like Ms. Smith's, was questioned because he has testified in 35 landfill

siting hearings, and in 34 of those hearings, he testified that the facility was compatible with the surrounding area. (2/24/03 Tr. 86). In the one case in which he testified that a facility was not compatible, he was paid by an objector to do so. *(Id.)* He also admitted that he was hoping to do the landscaping for the site if it was sited. (2/24/03 Tr. 97-98). Therefore, Mr. Lannert had a direct interest in providing testimony that would be supportive of the application.

It was entirely reasonable for the City Council to reject Mr. Lannert's conclusion that the facility was located to minimize incompatibility with the character of the surrounding area because as pointed out by CCOC, Mr. Lannert's conclusion was based on the presence of a berm to the east of the site to shield the site. (C7829). In fact, Mr. Lannert stated that he placed "substantial reliance on the berm to minimize the impacts and make the facility compatible with the surrounding area" and admitted that it was a "critical component" in reaching his conclusion. (2/26/03 Tr. 190-91). However, Mr. Lannert admitted that the berm was located off-site and not within the facility boundary; therefore, the City Council has no ability to control the size, maintenance or completion of that berm. (2/24/03 Tr. 110). Because Mr. Lannert placed such reliance on a landscaping structure that may never even exist on the site, the City Council was clearly within its rights to find that this criterion was not met.

Furthermore, it is clear that Mr. Lannert skewed his testimony to emphasize the facts that supported his position, while de-emphasizing facts that did not. For example, Mr. Lannert testified that he believed the landfill was compatible with the surrounding area because much of the property immediately surrounding the facility is zoned agricultural and industrial. (2/24/03 Tr. 74). However, on cross-examination, Mr. Lannert admitted that there are approximately 100 residential properties within a mile of the facility. (2/24/03 Tr. 93).

It was also reasonable for the City Council to be cautious of Mr. Lannert's testimony that there was minimal impact to the surrounding area because the photos that he provided at the siting hearing did not present an accurate picture of the facility because they were from one quarter of a mile away from the site even though there were houses closer than that from which photos could have been taken. (2/24/03 Tr. 88, 92). He also admitted that no photos were taken from backyards of homes in the Village of Creston. (*Id.* 24, 94). Therefore, the City Council may have concluded that the Applicant was presenting a skewed picture of the proposed landfill.

Mr. Lannert also admitted that he considered compatibility by looking only at a one-mile radius surrounding the proposed facility even though other studies have examined compatibility up to five miles from a proposed site. (2/24/03 Tr. 101). He also admitted that the landfill was the biggest landform in Ogle County and may be the highest ground elevation in the County. (2/24/03 Tr. 108-10). Based on the massive size of the facility, it was clearly reasonable for the City Council to find that the facility was not located to minimize incompatibility with the character of the surrounding property, especially based on an inadequate study that did not properly examine a large enough area. *See Waste Management*, 123 Ill.App.3d at 1089, 463 N.E.2d at 979.

Furthermore, the testimony of Mr. Poletti was also questionable because out of the twenty to twenty-five times that he has testified in a landfill siting hearing, he has always found that a facility is located to minimize the effect on the value of the surrounding property. (2/24/03 Tr. 146). Therefore, the City Council could have reasonably found that Mr. Poletti's testimony was not credible because no matter what the property values showed, he has testified that a proposal meets criterion iii.

In determining whether there was a negative effect on the value of surrounding property, Mr. Poletti created the target group and control group but, as was noted by CCOC, no reason or justification was provided for concluding that the current facility only impacted property within a mile and a half from the site. (C7829). Mr. Poletti also seemed to skew the data by removing various properties from his study based on certain characteristics without explaining why such characteristics would somehow adversely affect his results. Despite the skewed data, Mr. Poletti's study revealed that properties nearest the landfill were selling for $1.40 less per square foot that those further away. (2/24/03 Tr. 137-38). While Mr. Poletti concluded that there "was no statistical difference between those two averages" (2/24/03 Tr. 138), a 1500 square foot home located within a mile of the facility would be worth $2,100 less than if it were located further away from the facility. Based on such evidence, the City Council could have reasonably found that the facility was not designed to minimize the effect on the value of the surrounding property.

