BEFORE THE POLLUTION CONTROL BOARD

PROTECT WEST CHICAGO, Petitioner, vs. CITY OF WEST CHICAGO, WEST CHICAGO CITY COUNCIL, and LAKESHORE RECYCLING SYSTEMS, LLC, Respondents.	)	PCB 2023-107 (Pollution Control Facility Siting Appeal)

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

CERTIFICATE OF SERVICE

The undersigned hereby states that she served the following document:

Response Brief of Lakeshore Recycling Systems, LLC

upon:

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

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

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

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

by electronic mail to the addresses listed above this 6th_____ day of December, 2023.

LAKESHORE RECYCLING SYSTEMS, LLC.,
Respondent

BY: /s/ George Mueller_____
George Mueller
One of Its Attorneys

Karen Donnelly (#6317926)
Attorney at Law
501 State Street
Ottawa, IL 61350
(815) 433-4775
donnellylaw501@gmail.com

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

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

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

RESPONSE BRIEF OF LAKESHORE RECYCLING SYSTEMS, LLC

Now comes the Respondent, LAKESHORE RECYCLING SYSTEMS, LLC, by its attorneys, George Mueller and Karen Donnelly, and for its Response to the Opening Briefs of PEOPLE OPPOSING DUPAGE ENVIRONMENTAL RACISM and PROTECT WEST CHICAGO, states as follows:

INTRODUCTION

The Opening Briefs of PWC and PODER contain plenty of volume, but not much substance. PWC makes numerous arguments that have been repeatedly rejected by the Board in

the past. These include pre-filing contacts between LRS and the City, use of a third-party expert (Aptim) to review the Siting Application, deliberations in executive sessions, post-hearing written public comment submitted by Applicant, and statements by a non-decision maker (Mayor Pineda). The focus of the PWC Opening Brief really is on events that occurred prior to the filing of the Application, and the law regarding the non-applicability of those pre-filing events is well settled. PWC concentrates on these because there really is zero evidence of improper post-filing ex parte contacts. The alleged bias of West Chicago is based solely on unjustified inferences from innocuous conduct that is normal in a siting proceeding. For example, PWC argues the City should have denied the Siting Application based on their pre-filing reviewer's negative comments about some aspects of a much earlier draft of the Application. PWC's argument completely misses the point of pre-filing review, which is to identify and correct problems in earlier drafts of a Siting Application.

PODER's Brief is even odder, as it is, in essence, an unsupported plea for the Pollution Control Board to unilaterally rewrite the Environmental Protection Act. As stated in our Opening Brief, environmental justice principles are inherent in the structure and operation of Section 39.2l hearings, as demonstrated by the fact that the State's Environmental Justice Policy approvingly refers to the Section 39.2 siting process.

JURISDICTION

Pre-filing notice served in person on the Canadian National Railway was legally sufficient. This was extensively argued and explained in LRS's Opening Brief. PWC erroneously alleges that the Canadian National Railway is not shown as a property owner on the authentic tax records of DuPage County. However, LRS placed into evidence the DuPage County, Illinois 2022 Real Estate Tax Assessment Parcels Map for the west half of the northeast

quarter of Section 32 in Wayne Township. This map shows the eastern portion of the proposed Transfer Station property and the parcels immediately adjoining it. This map is identified as 1-32B-W, and is maintained by Jean Kaczmarerk, the DuPage County Clerk. It is an authentic tax record of DuPage County. These partial section maps are equivalent to the Sidwell maps that people used to use for parcel tract searches before inline searching became the standard. It has been admitted into evidence. (App. Ex. 5, Tr. 217) The subject parcel is identified on the aforesaid tax map, and the owner is also identified, that owner being Canadian National Railway, with a parenthetical reference to EJ&E.

PWC objects to the manner of service, but they provide no authority for the proposition that actual personal service by a UPS delivery man is not, in fact, personal service. Personal service doesn't get any better than when an employee at the corporate office signs a receipt acknowledging they received the served document.

PWC argues that the pre-hearing notice requirement is strictly enforced, and while LRS's notice is sufficient even under that standard, the argument is not exactly correct. The courts have strictly enforced the timing requirements of Section 39.2(b), but they have been more liberal with regard to the other portions of the notice requirements. "Notice is sufficient if it is in compliance with the statute and it places potentially interested persons on inquiry about the details of the activity. The notice itself need not be so technically detailed as to raise unnecessary concerns among local residents and the general public." *Tate v. Illinois Pollution Control Bd.*, 188 Ill. App. 3d 994, 1019 (4th Dist. 1989). This is consistent with the legislative declaration in 415 ILCS 5/2 that "[t]he terms and provisions of this Act shall be liberally construed so as to effectuate the purposes of this Act as set forth in subsection (b) of this Section, but to the extent that this Act

prescribes criminal penalties, it shall be construed in accordance with the Criminal Code of 2012."

1,000 FOOT SETBACK

This non-issue was also discussed at length in LRS's Opening Brief. The PWC Brief emphasizes the testimony of Joe Abel, who suggested that eventual development of the railroad right of way is possible, but, of course, that requires future events such as the railroad's abandonment of the tracks, rezoning of the property, and more, which cannot be predicted, and which, at this time, would be totally speculative. The City Council had to base its decision on current conditions and facts, and not on some totally hypothetical future developments. Mr. Abel did admit that at the current time the railroad property cannot be developed into residences. (Tr. 1088). He also admitted that Canadian National Railway is, in fact, the owner of one of the railroads in question. (Tr. 1086).

