

ILLINOIS POLLUTION CONTROL BOARD
October 18, 2001

AMERICAN BOTTOM CONSERVANCY,)	
EAST ST. LOUIS COMMUNITY ACTION)	
NETWORK, KATHY ANDRIA and JACK)	
NORMAN,)	
)	
Petitioners,)	
)	
v.)	PCB 01-159
)	(Pollution Control Facility
VILLAGE OF FAIRMONT CITY and)	Siting Appeal)
WASTE MANAGEMENT OF ILLINOIS,)	
INC,)	
)	
Respondents.)	

YVONNE M. HOMEYER APPEARED ON BEHALF OF PETITIONERS;

JOHN BARICEVIC APPEARED ON BEHALF OF RESPONDENT, VILLAGE OF FAIRMONT CITY; and

DONALD J. MORAN, PEDERSEN & HOUP, APPEARED ON BEHALF OF RESPONDENT, WASTE MANAGEMENT OF ILLINOIS, INC.

OPINION AND ORDER OF THE BOARD (by S.T. Lawton, Jr.):

On May 24, 2001, American Bottom Conservancy (ABC), East St. Louis Community Action Network, Kathy Andria and Jack Norman (petitioners), filed an appeal of the April 18, 2001 landfill siting decision by the Village of Fairmont City (Village), pursuant to Section 40.1 of the Environmental Protection Act (Act) (415 ILCS 5/40.1 (2000)). This appeal arises from the decision by the Village to grant siting approval to Waste Management of Illinois, Inc. (WMII) for the vertical expansion of the Milam Recycling and Disposal Facility (Milam RDF) in Fairmont City, St. Clair County.

Petitioners allege that the Village's approval of the expansion is against the manifest weight of evidence because the proposed facility fails to meet four of the nine criteria in Section 39.2(a) of the Act. 415 ILCS 5/39.2(a) (2000). Specifically, petitioners allege that WMII did not adequately prove that: (1) the landfill was necessary to accommodate the waste needs of the area it intends to serve; (2) the facility is designed, located, and proposed to be operated in a manner protecting the public health, safety and welfare; (3) the facility is located so as to minimize incompatibility with the character of the surrounding area and the effect on the value

of surrounding property; and (4) the facility is either outside the 100-year floodplain or is floodproofed. Pet. at 4-6.¹

For the reasons discussed below, the Board finds that the determination by the Village is not against the manifest weight of evidence. The Board accordingly affirms the decision by the Village to grant siting location suitability approval to WMII for the proposed Milam RDF vertical expansion.

PROCEDURAL HISTORY

On November 19, 1999, WMII filed a local siting application with the Board of Trustees of the Village of Fairmont City for the vertical expansion of Milam RDF. The Village conducted a public hearing on the application on March 17, 2000. Petitioners attended the hearing. The Village granted siting approval to WMII for the vertical expansion on April 19, 2000. Petitioners appealed the local siting decision to the Board on May 24, 2000. The Board found the Village hearing was fundamentally unfair,² vacated the decision, and ordered the Village to hold a new hearing. *See American Bottom Conservancy v. Village of Fairmont City*, PCB 00-200, slip op. at 18-19 (Oct. 19, 2000).

The Village held new hearings on the application for the Milam RDF expansion on February 12 and 19, 2001. The prior record was incorporated into the new proceeding. Tr.2 at 13.³ Expert witnesses for WMII did not provide independent explanations for their conclusions in the application, but were available for cross-examination at the hearings. Petitioners cross-examined several expert witnesses and submitted exhibits, including the Flood Insurance Rate Map issued by the Federal Emergency Management Agency, which the Board found was improperly excluded during the March 17, 2000 public hearing. *American Bottom Conservancy v. Village of Fairmont City*, slip op. at 17. Petitioners offered several exhibits, but did not present expert testimony. The Village granted siting approval of the Milam RDF vertical expansion for a second time on April 18, 2001.

Petitioners appealed the second local siting decision to the Board on May 24, 2001, on the grounds that the Village decision that WMII met four of the nine criteria under Section 39.2(a) of the Act was against the manifest weight of evidence. The Board held a hearing on the

¹ The Petitioners filed with the Board a petition for review on May 24, 2001, which is referred to as “Pet. at ____.”

² The Board, in its October 19, 2000 opinion and order, found the former proceeding before the Village of Fairmont City to be fundamentally unfair because the Village failed to provide adequate opportunity for petitioners to inspect the siting application, and failed to make the siting hearing transcript available to the petitioners.

³ The transcript for the public hearing in front of the Board of Trustees of the Village of Fairmont on February 12, 2001 is referred to as “Tr.2 at ____.” The transcript for the subsequent public hearing on February 19, 2001, is referred to as “Tr.3 at ____.”

petition for review on August 16, 2001. No new evidence was presented at hearing and no new members of the public offered testimony. Board Tr. at 3, 5, 7, 9.⁴

Petitioners filed two public comments with the Board on August 30 (PC 1) and September 4, 2001 (PC 2), respectively. In PC 1, petitioners attempted to file the Illinois Environmental Protection Agency's (Agency) 1999 Landfill Capacity Report. In PC 2, petitioners attempted to file an Administrative Warning Notice sent to Milam RDF by the St. Clair County Health Department. On September 6, 2001, WMII filed a motion to bar the admission of the two public comments on the grounds that they presented new evidence outside of the record, and the scope of review by the Board is limited to the record on appeal. Petitioners did not respond to the motion directly. However, they did file a motion to withdraw PC 2, and strike comments relating to PC 2 in their reply brief on October 15, 2001.

Petitioners filed a post-hearing brief on August 20, 2001, and WMII filed its post-hearing brief on September 14, 2001. The Village joined WMII in its brief. Petitioners filed a reply brief on September 21, 2001. WMII filed a motion to strike portions of petitioners' reply brief on September 27, 2001. The statutory decision deadline for this case is October 19, 2001.

LEGAL FRAMEWORK

Section 39.2 of the Act governs the local siting of landfills. 415 ILCS 5/39.2 (2000). Local authorities are to consider the nine criteria in Section 39.2(a) of the Act when reviewing an application for landfill siting approval. 415 ILCS 5/39.2(a) (2000). A local body can only grant siting of a landfill if it finds that the applicant meets all nine criteria by a preponderance of the evidence. CDT Landfill Corp. v. City of Joliet, PCB 98-60, slip op. at 4 (Mar. 5, 1998), citing Industrial Salvage v. County of Marion, PCB 83-173, slip op. at 4 (Aug. 2, 1984).

