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.	)	PCB 23-107 (Third-Party Pollution Control Facility Siting Appeal)
PEOPLE OPPOSING DU PAGE ENVIRONMENTAL RACISM, Petitioner, v. CITY OF WEST CHICAGO and LAKESHORE RECYCLING SYSTEMS, LLC, Respondents.	)	PCB 23-109 (Third-Party Pollution Control Facility Siting Appeal) (Consolidated)

REPLY BRIEF OF
PEOPLE OPPOSING DU PAGE ENVIRONMENTAL RACISM

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I. INTRODUCTION

When evaluating whether a proposed pollution control facility will be located, designed, and operated so as to protect public health, a local siting authority must consider pollution the community already endures and the specific vulnerabilities of the people who live in the community. In its opening brief, People Opposing DuPage Environmental Racism ("PODER") demonstrated how the City of West Chicago ("the City") failed to do so in its conditional approval of Lakeshore Recycling System's ("LRS") proposed facility. The City specifically refused to consider both the health and demographics of West Chicago residents, the "public" who will be affected by the proposed facility, and the fact that additional diesel truck emissions would exacerbate existing unhealthy air quality conditions. In their opening briefs, the City and LRS disagree with one another as to both whether such factors—what they term "environmental justice principles," and what PODER has explained as "cumulative impacts" and "disparate impacts,"—must or even can be considered by a local siting authority and as to whether those issues were considered the City. The disagreement between the respondents further highlights the need for the Pollution Control Board ("the Board") to clarify that assessing "public health, safety, and welfare" under 415 ILCS 5/39.2(a)(ii) (West 2023) ("Criterion (ii)") includes considering cumulative impacts and disparate impacts.

Nothing in the City or LRS's opening briefs refutes any of the points raised in PODER's opening brief. PODER's arguments are grounded in statute, caselaw and record citations, while the City and LRS offer nothing but circular logic, unsupported generalizations, and, regrettably, ad hominem attack. PODER argued that Criterion (ii) must include a consideration of cumulative impacts and disparate impacts. The City and LRS conflict on whether or not such factors are included, but neither actually analyzes the plain language of Criterion (ii). PODER argued that

the City's findings that LRS had satisfied Criteria (ii) and (viii) were against the manifest weight of the evidence. The City and LRS responded by mischaracterizing the standard of review and suggesting that the Board's only role is to rubberstamp the City's findings by downplaying the Board's obligation to utilize its independent technical expertise. Moreover, on the challenged criteria, LRS, without any citation, makes a number of inaccurate factual claims about the evidence presented during the City proceedings, claims directly contradicted by actual evidence in the record. Finally, PODER argued that the City hearings were not fundamentally fair due to the lack of translation, among other reasons. The City and LRS make a number of irrelevant and undeveloped arguments against translation while failing to analyze the actual requirements of "fundamental fairness." LRS concludes its "argument" against translation with a disrespectful and irrelevant snipe about the birthplace of a witness.

For the reasons enumerated in its opening brief and reiterated below, PODER requests that the Board reverse the City's conditional approval of LRS's application and clarify that a correct interpretation of Criterion (ii) includes a requirement to consider both cumulative and disparate impacts.

II. A PROPER INTERPRETATION OF SECTION 39.2(a)(ii) REQUIRES CONSIDERATION OF CUMULATIVE AND DISPARATE IMPACTS.

An analysis under Criterion (ii) must consider both *who* will be affected by a proposed pollution control facility—"disparate impacts"—and *how* those effects may combine with existing sources of pollution—"cumulative impacts." PODER Br. at 1. In other words, it must consider these two dimensions of what is often referred to as "environmental justice." While the statute's plain meaning includes environmental justice under Criterion (ii), PODER Br. at 17-23, 29-30, the City and LRS disagree with each other on the issue. Each is ultimately incorrect as a matter of law. PODER agrees with LRS's position that environmental justice is already contemplated in the plain

language of Criterion (ii), but LRS is wrong in its additional arguments about what that means, arguments that are either mischaracterizations or simply inapposite. LRS Br. at 8-10. Despite claiming to incorporate LRS's arguments, the City takes the exact opposite position on environmental justice by rejecting the applicability of environmental justice principles at all.[1] City Br. at 15-16.

In the end, however, both LRS and the City are partially correct: LRS is correct that, as the statute reads today, "all the objectives of a good environmental justice policy are inherent in a Section 39.2 siting hearing," LRS Br. at 8; the City is correct that it refused to acknowledge this in its conditional approval and that it refused to consider environmental justice at all, City Br. at 15. Taken together, LRS and the City themselves aptly demonstrate why the Board must reverse the City and deny siting approval here.

As the City and LRS have taken conflicting and independently incorrect positions, the Board should resolve the question and find that the environmental justice concerns of disparate and cumulative impacts must be included in a Criterion (ii) analysis for the reasons articulated in PODER's opening brief. PODER Br. at 14-32. To meet the standard of Criterion (ii), an applicant must demonstrate that the proposed "facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 39.2(a)(ii) (West 2023). This includes consideration of (1) how the facility will affect existing cumulative burdens of pollution where the facility is proposed to be "located" ("cumulative impacts") and (2) how the facility will impact the health of the particular "public" that will be affected, including impacts disproportionately imposed on protected classes of people or vulnerable groups ("disparate impacts"). PODER Br. at 14-15. While many considerations support this interpretation of Criterion

[1] The City's brief appears to incorporate LRS's brief in its entirety and therefore the City contradicts itself. City Br. at 2. Regardless of incorporation on this specific point, the City and LRS contradict each other in substance.

(ii), fundamentally, it must be the way the statute is read because the plain meaning of terms "public health, safety, and welfare", "located," and "will be protected" are inclusive of cumulative impacts and disparate impacts. PODER Br. at 17-23, 29-30.

Cumulative impacts and disparate impacts are specific analytical components of "environmental justice." Although LRS and the City's arguments on environmental justice lack the nuance of these distinctions, in instances explained below LRS and the City seem to agree that the substance of these two principles must be covered by Criterion (ii). Of particular importance, the City has included the idea of cumulative impacts in its own Code of Ordinances implementing section 39.2: an applicant must address, under Criterion (ii), "the procedure by which surface water and air will be monitored (including procedure by which the applicant will establish background levels)"—a cumulative impacts analysis. R. at 5967.[2] LRS never even attempted to meet this City Ordinance requirement. Despite acknowledgements that cumulative impacts and disparate impacts are relevant to Criterion (ii), LRS and the City nonetheless argue against inclusion of environmental justice as a meaningful consideration under the statute.

A. LRS's Arguments about Environmental Justice under Criterion (ii) are Contradictory and Ultimately Incorrect.

LRS apparently agrees with PODER that environmental justice principles already inhere in section 39.2, primarily through the language of Criterion (ii). LRS states in their opening brief that "all the objectives of a good environmental justice policy are inherent in [section 39.2] …. most importantly, there is the requirement that the applicant prove that a proposed facility is so located, designed and proposed to be operated such that the public health, safety, and welfare will

[2] Record citations are indicated herein with "R." and the page numbers referenced are the page number of the PDF document filed by the City as the "Record of Proceedings" filed on April 18, 2023, in this matter. The "R." page numbers used herein correspond directly to the City-stamped page numbers in the Record, which are the same as the number referenced here with the addition of the letter "C" and leading zeros (i.e. page R. 5967 herein refers to stamped page C005967).

be protected." LRS Br. at 8-9. Requiring a cumulative impacts and disparate impacts analysis under Criterion (ii) is exactly how a local siting authority should implement "all the objectives of a good environmental justice policy ... inherent in [section 39.2]." LRS Br. at 8; PODER Br. at 14-15.