ENVIRONMENTAL JUSTICE

Both opponents have a view of "environmental justice" that is over-simplistic and seems to emphasize the two words without real consideration of what they actually mean. This is emphasized by opponents' reference to the Environmental Justice Act being a part of Chapter 415 of the Illinois Compiled Statutes. The Environmental Justice Act (415 ILCS 155/1) has nothing to do with the procedures used for siting, and even permitting pollution control facilities. Instead, its sole purpose is to create a commission to study the issue and make recommendations at a statewide level. (415 ILCS 155/10). With the apparent recognition that local siting proceedings under Section 39.2 do an adequate job of addressing environmental justice concerns, the State's environmental justice focus seems to be on permitting issues.

With this consideration in mind, the Hearing Officer's alleged bias by not allowing questioning about the term "environmental justice," even though he allowed all competent questioning and testimony regarding possible pollution and other negatives resulting from construction and operation of the Transfer Station is a non-sequitur. The sole exception to this is that the Hearing Officer did not allow the testimony of Julieta Alcantar-Garcia about her so-called air monitoring because she was neither competent nor qualified to offer such testimony. Beyond the threshold questions of whether the simple device she was using actually works and if so, how it works, we do not know where she was standing, truck traffic at the time, how long the measurements took, or weather conditions. The fact that Ms. Alcantar-Garcia had been "trained" in the use of her monitoring device by a forest preserve commissioner, without any proof that he knew what he was doing, really ought to be the end of the inquiry. Keep in mind also that what was attempted to be measured were existing conditions and do not reflect on what if any pollution would result from the *new* Transfer Station. With that context, the Hearing Officer's rulings on the so-called emissions testing were, at best, appropriate, and, at worst, harmless error.

Somewhat troubling is the fact that several of PODER's Exhibits, which were not offered as demonstrative, but rather as substantive evidence, were apparently prepared by PODER's attorney. This is clearly the case with PODER Exhibits 1, 3, and 4. So what we are left with is a PODER witness (Alcantar-Garcia), who is admittedly not technically qualified, answering leading questions about exhibits prepared by her attorney. That hardly seems like a formula for accurate fact finding. PODER Exhibit 5 is even more troubling. It was placed into the record without foundation, other than a brief explanation by PODER's attorney that he partially prepared it and that he "manipulated" some of the data, so it would seem to have no evidentiary value. (Tr. 1265). However, counsel for PODER saw something in those almost 1500

inscrutable pages of data, now claiming in his brief that "… the increase in diesel trucks that LRS's facility will bring to West Chicago will contribute to an impermissible level of air pollution. This follows because the proposed 'location' for the LRS facility *already fails to meet public-health based ambient air quality standards.*" (PODER Brief at 25). Given the state of the record, there is no basis to even suspect that the statement is true, or even probably might be true. If the Transfer Station will present an air pollution problem, it is the burden of the opponent to prove the same. It is not the burden of the applicant to disprove every far-fetched hypothesis thrown out by an opponent. So PODER's assertion that LRS presented no evidence on how the proposed facility would protect the public from adverse health effects related to the anticipated, increased diesel truck pollution gets it backwards. LRS witnesses presented evidence that emissions from diesel trucks would be *de minimus* and would not occur near any populated areas within West Chicago. Speculation to the contrary is not a basis to find that the City's decision was against the manifest weight of the evidence.

PODER's brief argues at length that the Board must consider proof of disparate and cumulative impacts of the proposed Transfer Station. This argument is fatally flawed at the outset, because it requires the assumption that there will be negative impacts, an assumption not justified by any of the evidence in this hearing. By focusing on 'disparate and cumulative' impact, PODER again misses the point, which is that all negative impacts should be considered, but only if they are reasonably provable.

SPANISH LANGUAGE ISSUE

As stated in LRS's Opening Brief, this issue was waived by all opponents since they failed to bring it up at the start of the siting hearing. Reference in passing to the lack of Spanish language services by public commenters near the end of the public hearing, and well after LRS

had rested its case, does not defeat LRS's waiver argument, and does not constitute a timely or sufficient request for Spanish language services. Moreover, there is no authority for such services in this context. The due process afforded to participants in a section 39.2 hearing is not the same as the constitutional due process afforded to criminal defendants. "The siting authority's role in the siting-approval process is both quasi-legislative and quasi-adjudicative. *Land and Lakes v. IPCB*. 319 Ill. App. 3d 41, at 47 (3d Dist. 2000) *overruled for unrelated reasons.by Peoria Disposal Co. v. IPCB*, 385 Ill. App. 3d 385 781 (3d Dist. 2008). Recognizing this dual role, courts have interpreted the applicant's right to fundamental fairness as incorporating *minimal* standards of procedural due process, including the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence. "Mere expressions of public sentiment are not sufficient for a showing of prejudice. * * * Nor does the existence of strong public opposition render the proceedings fundamentally unfair, as long as the applicant is provided with a full and complete opportunity to present evidence in support of its application." *Fox Moraine, LLC v. United City of Yorkville.* 2011 IL App. (2d) 100017. The objectors have, however, not identified a single person who was unable to fully participate because of impaired English fluency. Ms. Alcantar-Garcia, the individual who was allegedly "forced" to participate in English, is a natural born US citizen, who did quite well while testifying in English.

The PWC opening brief mentions the volume of opposition letters submitted. This ignores the foregoing authority, because siting is not a popularity contest.

According to PODER, several individuals, who did not register in a timely fashion, were denied the opportunity to give oral public comment, but that denial has nothing to do with their English fluency, or lack thereof. Siting authorities are free to adopt their own procedural rules.