Local landfill siting decisions may be appealed to the Board. *See* 415 ILCS 5/40.1 (2000). The Board can review local decisions for jurisdiction, fundamental fairness of the local proceeding, and compliance with the nine criteria for site location suitability. CDT Landfill, PCB 98-60, slip op. at 4. Petitioners challenge WMII's compliance with four of the nine siting criteria under 39.2(a) of the Act in their current petition for review. Pet. at 3-7.

When examining local decisions on the nine criteria under Section 39.2 of the Act, the Board must determine whether the local decision is against the manifest weight of the evidence. McLean County Disposal, Inc. v. County of McLean, 207 Ill. App. 3d 477, 482, 566 N.E.2d 26, 29 (4th Dist. 1991); Fairview Area Citizens Task Force v. PCB, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3rd Dist. 1990). A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. CDT Landfill, PCB 98-60, slip op. at 4; Harris v. Day, 115 Ill. App. 3d 762, 769, 451 N.E.2d 262, 265 (4th Dist. 1983).

⁴ On August 24, 2001, a hearing was held before the Board on this matter, which is referred to as "Board Tr. at ____."

The province of the local authority as the hearing body is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses. Fairview, 198 Ill. App. 3d at 550, 555 N.E.2d at 1184. Where there is conflicting evidence, the Board cannot reverse merely because the local authority credits one group of witnesses and not another. Fairview, 198 Ill. App. 3d at 550, 555 N.E.2d at 1184; Tate v. PCB, 188 Ill. App. 3d 994, 544 N.E.2d 1176, 1195 (4th Dist. 1989). Simply because the Board could reach a different conclusion is not sufficient reason to warrant reversal of a local decision. Land and Lakes Co. v. Randolph County Board of Commissioners, PCB 99-69, slip op. at 21 (Sept. 21, 2000), citing City of Geneva v. Waste Management, PCB 94-58, slip op. at 16 (July 21, 1994).

STATUTORY CRITERIA

Section 39.2(a) lists nine criteria that the county board or governing body of the municipality must find the applicant satisfies in order to grant a request for local siting approval. *See* 415 ILCS 5/39.2(a) (2000). Section 39.2(a) requires that:

An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if the proposed facility meets the following criteria 415 ILCS 5/39.2(a) (2000).

Petitioners allege that the Village's decision that WMII satisfied criteria 1 through 4 under Section 39.2(a) of the Act was against the manifest weight of the evidence. The first four criteria under Section 39.2(a) require that:

- i. the facility is necessary to accommodate the waste needs of the area it is intended to serve;
- ii. the facility is so designated, located and proposed to be operated that the public health, safety and welfare will be protected;
- iii. the facility is so located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;
- iv. (A) for a facility other than a sanitary landfill or waste disposal site, the facility is located outside the boundary of the 100 year floodplain or the site is flood-proofed; (B) for a facility that is a sanitary landfill or waste disposal site, the facility is located outside the boundary of the 100-year floodplain, or if the facility is a facility described in subsection (b)(3) of Section 22.19a, the site is flood-proofed. 415 ILCS 5/39.2(a) (2000).

The fourth criterion concerning the siting of a landfill or expansion in a floodplain and subsequent measures to flood-proof such landfills, refers to Section 22.19a of the Act. Section 22.19a states that:

- (a) On or after January 1, 1998, no sanitary landfill or waste disposal site that is a pollution control facility, or any part of a sanitary landfill or waste disposal site that is a pollution control facility, may be located within the boundary of the 100-year floodplain.
- (b) Subsection (a) shall not apply to the following:
1. a sanitary landfill or waste disposal site initially permitted for development or construction by the Agency before August 19, 1997;
 2. a sanitary landfill or waste disposal site for which local siting approval has been granted before August 19, 1997;
 3. the area of expansion beyond the boundary of the currently permitted sanitary landfill or waste disposal site, provided that the area of expansion is, on August 19, 1997, owned by the owner or operator of the currently sited or permitted sanitary landfill or waste site to which the area of expansion is adjacent; or a sanitary landfill or waste disposal site that is a pollution control facility that ceased accepting waste on or before August 19, 1997 or any part of a sanitary landfill or waste disposal site that is a pollution control facility that ceased accepting waste on or before August 19, 1997. 415 ILCS 5/22.19a (2000).

FACTS

Milam RDF is located in the Village of Fairmont City, St. Clair County, Illinois, near the intersection of Interstates 55 and 70, U.S. Highway 40, and Illinois Highway 203. WMII Br. at 2⁵; C-12,798. It has been in operation since the 1960's, and was permitted in 1974. C-12,798. WMII acquired the landfill in the early 1980's. Tr.1 at 11.⁶ The site is currently 208 acres, with a landfill footprint of 176 acres. C-12,736. Milam RDF accepts municipal waste, special waste, and yard waste for composting. C-12,738.

Milam RDF is divided into two areas called the Old Milam Facility and the New Milam Facility. WMII expanded the Old Milam Facility in 1987, and remediated problems that it alleges were present before it purchased the site. Tr.1 at 12. In 1990, WMII expanded both the Old Milam Facility and New Milam Facility. The 1990 expansion raised the height of the landfill to 567 feet above mean sea level. Tr.1 at 13. This allowed the facility to build the landfill to approximately 167 feet above grade. Tr.1 at 13. The new vertical expansion as approved by the Village Board in this matter would raise that height limit to approximately 230

⁵ WMII's post-hearing brief is referred to as "WMII Br. at ____."

⁶ The transcript of the March 17, 2000 public hearing, as incorporated into the record at the February 12, 2001 public hearing, is referred to as "Tr.1 at ____."

feet above grade. Tr.1 at 13; C-12,736. The expansion would extend the life of Milam RDF by four years, to 2008. C-12,736. Without the proposed expansion, the Milam RDF would close in 2004. C-12,736.

The Milam RDF service area includes St. Clair, Madison, and Monroe Counties in Illinois, as well as the City of St. Louis and St. Louis, St. Charles, and Warren Counties in Missouri. C-12,736. The expansion as approved by the Village has the same service area as the existing facility. Tr.1 at 14; C-12,736.

PRELIMINARY MATTERS

Before the Board addresses whether the manifest weight of evidence supports the decision by the Village that WMII met all nine criteria under Section 39.2(a), the Board must address three preliminary matters. The Board will first discuss the petitioners' October 15, 2001 motion to withdraw the 1995 Administrative Warning Notice issued to WMII by St. Clair County. The Board will then address the merits of the motion by WMII to bar two public comments submitted by petitioners to the Board in this matter. The Board will finally discuss the motion by WMII to strike parts of petitioners' reply brief as introducing evidence outside the record and not being responsive to the post-hearing brief by WMII.