Reading section 39.2 in harmony with the Environmental Justice Act ("EJ Act") compels understanding the language of Criterion (ii) so that communities can be protected from disproportionate environmental burdens. 415 ILCS 155/1 *et seq.* (West 2023); PODER Br. at 30-32. LRS asserts that the legislature's passage of the EJ Act somehow precludes any argument that environmental justice should be included in Criterion (ii), an incoherent argument given LRS's earlier assertion that environmental justice is "inherent" in section 39.2. LRS Br. at 7-8. In any event, LRS misunderstands why the EJ Act is important here. The EJ Act recognizes that the failure to consider disparate impacts in environmental decision making has resulted in persistent social and environmental problems in Illinois. 415 ILCS 155/5 (West 2023). In particular, it has resulted in the concentration of pollution, and associated adverse health effects, in vulnerable communities across the state. *Id*. LRS claims that the EJ Act has "nothing to do with local siting" and does not further consider how the legislative findings in the EJ Act should influence the interpretation of the text of section 39.2. LRS Brief at 8. Though it does not specifically amend section 39.2, the EJ Act shows that the legislature has recognized that the disparate impacts of pollution can adversely affect the public health and that the past implementation of environmental laws has contributed to that problem. PODER Br. at 30-32.

Instead of analyzing the EJ Act and how section 39.2 can be read in harmony with it, LRS turns to the Illinois EPA Environmental Justice Policy and notes that this policy only applies to *permitting* by the Illinois EPA, not to local siting decisions. LRS Brief at 8. LRS's conclusion,

again without citation, appears to be that, because this Illinois EPA policy discusses consideration of environmental justice at the permitting stage by the Illinois EPA, environmental justice *cannot* be considered by a local siting authority when considering applications for pollution control facilities. That does not follow. Considering environmental justice in air, water, or waste permitting in no way precludes also considering it in the siting process. These are two different stages of review by different decisionmakers, applying different standards through different procedures.

LRS again offers inconsistency and disingenuity in its argument about "permitting." LRS argues the existence of the Illinois EPA policy means cumulative and disparate impacts "will surely be revisited in depth by the Agency during the permit process." LRS Brief at 8. LRS provides neither citation nor rationale for its certainty about how well—if at all—cumulative and disparate impacts will be reviewed in a state permit process and does not even identify the permit process to which it refers. As LRS acknowledges on the very next page, any Illinois EPA permit review occurs *after* a siting approval and, while section 39.2(a)(ii) requires specific consideration of where a facility will be "located," any Illinois EPA permit application process will take the applicant's location as a given. Local siting decisions, in contrast, consider a facility's *proposed* location and can prevent already overburdened communities from hosting new facilities. Permitting decisions take for granted the location of the facility and only set acceptable levels of particular pollution from the facility wherever it is already sited. Environmental justice must be considered at both stages to ensure that environmental justice principles will always be accounted for.[3]

[3] Indeed, LRS's confidence in the efficacy and intensity of Illinois EPA environmental justice review is not only unsupported in its brief, but is misplaced in fact. Illinois' Clean Air Act program, a permitting program covered by the Illinois EPA Environmental Justice Policy that LRS cites, is currently under a U.S. Environmental Protection

Further, despite LRS's misleading claims to the contrary, the exclusion of evidence related to environmental justice by the City was not harmless because it meant the City's conditional approval ignored evidence relevant to a properly construed Criterion (ii). In its brief, LRS claims that the Hearing Officer's exclusion of environmental justice at the City hearing caused "no harm because [the Hearing Officer] allowed virtually unlimited questioning about the potential environmental impacts on the citizens of West Chicago." LRS Br. at 10. Allowing "questioning" does not remotely replace entering and considering evidence and the Hearing Officer expressly stated that he was excluding all evidence related to "environmental justice" from the hearing. R. at 3097-98, 3100-01 ("I'm not going to hear testimony about environmental justice, I'm not going to have testimony about if this were to impact on persons of whether it's color, income. None of that is relevant to 39.2."). Notably, he did admit petitioner Protect West Chicago's ("PWC") Exhibit 702, but as an offer of proof only. R. at 3098. An offer of proof, however, preserves the issue for review on appeal—i.e. by the Board now, *see* PODER Br. at 5 and *infra* III.B, but it does not mean that it will be considered by the decisionmaker in the first instance. 1 Timothy J. Storm, *Illinois Appellate Practice Manual* § 4:26 (2022). Indeed, as indicated in the ordinance granting conditional approval, neither the Hearing Officer nor the City considered PWC Exhibit 702 or testimony from PODER's witness about cumulative impacts of diesel emission when making its decision. R. at 6009, 6039-83, PODER Br. at 10-11.

Agency External Civil Rights Compliance Office (ECRCO) Title VI investigation for failure to consider cumulative impacts. Letter from Lillian S. Dorka, Dir. of External C.R. Compliance Off., Off. of the General Couns., U.S. EPA, to John J. Kim, Director, Illinois EPA regarding EPA Complaint No. 01RNO-21-R5 (Jan. 25, 2021) (available at https://www.epa.gov/system/files/documents/2023-07/2021.1.25 FINAL RECIP IL EPA Acceptance Letter 01RNO-21-R5.pdf) (accepting complaint for investigation). Per Ill Admin. Code 35 § 101.630, the Board should take official notice of the fact of this investigation and the contents of this agency website, as a "matter[ ] of which the circuit courts of this State may take judicial notice" and "generally recognized technical or scientific facts within the Board's specialized knowledge." *See, e.g.*, *Ashley v. Pierson*, 339 Ill. App. 3d 733, 739-40 (2003) (taking judicial notice of information on the Illinois Department of Corrections website).

Finally, LRS's claim that the City's conditional approval as to Criterion (ii) somehow mooted or fulfilled the required consideration of environmental justice is untenable because it is inconsistent with the Act's requirement that the City have a written decision specifying the reasons for its decision. 415 ILCS 5/39.2(e) (West 2023). In its written decision, the City failed to address the air pollution issues raised by PODER and PWC; the City did not even bother to explicitly reject these arguments with specific reasoning. PODER Br. at 10-11, *infra* III.B. The City's erroneous decision cannot be salvaged by LRS's recasting it now because that decision was unexplained despite the statutory requirement to do so. The City did not record its judgments on the "environmental justice" evidentiary ruling or its evaluation under Criterion (ii) of the relevant "questioning," testimony, or exhibits (neither those admitted nor those excluded by the hearing officer). *Infra* III.B. This error harmed PODER because excluding environmental justice testimony excluded relevant evidence and the City did not even justify why. PODER Br. at 10-11. Without offering any citation to the record or actual analysis, LRS provides only a circular conclusion that "since the City Council found that LRS had met the…requirements of Criterion #2, environmental justice concerns are rendered moot." LRS Br. at 10. In fact, the opposite is true: environmental justice concerns are squarely at issue *because* the City Council found that LRS had met their burden of proof on Criterion (ii) without considering cumulative impacts or disparate impacts.