"The Act does not provide specific procedures for conducting the local hearing itself. It does establish procedures for the application process and for standards which must be applied. The language of section 40.1(a) recognizes that specific procedures as to the conduct of the local hearings may be established by a county board and also requires that those procedures be fundamentally fair. Thus, the Act does not prohibit a county board from establishing its own rules and procedures governing conduct of a local siting hearing so long as those rules and procedures are not inconsistent with the Act and are fundamentally fair." *Waste Mgmt. of Illinois, Inc. v. IPCB*, 175 Ill. App. 3d 1023, 1035–36 (2d Dist.1988). The individuals who wanted to provide late and untimely public comment without having first registered did so near the end of the public hearing on January 12, 2023, and offered no excuse for having failed to previously register. Moreover, the Hearing Officer explained these persons could provide written public comment, which would be considered by the City Council. At least one person in this group (Sofia Solis) did file a subsequent written comment.

SITING PROCEEDINGS WERE OTHERWISE FUNDAMENTALLY FAIR

Fundamental fairness has previously been adjudicated as a mixed question of fact and law. Therefore, despite suggestions by PODER to the contrary, the standard for reviewing fundamental fairness is whether the local decision is clearly erroneous. This standard gives substantial deference to the local decision-maker. *Peoria Disposal Company v. IPCB*, 385 Ill. App. 3d 781 (3d Dist. 2008*).* With regard to the unsupported allegations by PWC that the City Council was biased, first of all, those allegations have been waived by failure to make them in a timely fashion at the beginning of the local hearing. "Issues of bias or prejudice on the part of the siting authority are generally considered forfeited unless they are raised promptly in the original siting proceeding, because it would be improper to allow the petitioner to knowingly

withhold such a claim and to raise it after obtaining an unfavorable ruling." *Peoria Disposal,* 385 Ill. App. 3d at 797-98.

PWC also raises the issue of ex parte communications. Generally, these communications have to occur after a siting application is filed, and they have to involve an actual decision-maker. Neither of those is true for any communication identified by PWC. Instead, PWC recites a litany of communications between the Applicant and City staff and consultants, and other communications by the Mayor (himself not a decision-maker) with a local priest. This occurred several years before the application was filed, as did adoption of the host agreement. What PWC disregards is the judicial presumption that "members of a siting authority are presumed to have made their decisions in a fair and objective manner. *Peoria Disposal,* 385 Ill. App. 3d at 797. This presumption is not overcome merely because a decision-maker has previously taken a public position or expressed strong views on a related issue. *Id.* at 797-98. To show bias or prejudice in a siting proceeding, the petitioner must show that a disinterested observer might conclude that the siting authority, or its members, had prejudged the facts or law of the case. *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017.

Both objectors question the impartiality of the Hearing Officer. The Hearing Officer is not a decision-maker, and, in order to prevail, a party must demonstrate that the hearing officer's actions rendered the entire proceeding fundamentally unfair. *Cnty. of Kankakee vs. City of Kankakee, Illinois*, 2003 WL 137451, at *23. The extent of alleged hearing officer unfairness in this case is that he did not allow questions about environmental justice, and he did not allow unqualified testimony about air pollution readings obtained in some unknown fashion by Ms. Alcantar-Garcia. Ms. Alcantar-Garcia also testified at the Pollution Control Board hearing that the Hearing Officer made her feel humiliated and caused her to cry. Those complaints on her

part may be subjectively true, but there is nothing in the record that supports them. She certainly did not complain during the hearing about the way she was treated. Ms. Alcantar-Garcia also complained at the PCB hearing that she was offended by the fact that LRS filed its Siting Application on Mexican Independence Day.

The Opening Briefs also suggest the City demonstrated its bias by initially scheduling the siting hearing in late December, a time that would interfere with family and holiday events. However, the City heard the citizen complaints and rescheduled the public hearing to start in early January.

PWC next complains that LRS should not have been allowed to make a written public comment filing late in the public comment period. This filing included a letter from an LRS witness explaining his opinion in light of critical testimony by a PWC witness. This involves nothing more than the City Council having to weigh the opinions of competing experts. The other portion of the post-hearing public comment was a letter from Canadian National Railway, which confirms they received actual notice of the Siting Application filing. PWC objects to this letter, but then argues that it is proof that EJ&E Railroad should have received the notice that went to Canadian National. The Canadian National letter, however, confirms that EJ&E is and has been fully owned by Canadian National for over 10 years.

PWC's objection to LRS's post-hearing filing also ignores well established law. In *Land and Lakes v. IPCB,* Waste Management of Illinois filed approximately 2000 pages of material on the last day of the post-hearing public comment period. 319 Ill. App. 3d 41 (3d Dist. 2000), *overruled* by *Peoria Disposal Co. v. IPCB,* 385 Ill.App.3d 781 (3d Dist. 2008). That filing also violated the local Will County siting ordinance, which required 24 hour advance filing of

additional exhibits. Despite these seeming infirmities, the Court held that the County Board's consideration of these documents was harmless error. *Id.*

Lastly, PWC makes much noise about a FOIA related lawsuit by a local citizen against the City of West Chicago. What was at issue were communications between Aptim Engineering and LRS consultants regarding the pre-filing review of earlier drafts of the siting application. These communications happened several years before a revised and improved siting application was filed. The City originally denied the FOIA request, alleging that the information sought was exempt from disclosure under 5 ILCS 140/7(1)(f) and (k). The City lost the lawsuit and the information was provided without further delay or complications. PWC now argues that the City exercising its rights under FOIA and litigating a contested interpretation of that law is proof of the City's bias and prejudgment. PWC calls the City's action "concealment," and treats the whole matter (which did not directly involve any City Council members) as some type of grand conspiracy to hide the truth. Pre-filing review is routine and beneficial, and this is the first case this writer is aware of where an objector got access to pre-filing review comments. And, of course, the expected then occurred, because PWC argued that negative comments about an early, preliminary draft of the siting application prove that the substantially different final application is no good. We would have expected nothing less from an objector whose arguments are best described as the kitchen sink approach, throwing everything but the kitchen sink at the wall, without regard to merit, in the hope that something will stick.