Petitioners' Motion to Withdraw Document

On September 4, 2001, Petitioners filed with the Board a 1995 Administrative Warning Notice issued to WMII by St. Clair County Health Department. Petitioners identified this document as public comment #2 (PC 2). On October 15, 2001, petitioners filed a motion with the Board to withdraw PC 2, and strike a reference to this document in paragraph two of Section IV of their reply brief. The Board grants petitioners' motion to withdraw the document and strike the referenced paragraph of their reply brief. The Board also strikes paragraph three in Section IV of petitioners' brief, which also references PC 2.

WMII Motion to Bar Petitioners' Public Comments 1 and 2

On August 30, 2001, petitioners filed with the Board a report by the Illinois Environmental Protection Agency that was identified as the 1999 Landfill Capacity Report, as PC 1 in this case. On September 4, 2001, petitioner, Kathy Andria, filed with the Board a copy of a 1995 Administrative Warning Notice, as referenced above, which she requested to be admitted as PC 2. On September 6, 2001, WMII, filed with the Board a motion to bar admission of petitioners' two public comments. Petitioners did not file a response to the motion. The Board grants the motion by WMII concerning PC 1 for the reasons below. The Board finds that the motion to bar PC 2 is moot, since the Board is granting petitioners' motion to withdraw this document.

The Board's procedural rules allow public comments to be filed within 14 days after the close of the last hearing unless the hearing officer specifies a different submission date. 35 Ill. Adm. Code 101.628(c)(1). At the August 24, 2001 Board hearing, the Board hearing officer in

this matter established a 14-day public comment period, to expire on September 7, 2001. Petitioners filed PC 1 on August 30, 2001, well before this September 7, 2001 deadline.

The Board finds that, although timely, the information contained in PC 1 was either previously admitted or outside the scope of the Board's review, as specified by the Act and the Board's procedural rules. Petitioners introduced portions of the 1999 Landfill Capacity Report by the Agency at the February 19, 2001 hearing before the Board of Trustees of the Village of Fairmont. Tr.2 at 19, 135. The copies of the 1999 Agency report that were previously introduced are identical in part to what petitioners filed with the Board as PC 1 on August 30, 2001.

The Act requires that hearings conducted by the Board on landfill siting decisions are to be based "exclusively on the record before the county board or governing body of the municipality." 415 ILCS 5/40.1(b) (2000). All public comments that are submitted after a hearing must present arguments or comments based on evidence contained in the record. 35 Ill. Adm. Code 101.628(c)(2). Public comments may also present legal argument citing legal authorities. 35 Ill. Adm. Code 101.628(c)(2). The portions of the 1999 Landfill Capacity Report filed in PC 1 that were not part of the record before the Village, are outside of the record on appeal, and cannot, therefore, be considered by the Board in this proceeding. Accordingly, the Board grants WMII's motion to bar petitioners' PC 1 and directs the Clerk to strike this document from the record. The Board will not consider PC 1 in this appeal.

The Board notes that the public comments submitted by petitioners, are not true public comments, but instead should have been filed as a supplement to their petition for review. Petitioners cannot file public comments because they are a party to the proceeding. Public comments are reserved for members of the public that are not a party, who wish to submit information concerning the proceeding. *See* 35 Ill. Adm. Code 101.202, 101.628(c). This distinction, however, does not alter the result that PC 2 is withdrawn and PC 1 is barred for presenting evidence outside of the record on appeal.

WMII Motion to Strike Portions of Petitioners' Reply Brief

On September 24, 2001, petitioners filed a reply brief with the Board.⁷ WMII filed a motion to strike Sections I, II, III, and IV of the petitioners' reply brief on September 27, 2001.⁸ For the reasons below, the Board grants this motion in part.

WMII alleges in its brief that Sections I and IV of petitioners' reply brief are responsive to a motion by WMII to bar Public Comments 1 and 2 from the record. WMII Mot. to Strike at 2-4. Petitioners discuss in these sections why the Board should not bar the 1999 Landfill Capacity Report and the St. Clair County Administrative Warning Notice. Pet. Reply Br. at 1-2, 5-6. The Board finds that these arguments are not responsive to the post-hearing brief by respondents, and should have been raised in a separate response to WMII's motion. The Board

⁷ The petitioners' reply brief is referred to as "Pet. Reply Br. at ____."

⁸ The motion to strike by WMII is referred to as "WMII Mot. to Strike at ____."

accordingly strikes Section I of petitioners' reply brief in its entirety. The Board finds the arguments concerning Section IV are valid, but moot because the Board granted petitioners' motion to withdraw PC 2 and references to it in their reply brief. The Board notes that the information reiterated in Section I, even if properly presented, would not have altered the decision by the Board to bar PC 1 from the record.

WMII also alleges that Section II should be stricken because petitioners do not directly respond to arguments made by WMII concerning the appropriate standard in evaluating whether the expansion sits in the floodplain, the credibility and weight of evidence, and whether the Village's decision is against the manifest weight of evidence. WMII Mot. to Strike at 2. WMII alleges that Section II merely reiterates petitioners' original arguments in their post-hearing brief, and refers to the Board's hearing on landfills in floodplains. WMII Mot. to Strike at 2; *See Landfills, Waste Treatment and Transfer Facilities Located in 100-year Flood Plain*, R 94-34 (Feb. 20, 1997). WMII states that "[n]either the Board's floodplain hearing nor the legislature's amendment of the Act are responsive to the arguments contained in WMII's brief." WMII Mot. to Strike at 3.

The Board finds that Section II of petitioners' reply brief adequately addresses the issues presented by WMII in its post-hearing brief. WMII discussed the importance of Hediger in reviewing whether the applicant must solely show that the expansion, rather than the existing landfill, is sited in the floodplain. WMII Br. at 15. Petitioners, in their last two paragraphs of Section II, discuss the development of the current statutory and regulatory framework, and note that Hediger predates the amendment to Section 22.19a. Pet. Reply Br. at 4. The Board hearing is referenced in the context of legislative and regulatory history, rather than to establish the fact that the Milam RDF expansion sits in the floodplain. This is responsive to arguments raised by WMII on this issue.

The Board finds that petitioners' statements concerning Paul Osman in the third paragraph of Section II are intended to rehabilitate Mr. Osman, and rebut WMII statements challenging the reliability of his letter concerning the floodplain status of the Milam RDF. *See* WMII Br. at 14. The paragraph in the reply brief offers no new evidence for the record. It instead merely attempts to bolster Mr. Osman as an expert in hydrology studies.

The remaining arguments by petitioners in Section II of their reply brief summarize the reasons for their position that the Milam RDF, and thus the expansion, is in the 100-year floodplain. Although petitioners did not offer legal precedent or new arguments, their statements adequately address the issue of whether the Milam RDF expansion is in the floodplain.