Additionally, Mr. Poletti's conclusion that the facility will not negatively impact property values is questionable because based on appreciation statistics, the two most recent sales in the target area had the lowest rate of appreciation. (2/24/03 Tr. 167). In fact, a review of the appreciation rates of the homes in the target area revealed that each sale had a lower appreciation than the last. (2/24/03 Tr. 168-69). Therefore, it was reasonable for the City Council to conclude that the property values in close proximity to the landfill would continue to be negatively impacted based on the expansion of the facility.

The Applicant points out positive findings made by Mr. Poletti regarding property values to attempt to establish that criterion iii was met; however, the Applicant fails to provide the whole story. For example, the Applicant notes that Mr. Poletti found a 3% higher appreciation rate in property in the target area versus the control area; however, the Applicant fails to mention

that Mr. Poletti admitted that no conclusion could be drawn from that study because the number of houses analyzed in the target group was insufficient. (2/24/03 Tr. 167). Furthermore, the Applicant selects specific properties near the landfill that have increased in value to support its conclusion that such properties are not adversely affected by the landfill. (Petitioner's. Brief, 65). One of the properties specifically mentioned by the Applicant was the "Rich house" even though as pointed out by CCOC, the "Rich house" was specifically excluded from Mr. Poletti's study because of its size (C7830).

Finally, Mr. Poletti's study failed to take into account the effect of the expansion of the facility, which would result in a four-fold increase in the facility's size and nearly a ten-fold increase in its capacity. It is well settled that an Applicant cannot establish compatibility based on a pre-existing facility. *Waste Management*, 123 Ill.App.3d at 1088, 463 N.E.2d at 979. In this case, the evidence suggested a downward trend in property values since the application for expansion was filed because houses sold in the target area after the first application for expansion was filed were significantly lower than the average. (2/24/03 Tr. 172). By failing to recognize and acknowledge such a downward trend, the City Council may have concluded that the Applicant failed to adequately analyze the impact on property values and has failed to establish that the effect on values of surrounding properties will be minimized.

Just as in this case, in *CDT*, PCB 98-60, there was no expert testimony to contradict a real estate witness' testimony that a proposed landfill expansion would not negatively impact property values. Nonetheless, the IPCB upheld the City Council's finding that criterion iii was not met. In doing so, the IPCB noted that although the difference in appreciation in houses near the landfill and those removed from the landfill were statistically insignificant, one study showed

that the rate of appreciation in houses near the landfill was less, by under one percent. *Id.*, slip op. at 16-17. Based on such evidence, the Board concluded:

> Sufficient evidence exists on the record so that the City could find incompatibility with the surrounding area and a negative effect on property values. A review of the record indicates that the City could find that CDT did not demonstrate it has done or will do what is reasonably feasible to minimize incompatibility and effect on property values. An opposite conclusion is not clearly evident or indisputable from a review of the evidence. The Board, thus, concludes that the City's decision on criterion (iii) is not against the manifest weight of the evidence."

Id. at 17. As the evidence showed in *CDT*, the evidence in this case establishes that the property nearest the landfill is being negatively impacted and the Applicant has done nothing to reduce such impacts. Therefore, the City council's conclusion regarding criterion iii was not against the manifest weight of the evidence.

4. The City Council's Finding that the Traffic Patterns to or from the Facility are not so Designed to Minimize the Impact on Existing Traffic Flow is not against the Manifest Weight of the Evidence.

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). Mr. Werthman admitted that his conclusion was based on an assumption that there would be a widening and improvement of Mulford Road and 38, allowing for a left turn and right turn lane, which was planned by the IDOT, but was not yet in existence at the time of the hearing. (2/24/03 Tr. 248).