THIS BOARD CANNOT CHANGE STATUTORY SITING REQUIREMENTS

As mentioned hereinabove, the Opening Brief of PEOPLE OPPOSING DUPAGE ENVIRONMENTAL RACISM (PODER) is flawed at its inception. In its Introduction, PODER requests that the Pollution Control Board "instruct municipalities and regulated industries

throughout the state that the local siting process under 415 ILCS 5/39.2 *must* include consideration of both who will be affected by a proposed pollution control facility and how those effects may combine with existing sources of pollution." *See* PODER Opening Br. at 1. Essentially, PODER is requesting that this Board change the siting requirements established by the Illinois Legislature.

The Illinois Pollution Control Board (Board) was created in 1970 by the Environmental Protection Act (Act) (415 ILCS 5). Under the Act, the Board has two main functions: (1) adopting environmental rules for Illinois through rulemaking; and (2) deciding environmental cases through adjudicating, much like a "science court." The Board consists of five Members with verifiable experience in the field of pollution control. Board Members are appointed by the Governor and subject to Illinois Senate confirmation. *Citizens Guide to the Illinois Pollution Control Board*, https://pcb.illinois.gov/documents/dsweb/Get/Document-95493 (last visited Nov. 16, 2023). Furthermore, the Board's own mission statement reflects the following:

> The Illinois Environmental Protection Act (Act) was enacted in 1970 for the purpose of establishing a comprehensive State-wide program to restore, protect, and enhance the quality of the environment in our State. To implement this mandate, the Act established the Illinois Pollution Control Board (Board) and accorded it the authority to adopt environmental standards and regulations for the State, and to adjudicate contested cases arising from the Act and from the regulations.
>
> With respect for this mandate, and with recognition for the constitutional right of the citizens of Illinois to enjoy a clean environment and to participate in State decision-making toward that end, the Board dedicates itself to:
>
> - The establishment of coherent, uniform, and workable environmental standards and regulations that restore, protect, and enhance the quality of Illinois' environment;
>
> - Impartial decision-making that resolves environmental disputes in a manner that brings to bear technical and legal expertise, public participation, and judicial integrity;

- Government leadership and public policy guidance for the protection and preservation of Illinois' environment and natural resources, so that they can be enjoyed by future generations of Illinoisans.

It has long been held by Illinois courts that administrative agencies have only the powers conferred upon them by their enabling statute. The Pollution Control Board, under its own enabling statute, confers upon the Board the following powers:

> (b) The Board shall determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act.
>
> (c) The Board shall have authority to act for the State in regard to the adoption of standards for submission to the United States under any federal law respecting environmental protection. Such standards shall be adopted in accordance with Title VII of the Act and upon adoption shall be forwarded to the Environmental Protection Agency for submission to the United States pursuant to subsections (*l*) and (m) of Section 4 of this Act. Nothing in this paragraph shall limit the discretion of the Governor to delegate authority granted to the Governor under any federal law.
>
> (d) The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order; upon administrative citations; upon petitions for variances, adjusted standards, or time-limited water quality standards; upon petitions for review of the Agency's final determinations on permit applications in accordance with Title X of this Act; upon petitions to remove seals under Section 34 of this Act; and upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate. The Board may also conduct other proceedings as may be provided by this Act or any other statute or rule.
>
> 415 ILCS 5/5.

The Board clearly does not have the authority to rewrite the laws established by our legislature, as PODER suggests in its Opening Brief. The siting criteria for pollution control facilities in the State of Illinois were established by our legislature, and this Board lacks the authority to add or rewrite these factors. *E.O.R. Energy, LLC,* 2015 IL App (4th) 130443, ¶ 69.

ARGUMENTS UNIQUE TO PODER BRIEF

A. *The City Council's Decision to Approve Siting Under Section 39.2 Criteria is Not Against the Manifest Weight of the Evidence.*

The question before this Board on appeal of the City Council's siting decision is "not whether a ruling in favor of [Petitioners] is a more reasonable conclusion based on the evidence presented. Rather, the only question is whether it is clearly evident from the record that the [siting authority should have denied the siting application]." *Peoria Disposal Co. v. PCB*, 385 Ill. App. 3d 781, 801 (3d Dist. 2008).

As stated in Lakeshore's Opening Brief, it was clearly within the province of the City of West Chicago's City Council to "determine the credibility of witnesses, to resolve conflicts in the evidence, and to weigh the evidence presented." *Land & Lakes Co. v. PCB*, 319 Ill. App. 3d 41, 53 (3d Dist. 2000). Clearly, this Board is not tasked with reweighing the evidence presented at the hearings, and the mere fact there is some evidence that may support a different conclusion does not allow this Board to substitute its judgment for the judgment of the Council. *Id.*

There was ample evidence in the record to support the City Council's decision to approve Lakeshore's siting application.

Criterion #2:

As mentioned above, PODER, in its Opening Brief, accuses the City and the Hearing Officer of incorrectly interpreting the language of Criterion #2 to exclude environmental justice concerns. PODER argues that LRS presented no evidence on how the proposed facility would protect the public from adverse health effects related to the cumulative and disparate impacts of anticipated increased diesel truck pollution. As mentioned in LRS's Opening Brief, the concept of environmental justice is not found anywhere in Section 39.2 of the Act. 415 ILCS 5/39.2, but instead the Act has adopted an Environmental Justice Act establishing a statewide Environmental

Justice Commission that has nothing to do with local siting, but instead applies to the permitting process. Accordingly, it is the position of LRS that PODER's position in this regard is premature, and if deemed appropriate, the Agency will become involved in the permit process.