WMII finally alleges that the Board should strike Section III of petitioners' reply brief on two grounds. First, WMII states that petitioners bolster a flawed argument by repeating an unfounded assertion. WMII Mot. to Strike at 3. Second, WMII alleges that petitioners offer an Agency statement in a public comment from another proceeding that is hearsay and outside the scope of the record on appeal. WMII Mot. to Strike at 3; *See* Pet. Reply Br. at 5.

The Board finds that Section III of petitioners' reply brief adequately addresses the arguments by WMII concerning whether Milam RDF is required to be flood-proofed. However,

the Board finds that the reference to the Agency public comment in an entirely different proceeding is outside the scope of the record. Petitioners failed to introduce this information during the proceeding before the Village Board, and cannot bring this new evidence before the Board for consideration at this late date. The Board strikes the reference to the Agency's public comment in the last paragraph of Section III in the petitioners' reply brief.

ARGUMENTS ON THE CRITERIA

This section includes arguments by petitioners and WMII concerning the four criteria at issue in this case. The Board presents these arguments in the order of the four criteria: (1) need; (2) public safety, health, and welfare; (3) incompatibility; and (4) floodplain requirements.

Criterion 1 – Need

Section 39.2(a)(1) addresses whether “the facility is necessary to accommodate the waste needs of the area it is intended to serve.” 415 ILCS 5/39.2(a)(1) (2000). In this section, the Board first presents petitioners' allegations that the manifest weight of the evidence is against the Village's finding that WMII proved the facility is necessary to accommodate the area's waste needs. Petitioners raise issues concerning additional capacity in the service area and the Village's consideration of financial incentives when deciding on the application for the Milam RDF expansion. The Board next summarizes allegations by WMII that it sufficiently considered additional capacity in the service area, and that the Village can consider financial gain if it finds the expansion satisfied the nine criteria under Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2000)).

Petitioners' Arguments

Petitioners allege that WMII failed to show that the facility was necessary to accommodate the waste needs of the area it intends to serve. Pet. at 4. Petitioners claim that the Agency's 1999 Landfill Capacity Report, as well as evidence of three new or expanded area landfills, show that the expansion is not necessary. Pet. at 4; Pet. Br. at 6. Petitioners maintain that WMII did not amend its petition to reflect the increased capacity shown in the 1999 Agency report. Petitioners allege that the capacity from these three facilities negates any need for the Milam RDF expansion.

Cottonwood Hills Landfill. Petitioners state that Cottonwood Hills Landfill, which is owned by WMII, has come on line since WMII applied for the vertical expansion of Milam RDF in 1999. Pet. Br. at 7; C-15,013. Cottonwood Hills Landfill, otherwise known as Marissa, is also sited in St. Clair County, and is second in Illinois in capacity. Pet. Br. at 7, C-15,013. According to the Agency's 1999 Landfill Capacity Report, Cottonwood Hills has a capacity of 83,589,000 cubic yards on 206 disposable area acres, with a life expectancy of 30 years. Pet. Br. at 7; C-15,053. The 1999 Agency Report states that “[t]he region's capacity is expected to receive an enormous boost in the near future when Cottonwood Hills . . . begins accepting waste.” C-14,198.

Fred Weber Landfill. The WMII application for expansion asserts that the Fred Weber and Milam RDF service areas overlap. Pet. Br. at 8; C-12,733. Petitioners entered a permit issued by the Missouri Department of Natural Resources (MDNR) for an expansion of the Fred Weber Landfill into the record during the February 19, 2001 hearing. C-14,226-44. The MDNR permit expands the disposal area from 70 acres to 224 acres, with an increased design life of approximately 46 years. Pet. Br. at 8; C-14,227.

Petitioners allege that WMII should have considered the new capacity of the expanded Fred Weber facility in its analysis of the need for the Milam RDF expansion in the local service area. Petitioners reject the argument by WMII expert, Sheryl Smith, that the Fred Weber landfill does not accept Illinois waste. Tr.3 at 49. Petitioners state that this is not a condition of the Fred Weber Landfill permit. Pet. Br. at 8; C-14,226-44. Petitioners also contend that the acceptance of Missouri waste from the same service area will reduce the amount of waste in that service area that is sent to Milam RDF. Pet. Br. at 8. WMII testified that approximately 60% of the waste received at Milam RDF originates from Missouri. Tr.3 at 26.

Petitioners acknowledge that the Fred Weber Landfill does not accept special waste. However, petitioners allege that the Cottonwood Hills facility in St. Clair County, Illinois, and the Roxana Landfill, in adjacent Madison County, both accept special waste, and have available capacity. Pet. Br. at 8-9; C-14,220. The Board notes that the 1999 Agency report concerning Cottonwood Hills that was cited to by petitioners does not state whether Cottonwood Hills accepts special waste. C-14,202.

Roxana Landfill. Petitioners also allege that the Roxana Landfill in adjacent Madison County was granted local siting approval for an expansion to nearly double its capacity. Pet. Br. at 8; C-14,223-26. Petitioners state that the Roxana Landfill is capable of accepting special waste. Pet. Br. at 8-9; C-14,220.

Total Effect on Capacity. Petitioners allege that WMII miscalculated the capacity remaining in the local service area. Petitioners cite to the 1999 Landfill Capacity Report by the Agency, which states that, as of January 1, 2000, Region 6 experienced an increase in capacity of approximately 160 percent. C-14,994. According to the report, “[i]f Region Six [region including Milam RDF] continues as a net importer shown by its 53.5 percent import rate, . . . it could run short on landfill space in 20 years.” C-14,996. The report states that Cottonwood Hills will help “alleviate this situation.” C-14,996. Petitioners state that the Agency report “singlehandedly [sic] demonstrates the lack of need for additional landfill capacity.” Pet. Br. at 7.

Petitioners state that, as of last year, Fred Weber in St. Louis and Cottonwood Hills in St. Clair County together had a remaining capacity of 100 million yards and approximately 50 years of life. Pet. at 4. Petitioners contrast this figure to the estimates in the WMII application that, as of 2004, the region would have 6 to 7 years of remaining capacity. C-12,734. Petitioners state that, in the year 2004, Cottonwood Hills Landfill alone is estimated to still have a disposal capacity of 31 years and more than 83 million gate cubic yards of projected capacity. C-12,764.

Petitioners allege that the low estimates in WMII's siting application resulted from reliance on outdated reports. Petitioners state that the application quoted from the 1997 Agency Landfill Capacity Report, indicating that, as of January 1, 1997, the region had a 2004 capacity estimate of only 8.5 years remaining. C-12,782. Petitioners claim that this number excluded the capacity of the Cottonwood Hills Landfill and the Fred Weber expansion. C-12,782.

Financial Considerations. Petitioners allege that the Village incorrectly considered the financial needs of the community in its decision as to whether the proposed expansion of the Milam RDF met the waste needs of the service area. Pet. Br. at 6. Petitioners cite to the comment by Mayor Bregen that the Milam RDF provides two-thirds of the revenue for the Village of Fairmont City. Board Tr.1 at 419.