Mr. Werthman conducted a traffic study in which he analyzed traffic based on the facility taking 3,500 tons of garbage each day. (2/25/03 Tr. 199, 220). However, the facility does not have a yearly or daily tonnage cap and could possibly take up to 5,000 tons of garbage or more each day. (2/25/03 Tr. 220). Therefore, the traffic analysis was clearly not "conservative" as suggested by the Applicant. (Petitioner's Brief, p. 71). Because the traffic analysis was not

conducted assuming the highest possible traffic volume, that analysis and its conclusions are not reliable, as the City Council could have appropriately found.

The City Council was free to conclude that the traffic study was also unreliable because the applicant supplied the information regarding the number of trucks exiting and leaving the facility, the traffic patterns of those trucks, the number of employees working at the proposed facility and the peak hour distribution of traffic to the facility. (2/24/03 Tr. 223-25, 244). Because Mr. Werthman's conclusion was based on information provided by the applicant, it was inherently unreliable. *See A.R.F. Landfill*, 174 Ill.App.3d 94, 528 N.E.2d at 398.

Furthermore, as CCOC pointed out, Mr. Werthman's study was arguably inadequate because he did not consider construction traffic on the site even though there will be significant additional truck traffic due to construction. (C7831). In fact, Mr. Zinnen testified that approximately 665,000 cubic yards of material will have to be brought onto the site. (2/25/03 Tr. 235-36). Clearly, those trucks would add to the traffic at the site and should have been considered. Furthermore, Mr. Werthman's study fails to specifically calculate additional truck traffic that will result from the intermodal facility that is being developed in Rochelle. (2/25/03 Tr. 216-17). Finally, Mr. Werthman's study was insufficient because he purposely did not perform an analysis during snowy or rainy conditions even though traffic conditions usually degrade with snow and/or rain. (2/25/03 Tr. 215).

Directly contradicting his opinion that criterion vi was met, Mr. Werthman admitted that the facility will, in fact, have an adverse effect on traffic in the area because the presence of landfill traffic and the road improvements necessary to accommodate such traffic will downgrade the level of service at the intersection of Route 38 and Mulford from a grade "C" to a grade "D," the lowest acceptable level. (2/25/03 Tr. 240-42). Mr. Werthman admitted that a lower level of

service generally means that drivers will have to wait longer at the intersection (2/25/03 Tr. 242-43), which could lead to more frustrated and impatient drivers and could, in turn, lead to more accidents and less safe roadways.

While no court has specifically identified what is required to "minimize the impact on existing traffic flows," the Board has found that the criterion is met where the evidence establishes that traffic flows will not increase. *CDT*, slip op. at 19. In this case, however, there was no evidence presented that traffic flows will not increase, as they clearly will increase based on the over ten-fold increase in vehicles entering and exiting the proposed facility.

Additionally, it is clear that traffic will not be minimized because despite Mr. Werthman's belief that a stoplight would be beneficial at the intersection of Mulford Road and Route 38 to reduce the risk of accidents and help the flow of traffic, no stoplight will be installed. (2/24/03 Tr. 207-08, 212). Consequently, the impact on traffic is not minimized. *See Fairview*, 198 Ill.App.3d at 554-55, 555 N.E.2d at 1187 (finding that criterion ii was satisfied where no testimony was presented suggesting that traffic signals or signs should be installed).

Finally, the City Council's decision regarding criterion vi was not against the manifest weight of the evidence because, in addition to the testimony from Mr. Werthman, the City Council also heard numerous public comments from community members concerned about increased traffic. According this Board in *CDT*, those public comments could be considered. *CDT*, slip op. at 6. Furthermore, the City Council members were free to use their own knowledge and familiarity with local traffic conditions to determine that criterion vi was not met. *Hediger v. D&L Landfill*, PCB 90-163 (Dec. 20, 1990). Based on such evidence and the unreliable report created by Mr. Werthman, the City Council appropriately concluded that the

Applicant failed to establish compliance with criterion vi, and that decision is not against the manifest weight of the evidence.

V. CONCLUSION

The Respondent, City Council of the City of Rochelle, Illinois, respectfully requests that this Board affirm the Respondent's denial of siting approval and find that the hearing was fundamentally fair.

Dated: 1/6/04

Respectfully Submitted,

On behalf of the City Council of the City of Rochelle, Illinois, Respondent

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