B. The City's Exclusion of Environmental Justice under Criterion (ii) was an Error of Law.

The plain language of Criterion (ii) requires a local siting authority to perform a context-specific analysis to consider how environmental impacts of a proposed facility will affect public health, safety, and welfare in light of any existing conditions or burdens. The City disagrees and simply asserts that "nothing in [section 39.2(a)] or case law... provides that [the] concept of 'environmental justice' is a factor that must be, or even should be, considered in relation to an

Illinois local siting proceedings." City Br. at 15. The City fails to inquire into the actual meaning of the words of Criterion (ii). Without analysis of the statute or citation, and despite ample evidence to the contrary, including case law and the City's own Code of Ordinances, the City denies that this language includes anything related to environmental justice.

The plain meaning of "public health, safety and welfare" indicates that the legislature intended Criterion (ii) to require a consideration of relevant characteristics of the community in which a facility is proposed to be located. PODER Br. at 14. Construing Criterion (ii) in this way gives effect to the intent of the legislature. *People v. Haywood*, 118 Ill. 2d 263, 270-71 (1987) (holding that, in construing a statute, it is "fundamental" to give effect to intent of legislature). The City baldly claims that environmental justice "is simply not something that a local siting authority is even allowed to consider." City Br. at 16. The City's argument is that the statute should be read as if it contained explicit language *excluding* environmental justice, but that exclusion is simply not in the Act. Meanwhile, the City erroneously ignores the words of Criterion (ii) that *are* in the statute. *Town & Country Utilities, Inc. v. Illinois Pollution Control* Board, 225 Ill. 2d 103, 117 (2007) ("We must not depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent.").

The City's misreading of Criterion (ii) is not even consistent with its own Code of Ordinances or its conditional approval of LRS's application. The City relies on section 39.2(g) to claim that section 39.2 precludes any external "siting procedures and rules and appeal procedures." City Br. at 15. The City remarkably neglects to mention its own Code of Ordinances, which imposes many requirements on applicants that are in addition to, and more detailed than, the statutory language. 415 ILCS 5/39.2(g) (West 2023); R. At 5966-69. Current case law on section 39.2 also holds that "[n]otwithstanding section 39.2(g)… a siting authority… may establish its

own rules governing conduct of a siting hearing." *Stop the Mega-Dump v. County Board of De Kalb County*, 2012 IL App (2d) 110579, ¶ 12.[4] The West Chicago Code of Ordinances requires applicants to include in their Criterion (ii) application materials "the procedure by which surface water and air will be monitored (including procedure by which the applicant will establish *background levels*)" (emphasis added) R. at 5967. Considering background levels is about understanding existing environmental burdens and therefore being able to understand the impact that any new burdens will have—also known as a cumulative impacts analysis. Beyond cumulative impacts, the City Code of Ordinances requires, and the LRS application included, many other considerations that the City's reasoning would now reject as impermissible and "external" to the section 39.2(a) criteria. For example, Criterion (ii) does not explicitly require consideration of "airports" or "wildlife," and yet LRS's application analyzed these issues extensively, because, at bottom, the parties do recognize that "public health, safety, and welfare" is a flexible phrase that must account for context. R. at 320-22, 343-44.

Criterion (ii) case law also supports that the statutory language covers whatever substantive issues are relevant to public health, safety, and welfare under the circumstances. PODER Br. at 18. The breadth and flexibility of the language in the Section 39.2(a) criteria necessitates consideration of specific issues that are not explicitly mentioned in the statute and ensures that decisions are tailored to the relevant concerns in local context, whether those be queuing trucks, groundwater contamination, noise, pests, odor, stormwater or the cumulative and disparate impacts

[4] The City's Code of Ordinances also provides the procedures for providing oral public comment at city hearings for pollution control facilities. R. at 5972. The hearing officer relied on this Code to deny members of the public from providing oral public comment at the hearings, despite it being "external" to section 39.2(a). PODER Br. at 6, 49-50.

of increased diesel emissions.[5] Cumulative and disparate impacts are analyses that can and must be considered under Criterion (ii) to adequately meet the standard in the text of Criterion (ii).

Analyzing cumulative and disparate impacts under Criterion (ii) is also consistent with the purposes of the broader environmental law regime in Illinois. PODER Br. at 23-25, 30-32. The City's makes an unsupported and absurd argument that considering existing environmental burdens and the specific demographics of a community would somehow frustrate the purposes of the Act and be "an obstacle… to the full purposes and objectives of the General Assembly." City Br. at 16. The City's position is inconsistent with the "Legislative Declaration" of the Act, which states "[i]t is the purpose of this Act… to establish a unified, state-wide program… to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b) (West 2023); *see also* PODER Brief at 23. Like the Act as a whole, Section 39.2 is supposed to ensure that the siting of pollution control facilities "fully consider[s]" adverse effects with a specific focus on who bears them and who causes them. The focus must be on the actual people to be protected: as David Currie, an author of the Act, put it "[the Act] is a legal milestone in that both its intent and its provisions clearly establish that the rights of the people are paramount." David Currie, Governor's Coordinator for Environmental Quality, Statement on Passage of Illinois Environmental Protection Act, Illinois News (May 29, 1970) (available at https://pcb.illinois.gov/documents/dsweb/Get/Document-102507).

[5] *See, e.g.*, *Will County v. Village of Rockdale*, 2018 IL App (3d) 160463, ¶¶ 65–71 (analyzing evidence about traffic from queuing trucks and stormwater flooding and runoff); *Timber Creek Homes, Inc. v. Illinois Pollution Control Bd.*, 2015 IL App (2d) 140909-U, ¶ 2 at 3 (analyzing evidence about noise, visibility, pests, and odor) (cited as example, not precedent, per Supreme court Rule 23); *Fox Moraine LLC v. City of Yorkville*, 2011 IL App (2d) 100017, ¶¶ 94–103 (analyzing evidence about leachate, landfill gas, stormwater monitoring, wells); *E & E Hauling, Inc. v. Pollution Control Board*, 116 Ill.App.3d 586, 609–613 (1983) (analyzing evidence about landfill leachate in groundwater); *McHenry County Landfill, Inc. v. Illinois E.PA.*, 154 Ill. App. 3d 89, 100 (analyzing evidence about soil permeability and potential pollution in groundwater); *Town & Country*, 225 Ill. 2d at 110-13 (analyzing evidence about potential groundwater contamination).

III. THE BOARD MUST APPLY ITS OWN TECHNICAL EXPERTISE AND FIND INSUFFICIENT EVIDENCE UNDER CRITERION (II) DUE TO THE FAILURE TO ADDRESS LOCAL AIR POLLUTION IMPACTS.