WMII Arguments

WMII alleges that petitioners offered no evidence that contradicted or impeached WMII's proof that the vertical expansion is necessary. WMII Br. at 6. WMII states that the petitioners made groundless allegations that WMII did not address the expanded capacities at Cottonwood Hills, Fred Weber, and Roxana. WMII Br. at 6.

WMII explains in the site application report how it reached the conclusion that, as of January 1, 1994, only six to seven years of capacity remained in the service area of Milam RDF. C-12,734. Sheryl Smith testified and provided sworn affirmation that she drafted the report on need. Smith first determined the population of the service area. C-12,733. Next, she reviewed the surrounding counties' solid waste plans to find the generation rates for each waste stream. C-12,733. Smith applied the appropriate waste recycling and reduction goals in the counties' solid waste management plans to more accurately reflect the anticipated total waste generated in each county. C-12,733.

Smith then evaluated the service area to determine whether other disposal facilities could manage the waste disposal needs of the service area. C-12,733. Smith estimated that, by January 1, 2004, the remaining disposal capacity in the service area drops to 102,764,791 gate cubic yards (gcy) (31,140,845 tons). However, Smith stated that all of the remaining capacity will not be available to the service area. Smith alleged that the true capacity was 81,973,427 gcy (24,840,432 tons) "due to the historic waste flow patterns and service area allocations." C-12,734. Smith estimated that the landfills in the service area dispose of some 12,297,667 gcy/year of total waste. This adds up to about six to seven years of capacity remaining in the service area by January 1, 2004. C-12,734.

1999 Annual Report. WMII alleges that petitioners' quoted language concerning the increase in Region 6 that was misleading. WMII states that the 1999 Agency report included approximately 83.6 million gate cubic yards from Cottonwood Hills, which had not yet opened as of January 1, 2000. WMII Br. at 7. WMII alleges that, even though the Agency did not include the increased volume from Cottonwood Hills until the 1999 report, WMII accounted for the capacity of the Cottonwood Hills RDF in its needs analysis in its application for the Milam RDF vertical expansion. WMII Br. at 7; Tr.3 at 45.

WMII also alleges that the 1999 report does not prevent the Village from assessing need in appropriate locations. WMII Br. at 8. WMII states that to hold otherwise would hinder local governments from appropriately responding to need in their areas, and would “force local governments to accept existing landfills for their waste disposal, irrespective of distance, costs, safety and contractual limitations.” WMII Br. at 8.

Cottonwood Hills Landfill. WMII maintains that it accounted for the Cottonwood Hills RDF projected capacity in its needs analysis. WMII states that the Cottonwood Hills service area includes the same counties as Milam RDF, but also services an additional 25 Illinois counties and 9 Missouri counties. WMII Br. at 8. Since Cottonwood Hills services an additional 34 counties, WMII reduced the total available capacity for the Milam RDF service area by 25%. WMII Br. at 9. WMII alleges that the January 1, 2004 estimated remaining capacity of 81,973,427 gcy includes 75% of the available disposal capacity of the Cottonwood Hills landfill. WMII Br. at 9.

Fred Weber Landfill. WMII alleges that the Fred Weber landfill does not provide capacity for the Milam RDF service area because it does not accept out-of-state or special waste. WMII Br. at 9. According to WMII, 22% to 30% of the waste accepted at Milam RDF in the last three years was special waste. C-12,735.

WMII also states that Fred Weber does not own its own fleet of trucks. WMII finds this is significant because the distance from transfer stations to the Fred Weber landfill is greater than to Milam RDF by 7 to 26 miles. WMII states that the increased hauling costs will affect the decisions by haulers to dispose of waste at the Fred Weber Landfill. WMII experts also testified at the February 19, 2001 local hearing that the tipping fees are higher in Missouri than in Illinois. WMII predicted that this could also affect the total capacity available to Milam RDF.

Roxana Landfill. Smith testified that WMII appropriately did not consider the increase in capacity resulting from the proposed expansion of the Roxana Landfill because the expansion was not anticipated when WMII filed its application in 1999. WMII Br. at 10. Sheryl Smith, expert witness for WMII, testified at the February 19, 2001 hearing that she knew the expansion had local siting approval. Tr.3 at 29. However, Smith stated she did not consider the expansion because the Agency had not yet issued a permit to the Roxana Landfill. Tr.3 at 46-7. Without the permit, WMII considered the expansion merely to be an expectancy. WMII Br. at 10.

WMII states that, even if the Agency approved the expansion and granted a permit to expand the Roxana Landfill, it did not change her opinion that the Milam RDF remained necessary to meet the waste needs of the region. Tr.3 at 52. If the Roxana Landfill expands, WMII estimates that it will only provide another three years of capacity to the region. Tr.3 at 52.

Financial Considerations. WMII alleges that petitioners did not show that the Village based its determination on its own economic need. WMII Br. at 11. WMII refers to comments by Mr. Bregen at the March 17, 2000 hearing about the siting process, in which he states:

We did our best as an administration, I believe to review all questions and points.
We did make a point to accept information and responses and to review even after

the certain due dates. I think that we took every step that we could to make sure that our vote was fair. Board Tr.1 at 420-21.

WMII also states that the Village can consider the economic benefit of a proposed siting request as long as it finds that the statutory criteria under Section 39.2 of the Act are satisfied. WMII Br. at 11.

Criterion 2 – Public Safety, Health, and Welfare

Section 39.2(a)(2) of the Act requires that the “facility is so designated, located and proposed to be operated that the public health, safety and welfare will be protected.” 415 ILCS 5/39/2(a)(ii) (2000). The following section summarizes the arguments by petitioners and WMII about the satisfaction of this criterion.

Petitioners’ Arguments

Petitioners raise the issue of groundwater contamination as a concern regarding the public safety, health and welfare of the proposed expansion. Petitioners argue that the additional stress on the liner at Milam RDF from the weight of 4 million more tons of waste, combined with thousands more contaminants to degrade its liners and four more years of leachate from rainfall, poses a threat to public safety, health and welfare. Pet. Br. at 23-24. Petitioners state that the leachate will contain chemicals from the industrial sludges and special waste accepted at the site. Pet. Br. at 21. Petitioners allege that the additional leachate from waste in the expansion will lead to further migration of groundwater contaminants and added potential for leachate to reach the creek and river near the landfill. Pet. Br. at 24.