PODER'S position on the meaning of the statute is akin to asking this Board to rewrite the statute to include environmental justice concerns. *See above.* PODER argues that the "plain meaning" of "public health, safety, and welfare" is broad and flexible, and counsel for PODER references the need to utilize a dictionary to ascertain the plain and ordinary meaning of those terms. It is the position of LRS there is no need to resort to statutory analysis as the terms of Criterion #2 are not ambiguous or subject to more than one meaning. Nowhere in Criterion #2 is there any language that the applicant must demonstrate the effects of cumulative impacts. Rather, PODER argues the City should have considered community concerns about additional diesel emissions in an area that already fails to meet U.S. EPA air quality standards set to protect public health. The only proof offered by PODER with regard to the additional diesel emissions was discounted by not only the Hearing Officer, but also the City Council, based upon the lack of scientific knowledge of the testifying witness, Julia Alcantar Garcia. The Hearing Officer correctly found that Ms. Alcantar-Garcia was not qualified to testify about how polluted the air is based upon an app that no court has ever recognized, and that he regarded her testimony more like no expert public comment. That would still make it relevant, but it would be given little scientific weight. Regardless, PODER submitted an Exhibit, No. 5, which was a summary and various excel spreadsheets which contained information regarding Ms. Alcantar-Garcia's use of an app to measure air quality. This Exhibit lacks any foundation, appears to have been selectively edited by Counsel for PODER, and should not be considered by this Board. Additionally, Ms. Alcantar-Garcia was simply not qualified as a lay witness to offer opinion

testimony based upon scientific, technical, or other specialized knowledge, and her testimony about diesel truck emissions is at the heart f PODER's claim of harm resulting from the Transfer Station. *See* Sup. Ct. R. 701.

LRS presented ample evidence to address the public health, safety, and welfare concerns. To show that its proposed facility will be designed to protect public health, safety and welfare, LRS does not need to submit written documentation anticipating and addressing any objections which may be raised. *Tate v. PCB*, 188 Ill. App. 3d 994, 1197 (4th Dist. 1989). John Hock testified regarding the proposed site plan and operations. He found the transfer building itself will be a "fully enclosed" facility with fast opening doors which only open when vehicles are entering or leaving the building. As he testified, all unloading, transferring, and reloading is done indoors, with the trailers and larger vehicles being tarped prior to exiting the loading ramp. LRS employees would be tasked with patrolling the area to collect any small amounts of litter that may escape. Mr. Hock further testified that LRS would be required to leave no waste on the floor for more than 24 hours, with water sprays and vacuum systems used at least once a day. In addition, "spotters" would be present at the site who would tell the trucks where to go to make certain they are moving in an efficient manner at the right direction at all times to lessen idling concerns.

LRS also provided extensive evidence that truck emissions would be *reduced* because of less mileage in using this proposed location. Specifically, Mr. Hock provided a "conservative" estimate that truck miles would be reduced by about 800,000 miles per year, and over a 20-year span 16 million truck miles, or 4.6 million gallons of diesel fuel would not be burned, thereby reducing carbon dioxide emissions by over 102 million pounds. Objectors did nothing to rebut this testimony, with PWC calling their expert, John Powell, an individual who had never testified

at a 39.2 siting hearing. Mr. Powell testified regarding the two methods utilized to consider emission, both real time monitoring and modeling. Mr. Powell opined that real time monitoring would be more accurate than modeling due to having real data in hand. However, neither PWC nor PODER provided any real data through an expert qualified to render an opinion on emissions. Instead, PODER called a lay witness, whose value was recognized as a "mom" in the community, to testify regarding an app used on her phone to measure data at different unknown locations at the sites.

PODER continues in its argument regarding statutory interpretation that somehow this Board must consider extrinsic aids to determine the legislature's intent when it enacted Section 39.2. Again, this argument must fail as the language of the statute is not ambiguous and requires no such analysis.

B. ***PODER Incorrectly Argues that a "Proper" Interpretation of Section 39.2(a)(ii) Requires Considering Evidence of Cumulative and Disparate Impacts.***

PODER argues in its Opening Brief that this Board is to now consider both the cumulative and disparate impacts of the Applicant's proposed facility. PODER suggests that this specific standard is broad and site-specific, requiring the local siting authority to consider how the facility will affect existing environmental conditions and how it will impact the health of the particular "public" that will be affected. These are both environmental justice arguments that are best saved for the permitting process. PODER accuses both the City and the Hearing Officer of wrongly interpreting the statute to exclude these considerations, yet fails to offer any evidence in support of its position. While PODER focuses on the concept of disparate harm, LRS reads Criterion 2 differently, believing that it requires consideration of *all* potential harm that can reasonably be proved. Therefore, the nine siting criteria, in a fact finding proceeding such as a

siting hearing, do justice to all environmental justice issues without using those two specific words.

PODER does state, briefly, that the City and Hearing Officer failed to consider diesel truck pollution. Meanwhile, PWC, the other party opponent, does not even address diesel pollution, and instead bases its argument under (a)(ii) as failing to properly address airport concerns, namely the bird population in the area. Diesel truck pollution was addressed in the testimony of John Hock, who again stated that as a "conservative" estimate the truck miles would be reduced by about 800,000 miles per year, and over a 20-year span 16 million truck miles, or 4.6 million gallons of diesel fuel would not be burned, thereby reducing carbon dioxide emissions by over 102 million pounds.