The City's finding that LRS met its burden on Criterion (ii) was against the manifest weight of the evidence. PODER Br. at 33-38. The Board must use its specialized knowledge to assess the evidence and reverse the City's findings. Per *Town & Country*, the Board cannot merely rubberstamp the City's prior rubberstamping of LRS's application. Instead, the Board must conduct a technical review of the record developed before the City, despite LRS's contrary suggestions that some deference is owed. When it conducts its review of the record, the Board will find that PODER and PWC both presented credible evidence that the proposed facility will contribute to increased air pollution that will contribute to endangering public health in West Chicago. The Board will also find that LRS submitted no evidence or testimony, expert or otherwise, regarding whether its proposed facility would protect the public health, safety, and welfare of West Chicago from air pollution due to increased truck traffic.[6]

A. <u>The Board Must Apply Its Own Judgment, Without Deference to the City, Because that is the Proper Standard of Review from *Town & Country*.</u>

The Illinois Supreme Court's most recent case interpreting section 39.2 establishes that the Board is required to apply its own technical expertise in reviewing the record prepared as part of the City's process. In *Town & Country*, the Supreme Court reviewed a state appellate court's decision to reverse a Board decision on siting, wherein the appellate court rejected the Board's findings because the appellate court gave significant deference to the local siting authority's findings. 225 Ill. 2d 103, 106 (2007). The Board had reversed the local authority's decision to site a landfill within the city, finding the application failed to satisfy Criterion (ii), particularly as to

[6] The City incorporates by reference LRS's brief as it pertains to whether the nine criteria have been met, and so the City's position fails for the reasons articulated herein regarding LRS's arguments on Criterion (ii). City Br. at 2.

groundwater issues. *Id.* at 106, 110. The Supreme Court reversed the appellate court and reinstated the Board's decision that Criterion (ii) had not been met. *Id.* at 106. The Court held that appellate courts should apply the deferential manifest weight of the evidence standard to the *Board's* decision and not to the local siting authority's decision. *Id.*

Notably here, the Court's reasoning was based upon the fact that section 40.1 grants the Board an express statutory role to review siting decisions—while the local authority prepares the record, the Board makes substantive decisions and weighs the evidence itself. *Id.* at 106, 118. The Supreme Court further noted that the Board, as part of the state's "unified regime of environmental protection," must use its technical expertise when reviewing the record of local siting decisions, similarly to how the Board reviews other permitting decisions. *Id.* at 119-20, 122-23. The Court established that the Board, and not the local siting authority, makes the final decision on matters arising out of section 39.2. *Id.* at 123. Indeed, in *Town & Country* itself the Board reversed the city's approval where the city had credited the landfill's expert on groundwater over the objectors' experts on groundwater. There, where the applicant's expert spoke in depth on the specific Criterion (ii) issue, the Board nonetheless rejected the application because the Board disagreed with the technical assessment of the landfill's expert. *Id.* at 124.

LRS first acknowledges that the Illinois Supreme Court articulated the standard applicable here in *Town & Country*, but later backtracks from that standard by advocating for total deference to the City's evaluations of the testimony. LRS Br. at 7. In making this move, LRS relies on cases that are eighteen, twenty-one, and twenty-three years older than *Town & Country*. However, even these outdated cases do not support LRS's position.

In the oldest case, *Waste Management of Illinois, Inc. v. Pollution Control Board*, the court did state that a "reviewing court is not free to reverse merely because the *lower tribunal* credits

one group of witnesses and does not credit the other." 187 Ill. App. 3d 79, 82 (1989). However—with all too familiar disingenuity—LRS uses the phrase "local siting authority" in its brief even though the court said, "lower tribunal." LRS Br. at 7. This substitution obscures the court's actual analysis in the preceding sentence: a reviewing court's "function is not to reweigh the evidence to substitute its judgment for that of the *administrative agency*," i.e., the Board. 187 Ill. App. 3d at 81-82. Consistent with *Town & Country*, *Waste Management* directs a reviewing court to grant deference to the *Board*, it did not imply at all that the Board must defer to the local siting authority.

The other cases cited by LRS are equally unhelpful to it and the blind deference to a municipal hearing officer advocated by LRS is out of line with these precedents. LRS cites *File v. D & L Landfill, Inc*., 219 Ill. App. 3d 897 (1991), for the proposition that reviewing the criteria is "purely a matter of assessing the credibility of the expert witnesses." LRS Br. at 7. That line must be read in light of *Town & Country* which makes clear the Board must apply its own technical expertise when evaluating a siting application. 225 Ill. 2d at 122-23. Even in *File*, the appellate court noted, without any disapproval, that the Board had conducted its own review of the testifying experts' credibility. 219 Ill. App. 3d at 907. The *File* court, like *Waste Management*, said nothing that compels the Board to defer to the local siting authority and it reiterated that the reviewing court should not substitute its judgment for that of the Board.

LRS's cites to *City of Rockford v. Illinois Pollution Control Board*, 125 Ill. App. 3d 384 (1984), to assert that "a province of the hearing body is to weigh the evidence... and assess the credibility of the witnesses." LRS Br. at 7. First and foremost, LRS supplies no pin-cite to support its reading of this case and there is no obvious language in the decision which would support this proposition. Even if LRS's case did support LRS's assertion, it does not follow that the Board must give complete deference to the local siting authority because, again, it is the Board that is the

"hearing body" here. *City of Rockford* was specifically abrogated by *Town & Country*'s holding that an appellate court must review the Board's decision, not the local siting authority. 225 Ill. 2d at 116. As *Town & Country* clarifies, the Board, and not the local siting authority, has the duty to make the final decision on local siting appeals and it must evaluate all of the evidence with its own technical expertise. *Id.* at 116.

LRS does cite one post-*Town & Country* case, *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, in discussing the standard of review. The *Fox Moraine* court, reflecting on the Board's review there, disapprovingly stated that "the Board spent more time summarizing the arguments of the parties than it did analyzing those arguments in any usable legal framework." *Id*. ¶ 89; LRS Br. at 6. In other words, *Fox Moraine* also stands for the proposing that the Board itself must analyze the record and make factual findings, without deference to the local siting authority.

B. The Manifest Weight of the Evidence Compels Finding that the LRS Application Failed to Meet Criterion (ii).

PODER and PWC both presented credible evidence that the proposed facility would not protect the public health, safety, and welfare of West Chicago due to anticipated increased diesel truck emissions. PODER Br. at 5, 10-11. LRS submitted no evidence or testimony, expert or otherwise, that its proposed facility would meet the Criterion (ii) standard as to this specific anticipated impact. PODER Br. at 33-34. To be clear, this is *not* a situation where there is expert testimony on both sides of an issue—in this case, air pollution from diesel truck emissions. Unlike in *Town & Country,* where there were experts on both sides and the Board still overturned the city's approval because it disagreed with the technical conclusions of the applicant's expert, LRS presented *nothing* about the impact of diesel truck emissions on West Chicago. 225 Ill. 2d at 123, PODER Br. at 33-34. LRS failed to speak to this issue at all even though the West Chicago Code

of Ordinances both put the burden of proof on LRS and required discussion of air pollution against background levels. R. at 5967. Just because LRS presented an expert who spoke on Criterion (ii) generally—its expert on almost every other criterion and the individual LRS hired to prepare its application—does not mean LRS can hide behind his mere presence or his "inaccurate scientific assumptions" to obscure its failure to provide any evidence on the specific issue of diesel emission impacts. 225 Ill. 2d at 123, R. at 1959-60. PODER's argument is not an "alternative view of the evidence," as the City denigrates. City Br. at 18. PODER points to specific technical evidence in the record on air pollution that the City ignored; the City and LRS point to nothing in the record. LRS Br. at 17-20; City Br. at 17-18.