Petitioners state that the current condition of the landfill is not safe, as evidenced by the 1992 letter from the Agency that “it will be extremely difficult, perhaps impossible, for Milam to ever demonstrate an acceptable groundwater impact” Pet. Br. at 23. Petitioners refer to remediation efforts by WMII to clean up groundwater contamination at the site. Petitioners state that the Milam RDF 1999 Annual Report “indicate[s] that although there were 52 cases of groundwater improvement, there were 45 cases of groundwater degradation, meaning, apparently, that the groundwater contamination is worsening.” Pet. Br. at 19-20. Petitioners allege that this is exacerbated by the placement of the landfill on fragile soils subject to liquefaction, and within the new Madrid Seismic Zone. Pet. Br. at 20.

Petitioners finally argue that the expansion does not protect public safety, health, and welfare because the Milam RDF floods. Petitioners state that WMII admits in a document to flooding at the Milam RDF site, and that groundwater monitoring well levels were recorded above the flood plain level.

WMII Arguments

WMII states that petitioners did not provide testimony or evidence that challenged WMII’s prima facie case on criterion 2. WMII. Br. at 18. WMII alleges that petitioners inappropriately raise a number of technical questions relating to the existing Milam RDF landfill,

not the vertical expansion. WMII states that petitioners did not provide evidence that the design of the vertical expansion was inappropriate or unsafe.

WMII disagrees with petitioners' assertion that there are longstanding problems with the hydrogeologic conditions at the site. WMII Br. at 19. WMII states that the petitioners rely on an outdated 1979 Agency letter containing information collected by a former owner of the site. WMII asserts that over 100 borings were drilled and 75 wells were installed to characterize the geology and hydrogeology of the site. WMII alleges the borings and wells are generally located near the 176-acre footprint area. WMII Br. at 19. WMII states that the extensive characterization of the property allows for a considerable understanding of the current site conditions.

WMII states that petitioners incorrectly characterize the groundwater quality at the site as worsening. WMII expert reports attached to its application describe the history of the groundwater contamination, the Agency involvement, and WMII's subsequent extensive remediation efforts. WMII alleges that the contamination resulted from early development of unlined portions of Old and New Milam Facilities.

WMII states that petitioners' argument that the 45 test results of degraded water quality amount to worsening contamination, is misguided and shows that petitioners do not understand the type of analysis that WMII used in its remediation efforts. WMII Br. at 20-21. WMII states that petitioners take the results out of context and omit an important section of the report stating that "[a]s long as there continues to be a trend toward more improvements than degradations each quarter, the remediation will be considered to be effective." WMII Br. at 21.

WMII also argues that petitioners have offered no evidence that the facility is not properly designed to prevent threats to public health, safety, and welfare. WMII presented expert testimony that Milam RDF is underlain by sands and clays. WMII also provided results of geotechnical and seismic analyses for the vertical expansion. WMII alleges that the results show the expansion "will not impair the integrity of the existing facility systems, and that the new systems will be stable and in compliance with regulatory requirements." WMII Br. at 22.

WMII states that the petitioners arguments concerning special wastes and leachate are unsubstantiated. WMII Division Vice President, Mr. Joseph Durako, testified at a public hearing that the waste generators test special waste prior to being accepted by Milam RDF. Tr.1 at 47-48. Mr. Durako also testified that Milam performs random load checks of three incoming waste loads per week. Tr.1 at 50, WMII Br. at 23. WMII also describes how the Milam RDF will minimize leachate levels by utilizing a leachate management system, a surface water management system, and intermediate cover. WMII Br. at 23.

Finally, WMII alleges that petitioners incorrectly calculated leachate generation quantities, based on irrelevant groundwater levels.

Criterion 3 – Incompatibility

Section 39.2(a)(3) of the Act requires the applicant to prove that the proposed facility be located in a way to minimize incompatibility with the surrounding area and to minimize the effect on the value of the surrounding property. 415 ILCS 5/39.2 (2000). This section presents arguments by petitioners and WMII concerning whether the proposed expansion is incompatible with the surrounding area, and how the expansion may affect surrounding property values.

Petitioners' Arguments

Petitioners allege that the expansion could never minimize incompatibility with the surrounding area. Pet. Br. at 24. Petitioners state that the height of the expansion will be a visible eyesore from the St. Louis Arch, and will disrupt the view from Monks Mound, a nationally renowned Indian burial site that is approximately two miles from the Milam RDF. Pet. Br. at 28. Petitioners state that WMII pictures do not accurately show the view of the landfill from Monk's Mound in the winter, when the trees lose their foliage and do not offer as much cover. Pet. Br. at 28. Petitioners allege that the height of the Milam RDF expansion will dwarf the mounds in size and importance. Pet. Br. at 29. Petitioners also state that an aerial view of the site could also degrade the image of the Gateway National Racetrack in television broadcasts. Pet. Br. at 28. Petitioners state that the effect of the increased height of the expansion is exacerbated by the fact that the area surrounding the landfill is flat, with the only change in elevation from the Indian burial grounds being at Cahokia Mounds. Pet. Br. at 29.

Petitioners argue that the Milam RDF expansion will detract from a nearby national park, and affect businesses, such as new hotels and restaurants, built close to the landfill. Pet. Br. at 26-27. Petitioners note that East St. Louis resident, Sandra Reeves, complained of odor from the existing landfill (Tr.2 at 30). They state that the smell and sight of the landfill will detract from nearby businesses and recreational facilities. Pet. Br. at 26-27. Petitioners discuss the increased development of commercial rather than industrial enterprises in the surrounding areas, and question whether new real estate owners relied on the fact that the landfill only had capacity until 2005. Pet. Br. at 26. Petitioners state that expanding the Milam RDF to record Illinois height would impede the progress to improve the Metro-East and East St. Louis area. Pet. Br. at 30.

Petitioners allege that WMII focused on compatibility with the existing landfill, rather than taking into account how the expansion will affect business in the area. Pet. Br. at 28-29. Petitioners argue that WMII cannot rely on continued growth around the existing landfill to show that the expansion is compatible with the surrounding community. Pet. Br. at 28-29. Petitioners also state that WMII did not expand its analysis far enough to include surrounding areas, such as Horseshoe Lake State Park and the view from the St. Louis Arch. Pet. Br. at 29-30. Petitioners believe that this case is similar to one where the Appellate Court upheld the decision of the Board that Waste Management did not adequately prove compliance with criteria three because it only extended the scope of its analysis to 500 feet from the site. Pet. Br. at 29; citing Waste Management, 123 Ill. App. 3d 1075, 463 N.E.2d at 979.