There was ample evidence presented to satisfy Criterion #2, and accordingly the opposite conclusion is not clearly evident and LRS has met its burden on this factor. The remainder of PODER's argument once again deals with statutory construction of the terms "located" and "will be protected," for which there is no need for interpretation as the words are plain and unambiguous, as admitted by PODER itself in its Opening Brief.

C. *The City Council's Conditional Approval of LRS's Application is Not Against the Manifest Weight of the Evidence.*

PODER again argues that even if the Board does not require consideration of cumulative or disparate impacts (even as PODER argues it must consider *both*), LRS presented ample evidence of reduced emissions based upon the location and operations of the proposed site. There was no credible evidence presented by either PODER or PWC regarding particulate matter. In fact, the only witness presented, Ms. Alcantar-Garcia, was wholly disqualified from presenting "evidence" from a device not recognized by any court or administrative agency, and she lacked the scientific knowledge to opine as to the results obtained from the device. Even

PODER's expert testified the best way to determine effects of particulate pollution was in real time, yet PODER failed to present any "expert" to opine on this issue.

D. ***The City Council's Findings on Criterion #2 are <u>Not</u> Against the Manifest Weight of the Evidence.***

PODER argues on page 33 of its Opening Brief that LRS failed to meet its burden under Criterion #2 for its perceived failure to include with its Application an analysis of air quality, including procedures for how to assess "background levels." PODER argues that LRS presented only the testimony of John Hock, who, according to PODER, presented no evidence about air quality impacts from diesel trucks. As recited hereinabove, Mr. Hock provided ample evidence in his testimony regarding the impact of reduced diesel emissions. In arguing there can be no balancing of expert credibility on air quality, PODER continues to persist in its argument that there was unrebutted factual evidence collected by a commercially available sensor. There was no expert testimony regarding this sensor, and Ms. Alcantar-Garcia lacked the scientific knowledge to offer expert testimony on her "analysis." PODER therefore provided no conflicting testimony to that offered by Mr. Hock. In fact, PWC's own expert, John Powell, when questioned whether the proposed site is located so as to protect the public health, safety and welfare, responded there was nothing wrong with the site.

E. ***The City Council's Findings on Criterion #8 are <u>Not</u> Against the Manifest Weight of the Evidence.***

As discussed in LRS's Opening Brief, testimony was presented by John Hock that the proposed facility is consistent with the Solid Waste Management Plan enacted by DuPage County.

What is most noteworthy is the fact that DuPage County has entered into a secondary host agreement with LRS, finding the proposed site appears consistent with the County's Plan.

PWC's expert, John Lardner, testified the County's Plan does, in fact, call for more transfer stations, more recycling and more competition. Since the County drafted the Management Plan and all updates, it appears their staff are in the best position to interpret its meaning and contents. This proposed transfer station will serve to transport waste from the service areas to landfills outside the service area. This is clearly not prohibited by the Solid Waste Management Plan, and it is, therefore, consistent with the Plan.

ARGUMENTS UNIQUE TO PWC BRIEF

The issues raised in PWC's Opening Brief, namely jurisdictional notice, the 1,000-foot setback and fundamental fairness are each addressed above. The remainder of LRS's Response Brief deals with PWC's claim that LRS failed to comply with statutory criteria 1, 2, 3, and 8.

Criterion #1:

This Board is to determine whether the evidence supporting the City Council's decision is competent, sufficient and presented by a credible witness. *Indus. Fuels & Res./Ill., Inc. v.* IPCB, 227 Ill. App. 3d 533, 543-50 (1st Dist. 1992).

The City Council's finding that LRS met its burden of proof on Criterion #1 is not against the manifest weight of the evidence. The argument of PWC in its Opening Brief that there is no need for the facility is based upon the following: (1) the undisputed testimony that there is sufficient capacity to handle current and future waste needs; (2) competition is not a basis to establish need, particularly when LRS already has vertical integration (third largest waste provider; has over one hundred franchise agreements, and has a landfill in Atkinson, Il.); and (3) due to the failure of LRS to provide any documentation, data, reports, or studies in support of the "need" for more competition.

LRS does not dispute there was testimony from both LRS and PWC experts that there is sufficient capacity to handle *certain* current and future waste needs. The need of a facility as that term is defined in the Act is established when the evidence shows the facility is *reasonably required* by the waste needs of the service area. *File v. DNL Landfill*, 219 Ill. App. 3d 879 (5th Dist. 1991) (emphasis added). What PWC ignores is the *reasonableness* requirement and the fact that LRS is proposing to take on hydro-excavation waste, something not offered in unlimited quantities by other transfer stations in or near the service area.

LRS presented testimony from John Hock, who defined the proposed service area, evaluated the waste generation and disposal volume trends in the area, and described the benefits of the proposed transfer station. As part of his analysis, he testified that the current operations at the larger LRS site relate to construction and demolition debris, and that the facility recycles 75% of that material. The proposed operations would include single stream recyclables, provide a drop off for residents for both recyclables and electronic waste, and hydro-excavation waste. Mr. Hock testified there are two transfer stations in the area that accept municipal solid waste, namely DuKane and Batavia. However, Mr. Hock testified there are "very few" facilities out there that can manage hydro-excavation waste. The only facilities within the service area or close to it that provide such services are the Woodridge Greene Valley Wastewater Treatment Plant, which Mr. Hock testified closes at 3:00 p.m. and can only manage limited volumes, and the Forest View facility owned by LRS, but even further distant from the service area.