Actual review of the record shows that specific air pollution concerns were raised, and went unanswered in any credible way, by both LRS and the City. PODER Br. at 10-11. Actual review of the record appears anathema to LRS and the City, given the striking paucity of actual record citations in their briefs. LRS claims, without citation, that there was "no evidence presented whatsoever that 'the proposed transfer station will have a deleterious effect on public health, safety, welfare.'" LRS Br. at 17. PODER did in fact present unrebutted evidence that the ambient air quality in the area around the current LRS facility already fails to meet public health-based standards for particulate matter pollution. R. at 4257. LRS itself projects that its proposed facility will increase diesel trucks in the area. R. at 1130, PODER Br. at 35. Although LRS calls this evidence that air pollution will worsen and threaten public health "barely better than rank speculation," LRS Br. at 27, LRS neglects to note that the record contains nearly 1500 pages of raw data showing that particulate matter measurement near the facility exceed the current US EPA ambient air quality standards and that those standards are set at a level to protect public health. R.

at 4258-5727; PODER Br. at 7-8 (describing collection of data and hearing officer's refusal to consider US EPA standards); 35 n.10 (describing health-based nature of standards).

LRS further claims, in another misstatement of the record without citation, that it presented "credible evidence that emissions would, in fact, be reduced because of less mileage in using this proposed location." LRS Br. at 19, 28. Without citation, it is impossible to know to what "credible evidence" LRS refers, but later in the brief LRS claims, again without citation, that (1) "total new truck traffic associated with the operation of this site is *de minimus*" and (2) "the truck routes take truck traffic away from West Chicago." LRS Br. at 27 (emphasis omitted). The phrase "*de minimus*," however, does not appear in the City's record at all and appears for the first time in this entire proceeding in the Board hearing transcript. At that point, and again without any citation or specific reference, *counsel* for LRS announced in his opening statement that "our testimony was that the emissions from trucks servicing this transfer station would have a de minimis effect on air quality in the area." Hr'g Tr. at 45, Sep. 28, 2023. Again, LRS counsel ignores the record. LRS admitted that diesel truck traffic will increase and LRS's hired expert admitted he could not say that emissions in West Chicago will be reduced. R. at 1130, 2094-95. LRS's second claim, that "truck routes take truck traffic away from West Chicago," must also be rejected because it too is unsupported in the record—indeed, it is contradicted by the record. LRS itself projected an *increase* in diesel trucks entering and exiting its facility in West Chicago. R. at 1130. And LRS's own expert admitted that diesel emissions from trucks "will go where they go" and that LRS "didn't evaluate exactly where the reduced miles or reduced emissions would occur." R. at 2094-95.

The burden was on LRS to prove its facility is located so as to protect public health, safety, and welfare. PODER Br. at 33. LRS failed to consider existing air quality concerns in West

Chicago and did not consider how its proposed increased use of diesel trucks will contribute to existing air pollution. PODER Br. at 34-37. PODER presented air quality data that was unrebutted by LRS and ignored by the Hearing Officer and the City. *Id*. These errors mandate reversal by the Board. In this connection, it is especially important for the Board to consider the evidence in PWC's offer of proof on environmental justice. PODER Br. at 5; R. at 4133-38. The Board should consider this expert testimony that the City refused to evaluate. PODER Br. at 10. LRS criticizes the lack of expert testimony on air pollution from petitioners, but this offer of proof *is* expert testimony that supports PODER's witness testimony on cumulative impacts. LRS Br. at 20; R at 4134. PWC's expert even agreed it would have strengthened his analysis to have the type of data on air quality that PODER's witness collected. R. at 3106. Unlike in *Town & Country* where there was competing expert testimony, here, LRS offered no testimony or evidence on air pollution. The Board must still apply its technical expertise to evaluate the record, as the court in *Town and Country* directed, which includes both fact and expert testimony offered by petitioners that supports a finding that the application fails Criterion (ii). 225 Ill. 2d at 123.

It was against the manifest weight of the evidence for the City to conclude that LRS had carried its burden on Criterion (ii). Ultimately, the record shows there was evidence presented by PODER and PWC on potential air quality harms and no evidence presented by LRS on this issue. PODER Br. at 34-37. Weighing something against nothing, the Board must reverse an approval that ignored an unresolved and crucial public health impact raised by the parties, especially where the applicant has the burden of proof. *Id.* [7]

[7] LRS ends its Criterion (ii) analysis by quoting a public comment from one member of the local chapter of the Sierra Club. LRS Br. at 28. This is not testimony and can safely be ignored in any event: the opinion of one member of a state-wide environmental group who is concerned with global climate change and state-wide waste issues and that disregards the health concerns of a local community organization highlights why local siting decisions must consider cumulative impacts and disparate impacts in the specific community in which a facility is proposed to be located rather than some larger geographic area. *See* PODER Br. at 20-21.

IV. THE APPLICATION FAILS CRITERION (viii) AND LRS AND THE CITY FAIL TO ADDRESS THE ACTUAL LANGUAGE OF THE DU PAGE COUNTY SWMP.

The Du Page Solid Waste Management Plan ("SWMP") states that any new waste transfer stations in Du Page County should be in the southern portion of the county, and the City's conditional approval of LRS's proposed facility in West Chicago is inconsistent with that SWMP policy and should be reversed. Both LRS and the City fail to address the actual language of the SWMP in their briefs. City Br. at 2; LRS Br. at 33. PODER therefore reiterates the argument in its opening brief that approving a second waste transfer station in West Chicago would be inconsistent with the Du Page County's SWMP, which expressed a policy of siting any new transfer stations so as to increase the geographic diversity of waste transfer stations throughout Du Page County, not consolidate them in a single corner of a single City. PODER Br. at 38-40.

After selectively referring to a general idea in the SWMPs without addressing its actual text and wholly out of context, LRS rests its argument on the presence of a host agreement and the fact that a Du Page County employee wrote a letter endorsing its application.[8] LRS Br. at 33. LRS, again without citation, asserts that an SWMP update calls for more waste transfer stations in Du Page County, while attempting to obscure the full picture. *Id.* LRS ignores the actual words of the 2007 update, which is the update that specifically addressed geographic distribution of potential new transfer stations: "the only areas that might benefit from a waste transfer station are located in the southern portion of the County." R. at 1848, LRS Br. at 33 (misleadingly omitting that fact when summarizing the SWMP updates as "consistently… recogniz[ing] the need for more transfer stations, additional recycling, and more competition"). It is true that the SWMP updates contemplate an additional waste transfer station, but not this particular waste transfer station in

[8] The City did not address Criterion (viii) in its opening brief but incorporated by reference all of LRS's arguments. City Br. at 2.