WMII Arguments

WMII alleges that the area is not incompatible with the landfill expansion. Tr.3 at 87. WMII states that numerous photographs of the current and projected view of the landfill show

that it is not obtrusive to the surrounding area, including Monk's Mound and the Gateway International Racetrack. Tr.3 at 102-03. J. Christopher Lannert, WMII landscape expert, testified that the expansion will have no visual impact on the view of surrounding areas. Tr.3 at 103. WMII states that the pictures from Monk's Mound and other locations are accurate, and that the photos from Monk's Mound were taken in January when the trees were without foliage. C-13,967-68; WMII Br. at 27. WMII alleges that the January time stamp on the photos concerning Monk's Mound were contrary to statements by petitioners in their post-hearing brief that WMII photographed the view at the end of summer. WMII Br. at 27. WMII states that petitioners did not substantiate their argument that the photos presented an inaccurate view by presenting contradicting photographs or evidence of their own. WMII Br. at 26.

WMII states that, despite the fact that the Milam RDF expansion is compatible with the surrounding area, WMII will sufficiently screen the expansion from view to minimize any negative visible effects. Tr.3 at 92-93. WMII expert testimony and a report in its siting application contain detailed landscaping plans to mask the expansion from view. Tr.3 at 92, 98-99. WMII is also designing the site to be used as open space upon closure, which it alleges will be compatible with the surrounding area. C-12,912.

WMII also provides evidence that the value of the surrounding property has recently increased, and that several businesses, including the Gateway National Racetrack, have been built near the existing landfill. Tr.3 at 89. WMII also provides studies of land value in the immediate area around the landfill that did not indicate depreciation in value from the expansion. C-12, 954-13,003. Peter Polletti, WMII expert on real estate value, reported that the sale prices near the Milam RDF are similar to those found in other areas. C-12,990. Polletti stated in his report that "[a]n analysis of historical sales indicates a consistent real estate market throughout the 1980s and 1990s with an indication of increasing values for commercial and industrial land." C-12,990.

According to Polletti, despite little commercial development in Fairmont City in the last 10 years, a number of recent developments west of the city limits indicate an increase in the economic development of the community. C-12,961. The western development occurred over the last three years, and includes the reconstruction of the Gateway International Racetrack, Gateway International Golf Course, a new Burger King, motel, and additions to the Gateway Truck Plaza. C-12,961. Polletti states in his report that all of these developments occurred since Milam RDF has been in operation.

Criterion 4 – Floodplain Issues

This section discusses arguments by petitioners and WMII about whether the Village's decision that WMII met the floodplain criterion in Section 39.2(a)(iv) is against the manifest weight of evidence. Petitioners allege that Milam RDF, and consequently the expansion, are in the floodplain and are not flood-proofed in accordance with Section 39.2(a)(iv) of the Act (415 ILCS 5/39.2(a)(iv) (2000)). Petitioners allege that WMII is not exempt from the requirement that the expansion not be built in the floodplain because WMII is not the same company as it was in August, 1997. WMII alleges that the expansion is not in the floodplain, and states that the scope of review should be limited to the expansion, and not extended to the existing facility.

WMII also states that the expansion is flood-proofed, and that petitioners are incorrect in their assessment that the landfill previously flooded in 1993 and 1995.

Petitioners' Arguments

Petitioners allege that the manifest weight of the evidence does not support the Village's determination that WMII met the floodplain criterion in Section 39.2(a)(iv) of the Act. Petitioners state that the foundation of the expansion at the Milam RDF is within the 100-year floodplain, which they state is contrary to the requirement in Section 39.2(a)(iv) of the Act. Petitioners allege that the exemption allowing siting within the floodplain for landfills permitted before August 19, 1997, under Section 22.19a(b) of the Act does not apply to Milam RDF because WMII changed ownership after August 19, 1997. Furthermore, even if Section 22.19a(b) of the Act applies to the Milam RDF, petitioners argue that the existing Milam RDF, which is the foundation for the proposed expansion, is not flood-proofed, as required by 39.2(a)(iv)(B) of the Act.

The Expansion is Within the 100-Year Floodplain. Petitioners rely primarily on the current Flood Insurance Rate Map by the Federal Emergency Management Agency (FEMA map) to show that the foundation of the Milam RDF expansion falls within the 100-year floodplain. *See* C-13,571. Petitioners state that Thomas Conner, WMII design expert, admitted that, according to the FEMA map, the landfill was partially located in a zone designated as part of the 100-year floodplain. Tr.1 at 35-36. Although Mr. Conner concluded that the FEMA map was inaccurate and had an old effective date of December 15, 1981, he later submitted a public comment admitting that the petitioners provided him with the current map. Tr.1 at 37; C-13,490. Petitioners allege that Mr. Conner did not provide any evidence supporting his conclusion. Mr. Conner testified that the Illinois Department of Natural Resources (IDNR) and the Illinois Department of Transportation (IDOT) considered the Milam RDF to be outside the floodplain. Tr.1 at 37. However, petitioners faulted Mr. Conner for failing to submit any documentation from either IDNR or IDOT, stating that the status of the site had changed. Pet. Br. at 12-13; Tr.1 at 37. Petitioners state that Mr. Conner solely provided five unsubstantiated sentences in his report attached to the WMII application. *See* C-12,005.

Petitioners allege that a finding that Milam RDF is within the floodplain is bolstered by a letter from Paul Osman, an IDNR floodplains expert. *See* Pet. Br. at 13; C-13,567. Petitioners submitted a letter by Osman as public comment before the Village, which states that, based on information provided by petitioners, parts of Milam RDF "are clearly located within designated flood hazard areas and therefore fall under the floodplain requirements of [Illinois Executive Order #IV]." C-13,567. In the letter, Mr. Osman characterized the 100-year flood elevation as 403 feet, and noted that the U.S. Army Corps of Engineers and IDNR have identified several flood zones that are not on the current FEMA map (dated December 1981). C-13,567. Petitioners argue that the 403 foot elevation is even lower than projected on the FEMA map. Pet. Br. at 14.

Petitioners also submitted as public comment before the Village a 1991-1992 report by Mr. Conner's employer, Hurst-Rosche, for an expansion at Milam RDF, which depicts the foundation of the landfill to be at or below 400 feet. *See* C-5109; C-13,572-82. Petitioners

allege that the diagrams indicate that the base of refuse at Milam RDF is up to 11 feet lower than the floodplain elevation at the site. Pet. Br. at 14. Petitioners point out that an elevation map by Hurst-Rosche reveals that 30.2 acres of the 1992 expansion would be below the 100-year floodplain elevation of 405 feet. See C-5,109.

Petitioners state that, since the proposed vertical expansion rests on the current Milam RDF, which petitioners allege is below the 100-year floodplain, the expansion should also be considered to be below the 100-year floodplain. “The existing Milam landfill is the foundation for the expansion.” Pet. Br. at 15. Petitioners state that the “expansion will not hang suspended in air.” Pet. Br. at 15. Petitioners allege that the manifest weight of the evidence shows that the Milam RDF, and consequently the proposed vertical expansion, has a foundation below the 100-year flood plain, which Petitioner alleges is prohibited by Section 39.2(a) of the Act. See 415 ILCS 5/39.2 (2000).