Mr. Hock testified he spoke extensively with representatives from Badger Daylighting, who stated that companies like Nicor and Commonwealth Edison have indicated they are now requiring that if there are any excavation digs around their utilities that the hydro-excavation technique must be utilized. Badger has a fleet of 50 vehicles that are in multiple locations, with

the addition of several new trucks in the last couple of years. A representative of Badger who supports the project indicated that the need for hydro-excavation waste is increasing over time and indicated that the facility would save Badger two hours of drive time per truck per day, with a cost savings that would pass to utility companies and later hopefully to the citizens of the service area. In fact, Badger stated that about 40 percent of their work is located more conveniently to West Chicago than Forest View. Letters of support were also introduced from the Underground Contractors Association in favor of the facility due to the fact that it would be taking in hydro-excavation waste.

Additionally, the testimony and evidence presented at the hearing demonstrated that the proposed facility will increase competition in the service area. PWC relies upon the case of *Will County v. Rockdale* to support its position that the *only* basis for approval of that facility was due to the Joliet Transfer Station operating beyond capacity. *Will Cty. v. Vill. of Rockdale*, 2018 IL App (3d) 160463. In fact, PWC goes so far as to state that LRS failed to meet the "Rockdale" factors. Their reliance on that basis is misplaced.

In the *Rockdale* case, ERDS filed a siting application for a transfer station. *Id.* The Hearing Officer in that case held that ERDS failed to meet the need criterion for the transfer station. *Id.* However, the Village of Rockdale conditionally approved the application. *Id.* Waste Management and Will County both petitioned for review claiming the Village lacked jurisdiction and that certain criteria were not met. *Id.* The Pollution Control Board later held the Village Board did, in fact, have jurisdiction, that the amendment to the application was proper, and that the Village decision on criteria 1, 2, 5, and 8 was not against the manifest weight of the evidence. *Id.* The Appellate Court affirmed the Pollution Control Board, finding that there were three landfills in the proposed service area (one did not accept municipal solid waste, and one had one

year of life left). *Id.* There were three transfer stations in the proposed service area, with one being .3 miles from the proposed facility that only took in recyclables, one was 4.5 miles from the proposed facility that took in only construction and debris materials, landscape waste, and recyclables, and the last facility was 1.25 miles from the proposed facility and took in municipal solid waste, but was arguably overburdened with waste left on the tipping floor and trucks cut off in line. *Id.* ERDS's expert, John Hock, testified there was a shortfall due to the overburdened Joliet Transfer Station, and that the proposed facility would offer longer hours and provide *an additional option* for haulers in the area. *Id.* (Emphasis added.) *Id.* WMI argued the facility was not needed because the Joliet facility had sufficient capacity, there were two transfer stations within 1.1 miles of the proposed facility, that transporting waste out of Will County to distant landfills would be more expensive, and that the Will County Solid Waste Management Plan required that transfer station development *must* occur in the northern and eastern parts of the county. *Id.* (emphasis added).

The Village Board conditionally approved the application and considered the application itself, the testimony of John Hock, and written public comment as evidence the facility was necessary to *assist* the other transfer stations with overabundant supply of materials. *Id.* The Village Board further found that the testimony of WMI's expert regarding Criterion #1 was not persuasive as the expert focused on landfills and not transfer stations, found John Hock more credible regarding Criterion #2, and found that Criterion #5 had been met. *Id.*

The *Rockdale* factors as found by the Pollution Control Board and Appellate Court were:

1 and 2. Increase in Competition and improved service; The proposed facility would increase competition by increasing transfer capacity, would provide

benefits to Will County, would provide more operational flexibility, and would reduce environmental impacts.

3. Credibility of Experts: The Court found the WMI expert was not persuasive, holding that credibility findings of the Village would not be reweighed, citing *Fox Moraine*, 2011 IL App (2d) 100017, ¶ 88.

4. Urgent Need and Reasonable Convenience: The Court found that there is no need to find "absolute necessity," and instead only "urgent need" and "reasonable convenience of establishing facility." *Rockdale*, 2018 IL App (3d) 160463.

An important finding of the appellate court was, "Petitioners' argument that ERDS failed to meet criterion (i) because it did not conduct a transfer capacity analysis of the transfer stations is unpersuasive." at 121 NE3rd 484. This simple statement completely changed the calculus for establishing need in that the formerly used approach of subtracting service area waste generation from service area disposal capacity to establish a numeric shortfall is no longer used. In truth, this simplistic approach was never appropriate for need evaluation in transfer station cases, although it may still have some utility in landfill siting cases.

This Board recognized the fact that transfer station need analysis involves multiple economic and operational factors in 2014 where it affirmed a local finding of need in the Caseyville case, *Roxana Landfill v. Village of Caseyville*, 15 PCB 15-65. In Caseyville, this Board cited factors such as reduced road wear, reduced air emissions, reduced transportation costs and more efficient waste processing. These are all factors LRS proved at the siting hearing in the instant case.