West Chicago, in the northern portion of Du Page County, the location of which would not be consistent with the way those updates describe geographic limitations on the areas of the county in which any new waste transfer station should be located.

Unable to square its position with the text of the SWMPs, LRS attempts to fall back on a 2019 letter from county employee. LRS Br. at 33. That county employee, however, had neither authority nor knowledge to speak on what the Du Page County Board intended in past updates to the SWMP and had not even seen LRS's application when she wrote that letter. R. at 2714-18, 2722. Finally, just because Du Page County entered into a host agreement with LRS does automatically create some presumption of compliance with section 39.2(a) and LRS offers no authority for the assertion that a county employee letter or host agreement can substitute for substantive consistency with the SWMPs under Criterion (viii). LRS Br. at 33.

Again, a decision locating the only two waste transfer stations for all whiter, wealthier Du Page County in its only majority-minority city not only contradicts the SWMP, but also concentrates harm in a majority-minority community. PODER Br. at 40.

V. THE CITY HAD THE BURDEN TO ENSURE THE HEARING WAS FUNDAMENTALLY FAIR AND FAILED THAT DUTY BY FAILING TO PROVIDE TRANSLATION.

To satisfy the statutory requirement of fundamental fairness, the City was required to provide English-to-Spanish translation of both the hearing and of LRS's application materials. 415 ILCS 5/40.1(a) (West 2023). West Chicago is a majority-minority community where over 52% of residents over the age of five speak a language other than English at home.[9] R. at 4240. Translation

[9] LRS asserts that there was no evidence presented on the point that "West Chicago has a 50% ethnic Latino population." LRS Br. at 35. Further, LRS asserts that "we don't know... the percentage of West Chicago residents who are unable to meaningfully communicate in English." *Id.* In fact, PODER's first exhibit introduced into the record during the City Hearing speaks to both of those points. R. at 4240. That exhibit contains a number of demographic statistics on West Chicago and Du Page County drawn from the U.S. Census Bureau. *Id.*

was necessary to ensure that residents of West Chicago could access and engage with the siting process as contemplated by the Act. PODER Br. at 41-44. The City was aware of this need before the hearing began, and yet it did nothing to address it. PODER Br. at 43. And even though the City's obligation to provide for a fundamentally fair siting process is a burden that it cannot shift to the very public it excluded, PODER protested the unfairness of the lack of translation at both the City Hearing and in the post-hearing submissions. Because the City failed to provide translation—along with the other aspects of fundamental unfairness addressed in PODER's opening brief, PODER Br. at 40-50—the City failed to conduct its local siting process in a fundamentally fair manner and its conditional approval of LRS's application must be reversed. 415 ILCS 5/40.1(a) (West 2023).

None of the City or LRS's arguments grapple with whether translation was required in these circumstances by the statute's requirement that siting procedures be fundamentally fair. Instead, as explained further below, respondents offer arguments that misrepresent the statute, seek to impermissibly shift the burden to ensure that the City's proceedings were fundamentally fair to PODER, and irrelevantly and offensively resort to ad hominem attacks on one of PODER's witnesses. City Br. at 13-15; LRS Br. at 34-40. First, the City and LRS claim that translation was not required because translation is not explicitly mentioned in section 39.2. City Br. at 14; LRS Br. at 35. That claim ignores that the Act also fails to explicitly mention cross-examination and a number of other procedures which have long been hallmarks of fundamental fairness. 415 ILCS 5/40.1(a). The Act does not define "fundamental fairness," meaning that the Board must decide what fundamental fairness means in the particular circumstances of these proceedings. *Id*. Second,. respondents claim PODER waived its objection to translation. City Br. at 14; LRS Br. at 35 Neither explains why it was PODER's burden to convince the City to run a proceeding accessible to all of

its residents nor addresses PODER's repeated objections to the lack of translation. Third, LRS grossly mischaracterizes and misrepresents testimony by one of PODER's witnesses on why translation is essential to fundamental fairness. LRS Br. at 35. Neither the City nor LRS even care to attempt to justify their position that an English-only proceeding was fundamentally fair in a city where a substantial percentage of residents do not speak English as their primary language.

A. Fundamental Fairness Required that the City Provide Translation.

To satisfy fundamental fairness and minimal standards of due process, the City was required to provide Spanish-to-English translation at the hearing and of the application materials. PODER Br. at 41-44. The requirements of due process in an administrative hearing are determined by a contextual inquiry into the purposes of the proceeding. PODER Br. at 41-42 (citing *People ex rel. Klaeren v. Village of Lisle*, 202 Ill. 2d 164, 184). In this case, where the hearing was meant to engage and educate the public, and many members of the public speak a language other than English, translation was required. PODER Br. at 42.

Respondents argue that English-to-Spanish translation was not required at the City's hearings because there is no explicit provision "in 39.2 or elsewhere in the Act" that proceedings be conducted in Spanish. LRS Br. at 35; City Br. at 14. LRS and the City are correct that there is not an explicit requirement of translation in the Act, but it does not follow from the absence of explicit statutory directive applicable in every case that translation was not required in these circumstances. As the City correctly notes, "[t]he Act does not provide specific procedures for conducting the local hearing itself and it does not prohibit the local siting authority from establishing its own rules and procedures... *so long as those rules and procedures... are fundamentally fair*." City Br. at 13 (emphasis added). It is certainly true that "specific procedures for conducting the local hearing" are not provided in the Act, but that merely puts the burden on

the siting authority to craft procedures that are fair under the particular circumstances.[10] The City's argument merely recites the uncontroversial requirement that, "in reaching its decision," the local siting authority employ procedures that satisfy "fundamental fairness." 415 ILCS 5/40.1(a). Summarizing the general statutory requirement does not provide any insight into the meaning of fundamental fairness in this case.

Respondents' briefs show that they know full well that this argument is a non-starter. Their contention that the absence of a specific statutory requirement forecloses PODER's arguments for translation is inconsistent with almost the entire corpus of case law discussing fundamental fairness. For example, there is no explicit provision in the Act requiring that parties be able to cross-examine adverse witnesses. Nor is there an explicit statutory requirement that parties have an opportunity to be heard or that hearings include impartial rulings on the evidence. Yet, as respondents each note, both the Board and appellate courts have found that these procedures are essential to satisfy the requirement of fundamental fairness. City Br. at 13 (citing *Land & Lakes Co. v. Illinois Pollution Control Board*, 319 Ill. App. 3d 41, 47-48 (2000) and *Fox Moraine*, 2011 IL App (2d) 100017 ¶ 60); LRS Br. at 34 (also citing *Land & Lakes*). In short, the City and LRS are asking the wrong question. They search the Act for specific mentions of translation and, predictably, find none. However, what is important here is not whether translation, or any other procedure, is mentioned expressly in the Act, but rather whether translation was required by fundamental fairness in this proceeding. In West Chicago, in a hearing which is meant to engage a majority-minority public, it is. PODER Br. at 41-44.

Additionally, despite the City's suggestion to the contrary, there is no reason to distinguish between the need for translation during the hearing and the need for translation of the application

[10] Indeed, the City's Code of Ordinances provides for rules and requirements for siting applications and hearings that go beyond what the Act requires. *Supra* Section II.B; R. At 5966-69.

materials submitted by LRS. The City argues that the fundamental fairness inquiry is limited to the hearing, that "[f]undamental fairness is only applicable to procedures before the local siting authority pursuant to Section 40.1." City Br. at 14. The City again ignores much of the case law on fundamental fairness, which looks at issues of prejudgment and ex parte communications that often occur before any proceedings have even begun. *See, e.g., Waste Management of Illinois, Inc. v. Illinois Pollution Control Board*, 175 Ill. App. 3d 1023, 1043-44 (1988); *Concerned Adjoining Owners v. Illinois Pollution Control Board*, 288 Ill. App. 3d 565, 572-74 (1997). Further, the City does not explain the basis for this distinction between hearings and applications and there is no obvious rationale for it. The application and the hearing are both essential, and both must be fundamentally fair, in order to ensure that members of the public have the opportunity to review and engage with the siting of the proposed pollution control facility. Requiring that the application be accessible is indispensable to the purposes of the siting review process because it provides the public with the opportunity to review the applicant's own plans and come to the hearing well-informed.

Oddly and erroneously, the City also seems to object to translation of the application by suggesting that it does not have the power to dictate the content of an application to site a pollution control facility. City Br. at 15. This is contradicted both by the City's own arguments, where it acknowledges that it can create its own "rules and procedures" to for siting, and the City's Code of Ordinances, which specifies requirements of an application in detail. City Br. at 13; R. at 5964-70. The form of the application, including a requirement that applicants translate it into Spanish, is a procedure fully within the control of the local siting authority and relevant to assessing "the fundamental fairness of procedures used by [the local siting authority] in reaching its decision." 415 ILCS 5/40.1(a).

B. In Failing to Hold A Fundamentally Fair Proceeding, the City Ignored PODER Repeatedly Raising Objections to the Lack of Translation.

The City, not PODER or the public of West Chicago, has the burden to ensure that the City's siting process is fundamentally fair, and thus, the City had the responsibility to provide for translation. 415 ILCS 5/40.1(a) (requiring "fundamental fairness of the procedures *used by the county board or the governing body of the municipality* in making its decision") (emphasis added). In this context, respondents' baseless assertions that PODER waived the issue of translation make no sense.[11] Respondents seem to raise the issue of waiver in an attempt to distract from the City's independent failure to ensure that its proceedings were fundamentally fair. The Act vests control over the decision-making procedures in the local siting authority by entrusting that authority to hold a public hearing. 415 ILCS 5/39.2(d) ("[a]t least one public hearing ... is to be held by the county board or governing body of the municipality). Indeed, the City seems to understand that ensuring fundamental fairness is its own obligation when it touts that the statute allows it to "establish[ ] *its own* rules and procedures... *so long as those rules and procedures... are fundamentally fair*." City Br. at 13 (emphasis added). The City's failure to fulfill that duty cannot turn on whether or when PODER identified the City's failing.

PODER cannot have been expected to raise arguments about the fundamental fairness of the proceedings before those proceedings even began, even if PODER had some obligation to have raised the translation issue. PODER did not control the implementation of procedures. It was only when the hearings began that PODER could have known that Spanish-to-English translation would not be provided. PODER did not have representation from counsel prior to midway through the

[11] The City and LRS's arguments that PODER waived its objection to translation take slightly different forms. LRS argues that PODER waived its translation argument by not timely raising it. LRS Br. at 35. The City, citing *Concerned Adjoining Owners*, argues waiver because PODER "fail[ed] to cite any authority in support of [its] arguments." City Br. at 14. Strangely, the City made this assertion without having read PODER's opening brief. Regardless, both arguments are addressed in this section.

City hearing. PODER Br. at 2, 4-5; R. at 6094-95. PODER was not included in the pre-hearing meetings between the City's Hearing Officer and the other parties. R. at 2432, 3241. The concept of waiver does not require parties to preemptively raise all arguments on an issue before the issue has even become a reality. It certainly does not require them do so where they were unrepresented and excluded from pre-hearing proceedings. Even if PODER had wanted to preemptively raise an argument about the fundamental fairness of the hearings, there was no clear procedure for PODER to object until the hearings actually began.

The single case that LRS cites to support its waiver argument actually found that no waiver had occurred and its reasoning supports PODER's fundamental fairness argument. LRS Br. at 35. In that case, *Valessares and Heil v. County Board of Kane County and Waste Management*, one of the petitioners argued that a respondent had waived its objection to that petitioner's lack of standing by failing to raise the objection at all before the local siting authority. Ill. Pollution Control Bd. Op. 87-36 at 10 (July 16, 1987). After finding that the waiver rule could apply to local siting proceedings, the Board proceeded to apply the test for waiver: "where an issue could have been raised at the county board hearing and it was not raised, the issue may not be raised for the first time on review by this Board." *Id*. at 11. The Board ultimately found that the objection was *not waived* because it could not have been properly raised at the local siting authority's hearing. *Id*. at 12. Notably, the issue allegedly waived in that case was a respondent's argument as to a petitioner's individual standing—i.e. an individual party's argument about another individual's party's rights or status. Here, the question is whether the City met a statutory requirement, a duty it owes to the entire public and that cannot be waived by any individual person or party. In any event, as explained below, PODER *did* object to the lack of translation both during the hearings and in post-

hearing submissions during the City's review, and, due to the lack of clear procedure, PODER could not have objected before the hearings began. R. at 2868.

Respondents' waiver arguments also fail because the City had actual knowledge, before the City hearing even began, that many residents of West Chicago spoke Spanish and would be interested in engaging with the hearings if they could do so in Spanish. PODER Br. at 43-44. In other words, the City did not need PODER to request translation because it already knew that translation was necessary. *Id.* Again, according to the latest census statistics, West Chicago is 48.9% Hispanic or Latino and 52.7% of residents over the age of five speak a language other than English at home. R. at 4240. To accommodate their Spanish-speaking population, the City regularly employs a "Google translation feature on its website to provide access to Spanish language information." City Br. at 14, n.1. Mr. Michael Guttman, the City Administrator, who planned the hearings, even provided additional translation of some text on the City's website describing the decision-making process. Hr'g Tr. at 199-200, Sep. 28, 2023. He did so because he thought that the document "might be of interest… to residents of the community… who would want to see it in Spanish." *Id.* The City's knowledge of Spanish-speaking residents' interest in the proceedings before the hearings demonstrates that the City knew translation was necessary to ensure broad public access, whether or not PODER or anyone else formally requested it.

Nonetheless, PODER timely and clearly objected to the lack of translation before the City had conditionally approved LRS's application, both during the City hearings and in post-hearing submissions. As discussed in PODER's opening brief, a representative of PODER raised concerns about the lack of translation during the hearing on January 12, stating, "we have no Spanish language translation here for people from the community in a minority-majority community that have an interest in this along with the rest of the people of West Chicago." R. at 2868. Counsel for

PODER raised the issue again during the proceedings on January 16, when introducing a West Chicago resident who was about to testify. R. at 3160. After the hearing was over, PODER again objected to the lack of translation in Findings of Fact and Conclusions of Law submitted to the Hearing Officer. R. at 6338 ("Finally, and most fundamentally unfair, the public hearing was conducted entirely in English and there were no translation services available."). Once PODER had an opportunity to object to the fundamental unfairness of the lack of translation, PODER raised the issue clearly and repeatedly.