While PWC argues that LRS must show "urgent need," that is not disputed, but this Board must consider other factors as well. The urgent need and reasonable convenience of establishing the facility were presented in the form of testimony from Mr. Hock as referenced hereinabove, particularly with regard to the boom in hydro-excavation waste, together with letters in support of the facility by the Contractors Association. As in *Rockdale*, the proposed facility here would provide *additional assistance* to the other transfer stations, particularly when it comes to hydro-excavation waste, extended operating hours to accept that waste, and LRS submitted letters in support of this option. *Id.*

One of the main arguments of PWC is that there is a transfer station literally down the street from this proposed site. However, the finding in *Rockdale* was not based solely upon the inability of the Joliet transfer station 1.25 miles from that proposed facility to accept waste and the urgent need for the proposed facility as PWC would have you believe, but instead considered competition (to include in its analysis increased transfer capacity, benefits to the Village, and reduction in environmental impacts) as one of its bases for so holding, in addition to the credibility of witnesses *Id.* Here, there was sufficient and ample testimony from Mr. Hock that there would be an increased transfer capacity with the approval of the proposed facility, West Chicago and DuPage County would reap the benefits in the form of host fees and additional benefits to its citizens in the form of free electronics recycling, and there would be a reduction in environmental impacts based upon reduced mileage (and therefore reduced emissions) of transport vehicles to and from the facility. Lastly, both the Hearing Officer and the City Council found that Mr. Hock was a credible witness.

<u>Criterion #2:</u>

With regard to Criterion #2, PWC argues that LRS did not rely upon proper data that the issue of the facility's proximity to the airport was properly addressed. Specifically, PWC noted that when Mr. Hock testified regarding this criterion, he admitted that the peak hours to accept waste had slightly changed and that the tipping floor stockpiling capacity was ultimately deleted from the final version of the Application. With regard to the airport concerns, these concerns were addressed by Mr. Hock, and the DuPage Airport Authority provided a letter wherein LRS agreed to comply with multiple conditions and actions required by the Airport Authority to safeguard airport operations, with the Airport Authority ultimately finding the proposed facility did not pose a threat to the safety of the airport.

Once again, in assessing whether Criterion #2 has been satisfied, the proposed facility must not pose an unacceptable risk to the public's health and safety. *Industrial Fuels & Resources/Illinois v. PCB,* 227 Ill. App. 3d 533, 546 (1st Dist. 1991). PWC presented no evidence to demonstrate otherwise. Instead, they presented the testimony of their expert, John Powell, an individual who has never testified at a 39.2 siting hearing, who testified with regard to emissions and the two methods utilized to consider those emissions. Specifically, he opined that monitoring emissions is more accurate than modeling, but he had no data to show that he conducted any form of monitoring, and he later admitted there was "nothing wrong with the site." (Tr. 1193). PWC and PODER, with its unsubstantiated speculation about particulate emissions from trucks, both suggest that facilities such as this pose zero risk to the public, but the actual standard is *unacceptable risk."*

A determination on Criterion #2 is purely a matter of assessing the credibility of the expert witnesses. *File v. D & L Landfill, Inc.*, 219 Ill. App. 3d 897,907 (5th Dist. 1991). The

City of West Chicago fully considered Mr. Hock's testimony more credible than that of PWC's expert.

Criterion #3:

PWC also argues that LRS failed to establish the factors considered under Criterion #3, a two part analysis to include: (1) the facility is located so as to minimize incompatibility with the character of the surrounding area; and (2) that the facility will minimize the effect on value of surrounding property. To support their argument, PWC relies upon their expert, Kurt Kielisch, whom they claim is "more qualified" than the expert retained by LRS on this issue, Dale Kleszynski. Regardless of qualifications, in *Fox Moraine*, the Pollution Control Board held individuals involved in real estate transactions and who live and work in the area were qualified to offer an opinion as to this Criterion. *Fox Moraine, LLC v. United City of Yorkville*, 2009 WL 6506730 (Ill.Pol.Control.Bd.) Mr. Kleszynski is a licensed real estate appraiser and member of the Appraisal Institute, who prepared and submitted as an Exhibit herein a detailed report and power point presentation. He determined the property was "industrial in character" and segregated from other uses, namely residential. On the other hand, the Hearing Officer made a credibility determination of the two competing experts, finding that Mr. Kielisch, was admittedly not a licensed Illinois appraiser, had never testified in a Section 39.2 siting hearing, and Kielisch himself readily admitted he was not knowledgeable about the siting process.

Most importantly, the issue is *not* whether there is *no* impact on the surrounding area, but instead whether the facility will be located to *minimize* any potential incompatibility and effect on value. See *Fairview Area Citizens Task Force v. IPCB*, 198 Ill. App. 3d 541 (3r Dist. 1990) (*abrogated on other grounds*).

Criterion #8:

Lastly, with regard to Criterion #8, PWC argues the facility is inconsistent with the Solid Waste Management Plan enacted by the County of DuPage. As discussed in LRS's Opening Brief, testimony was presented by John Hock that the proposed facility *is* consistent with the Solid Waste Management Plan enacted by DuPage County.

What is most noteworthy is the fact that DuPage County has entered into a secondary host agreement with LRS, finding the proposed site appears consistent with the County's Plan. PWC's expert, John Lardner, testified the County's Plan does, in fact, call for more transfer stations, more recycling and more competition. Since the County drafted the Management Plan and all updates, it appears their staff are in the best position to interpret its meaning and contents. This proposed transfer station will serve to transport waste from the service areas to landfills outside the service area. This is clearly not prohibited by the Solid Waste Management Plan, and it is, therefore, consistent with the Plan.

CONCLUSION

Based upon the foregoing, THE CITY OF WEST CHICAGO'S CITY COUNCIL had jurisdiction, the statutory setback requirements were not violated, and conditional approval of LAKESHORE'S Application was not against the manifest weight of the evidence. Lastly, the proceedings were fundamentally fair. The Council's decision should be affirmed. No opposite result is clearly evident from a review of the record, and it is requested that Applicant be allowed to apply for a permit from the Illinois Environmental Protection Agency evidencing the local siting approval.

Respectfully submitted,

LAKESHORE RECYCLING SYSTEMS, LLC.,
Respondent

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

BY: /s/ Karen Donnelly
Karen Donnelly
Attorney for Respondent

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

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