C. LRS Grossly Mischaracterizes the Testimony of PODER's Witness.

LRS's characterization of Ms. Julieta Alcántar-Garcia's testimony in its opening brief is dishonest and offensive. LRS's brief selectively quotes Ms. Alcántar-Garcia and takes her words out of context. LRS even misspells her name. LRS Br. at 20. LRS seems to argue that because Ms. Alcántar-Garcia can speak English, there was no need for translation of the application or during the hearings for the people of West Chicago more broadly. LRS eschews honest engagement and elects instead for inflammatory attacks of PODER's requests for translation as "a smokescreen" and a "twisted attempt to bring... the cultural wars... to Illinois." Hr'g Tr. at 45, Sep. 28, 2023. LRS never once pauses to consider whether translation was important to ensure that all of the public of West Chicago could access the important information that LRS was required to provide about its proposed pollution control facility.

For some unknown reason, LRS's brief states that the "first words out of Ms. Garcia's mouth were: 'actually I was born here." LRS Br. at 36. This is both untrue and taken out of context. It is untrue because the first words Ms. Alcántar-Garcia actually spoke were, "[m]y name is Julieta Alcántar-Garcia." R. at 3161. While this misstatement might be minor, it is yet another example of LRS sacrificing fidelity to the record in the name of rhetoric and is particularly offensive

because LRS's brief ignores Ms. Alcántar-Garcia's name here only to misspell it elsewhere. *See* LRS Br. at 20 ("*Juliette* Alcantar-Garcia...") (emphasis added). LRS's brief also takes Ms. Alcántar-Garcia's words out of context; it ignores that she stated that she was born in West Chicago to contextualize her testimony with her roots in the community, her interest in protecting it, and her long experience in West Chicago. R. at 3161-64. The fixation of LRS's counsel with Ms. Alcántar-Garcia's birthplace is as irrelevant to the translation issue as it is offensive.

LRS's selective quotation of Ms. Alcántar-Garcia' testimony also ignores the rest of her answer, in which she shed further light on why Spanish translation was essential during a hearing in a community where many residents do not speak English. In describing her experiences in West Chicago at the City hearing, Ms. Alcántar-Garcia mentioned that she was the board president of the Bilingual Parents Advisory Committee, an organization which advocates for bilingual children in the community. R. at 3162. As Ms. Alcántar-Garcia explained, "our children are bilingual, most parents are not. I am." *Id*. In her later testimony at the Board hearing, Ms. Alcántar-Garcia expanded on this point, explaining that she was testifying in Spanish because she wanted "[her] community, [her] whole community, to understand what [she was] saying, not only the members of [her] community who speak English." Hr'g Tr. at 47, Sep. 28, 2023. While Ms. Alcántar-Garcia is bilingual, not everyone in West Chicago speaks English. Translation was essential, not for PODER's witnesses at the City Hearing, but for the entire public of West Chicago. As Ms. Alcántar-Garcia further noted in her testimony at the Board hearing, she saw "friends and neighbors, all Latinos" leave in the middle of the City hearings because "they didn't understand... what was happening." Hr'g Tr. at 51, Sep. 28, 2023.

These mischaracterizations by LRS are part of its broader pattern of dismissing the legitimate need for translation in West Chicago in favor of emphasizing LRS's counsel's strange

references to his personal experiences and political opinions. Instead of engaging with the practical question of whether translation was needed, LRS refers to the issue as a "smokescreen" and part of the "cultural wars." Hr'g Tr. at 44, 45, Sep. 28, 2023. At the Board hearing, counsel for LRS seemed to argue that there could not possibly be a need for translation because he does his personal "business," like shopping or dining out, in West Chicago in English.[12] Hr'g Tr. at 43, Sep. 28, 2023 (the Board's Hearing Officer properly sustained objections to these strange, irrelevant, and offensive questions). Despite the evidence that PODER presented during both the City and Board hearings, LRS has failed to acknowledge the fact that many residents of West Chicago speak Spanish as their main language. LRS's arguments on translation, and its treatment of PODER's witness, are rooted not in law or logic, but in counsel for LRS's own personal opinions. For the reasons above and in PODER's opening brief, the Board should reverse the City's conditional approval for lack of fundamental fairness, and it should do so in a way that specifically condemns both the tone and content of LRS's positions.

VI. CONCLUSION

For the foregoing reasons in addition to those articulated in its opening brief, PODER requests that the Board reverse the City's conditional approval of LRS's application to bring a new pollution control facility to West Chicago. The arguments made by the respondents in their opening briefs only serve to further confirm that, in reversing the City's decision, the Board must clarify that an applicant and a local siting authority must consider specifically both *who* will be affected by the proposed facility and *how* that facility's impacts will layer upon existing environmental burdens. Moreover, the Board should reverse the City's decision because it was the

[12] Counsel for LRS claimed to live in West Chicago during his opening statement at the Board hearing and relied on this fact in making this argument. Hr'g Tr. at 43, Sep. 28, 2023. PODER notes that LRS's counsel's claim was not testimony and not subject to cross-examination. Further, PODER notes that the addresses used by LRS's attorneys throughout the Board appeal are located in Winfield, IL and Ottawa, IL, respectively. LRS Br. at 38.

product of a fundamentally unfair process. The Board should take this opportunity to remind local decisionmakers that their procedures must be fair to their constituents under their particular circumstances.

Date: December 6, 2023

Respectfully submitted,

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OPPOSING DUPAGE ENVIRONMENTAL RACISM,	)	
Petitioner,	)	
v.	)	PCB 23-109 (Pollution Control Facility Siting Appeal)
CITY OF WEST CHICAGO and LAKESHORE RECYCLING SYSTEMS,	)	
Respondents.	)	

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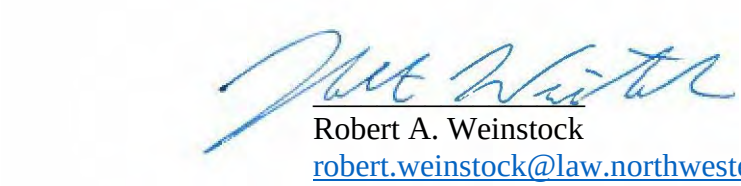
PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the foregoing REPLY BRIEF OF PEOPLE OPPOSING DU PAGE ENVIRONMENTAL RACISM, a copy of which is hereby served upon you.

Date: December 6, 2023



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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served on the date of December 6, 2023, the foregoing REPLY BRIEF OF PEOPLE OPPOSING DU PAGE ENVIRONMENTAL RACISM, and Notice of Filing, upon the below-named parties via the email addresses listed below:

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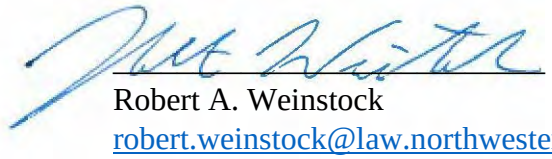
Respectfully submitted,



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