Section 22.19 Exemption does not apply to WMII. Petitioners allege that they do not have to address whether the Milam RDF facility was flood-proofed because the facility is in the 100-year floodplain, and is not exempt under Section 22.19a of the Act. See 415 ILCS 5/22.19a (2000). Petitioners state that Section 22.19a(b)(3) of the Act “exempts owners of landfills who want to expand in the flood plain if they were owners prior to August 19, 1997.” Pet. Br. at 16; See 415 ILCS 5/22.19a(b)(3) (2000). Section 39.2(a) of the Act only requires that the exempt facilities are flood-proofed. See 415 ILCS 5/39.2(a) (2000).

Petitioners allege that WMII is not eligible for the exemption under Section 22.19a of the Act because it is not the same company that owned the Milam landfill in August 19, 1997. Pet. Br. at 16. Petitioners state that they introduced evidence that shows USA Waste Services, Inc. (USA Waste), a Texas based corporation, purchased Waste Management of Illinois, Inc. in 1998. Pet. Br. at 17. Petitioner, Kathy Andria, filed public comments after the March 2000 hearing that included WMII Securities and Exchange financial statements. See C-13,551-565. The S-8 POS form for WMII, relates to the issuance of shares of stock after the merger between the two companies on July 16, 1998. C-13,552. Petitioners allege that WMII, as a new and different company in 1998, cannot take advantage of the Section 22.19a exemption, and therefore cannot build the vertical expansion in the floodplain. Pet. Br. at 17. Petitioners state in the alternative that even if WMII is considered to be the same company after its merger with USA Waste, then the Milam RDF expansion must still be flood-proofed in accordance with Section 39.2(a) of the Act. Pet. Br. at 17.

The Milam RDF expansion is not flood-proofed. Petitioners allege that the Milam RDF landfill, and consequently the proposed vertical expansion, is not flood-proofed as required by Section 39.2(a) of the Act. Pet. at 17. Petitioners state that 1995 WMII reports confirm that the Milam RDF landfill has previously flooded, and that all groundwater monitoring well levels were higher than the floodplain elevation of 405 feet. Pet. Br. at 16; See C-11,468. Petitioners quote the WMII summary of monthly water levels, which states that “[t]he months of May and June 1995 show water levels after periods of significant rainfall and flooding.” C-11,468. Petitioners also maintain that WMII monthly water level reports indicate that the water level in four wells exceeded 408 feet in May and June, 1995. C-11,478-79. Petitioners allege that these reports of elevated monthly water levels prove that the Milam RDF landfill has flooded, and is

therefore not flood-proofed. Since the site is not flood-proofed, Petitioners state that WMII fails to comply with criterion 4 for the expansion of the landfill.

WMII Arguments

WMII presents three main arguments concerning criterion 4. First, WMII alleges that the expansion starts above the floodplain. WMII states that the Board's review is limited to the facts regarding the expansion, not the existing landfill, and that petitioners cannot revisit whether an existing permitted facility properly satisfies the Section 39.2(a) criteria. Second, WMII states that the land under the site is no longer in the 100-year floodplain because developments in the last 20 years have significantly altered the character of the area. Third, WMII alleges that even if the site was in the floodplain, WMII has taken adequate measures to ensure the site is flood-proofed in accordance with Sections 39.2(a)(iv) and 22.19a of the Act. 415 ILCS 5/39.2(a)(iv), 22.19a (2000).

The Milam RDF expansion is above the floodplain. WMII alleges that petitioners misconstrue the nature of the siting application and the applicable legal standard by stating that the landfill, rather than the expansion, must be above the 100-year floodplain. WMII Br. at 12. WMII states that Sections 3.32(b) and 39(c) of the Act only require local siting approval for new pollution control facilities. WMII Br. at 12. A "new facility" includes "the area of expansion beyond the boundary of a currently permitted pollution control facility." 415 ILCS 5/3.32(b)(2) (2000). WMII maintains that this includes vertical expansions above an existing landfill. M.I.G. Investment v. IEPA, 122 Ill.2d 392, 399-400, 523 N.E.2d 1, 10-11 (1998).

WMII states that this requirement only pertains to the application for the vertical expansion and not the existing Milam RDF. *See* C-12,798-907. WMII alleges that the siting approval and permits for previous expansions in 1988 and 1991 are not properly subject to review in this proceeding. WMII Br. at 12-13. WMII states that the scope of the Board's review in this case is limited to the vertical expansion, which is proposed above the permitted Milam RDF site at a starting elevation of 410 mean sea level (MSL). *See* Tr.3 at 61; C 12,902, C-13,005. WMII alleges that this is five feet above the 405-foot elevation of the 100-year floodplain. Tr.3 at 79-80. Since every location of the expansion is above the floodplain, this "new facility" is located outside the floodplain, and therefore meets criterion 4 under Section 39.2(a)(iv) of the Act (415 ILCS 5/39.2(a)(iv) (2000)).

WMII relies on a finding in a prior Board decision to illustrate that the proper issue in this matter is whether the vertical expansion is located within the floodplain. *See Hediger v. D & L Landfill*, PCB 90-163, slip op. at 12-13 (Dec. 20, 1990). In *Hediger*, the vertical expansion, as opposed to the existing landfill, was outside of the 100-year floodplain. *Hediger*, slip op. at 14. As a result, this Board decided that the county board's finding on criterion 4 was justified, and consequently not against the manifest weight of the evidence. *Id.* WMII alleges that the uncontroverted evidence in this case shows that the vertical expansion is outside of the floodplain. WMII Br. at 16; Tr.3 at 79. Moreover, WMII states that the "Board has consistently upheld a local governing body's determination that criterion four was satisfied, even in cases whether there was conflicting testimony or uncertainty regarding the location of the floodplain." WMII Br. at 16, *citing* Environmentally Concerned Citizens Organization v. Landfill L.L.C.,

PCB 98-98, slip op. at 10-11 (May 7, 1998); C.O.A.L. v. Laidlaw Waste Systems, PCB 92-131, slip op. at 11-14 (Jan. 21, 1993); Hediger, slip op. at 14.

The Milam RDF is no longer within the 100-year floodplain. Petitioners base their determination that Milam RDF is in the 100-year floodplain on the current 1981 FEMA map. Tr.3 at 76. WMII alleges that its expert witness, Thomas Conner, provided detailed evidence as to how the FEMA map was inaccurate and outdated. WMII Br. at 13. Mr. Conner testified that: (1) the FEMA map does not list elevations; (2) the map is designed to “determine flood hazards as relating to structures that are built and then being eligible [sic] for flood insurance”; and (3) the map is outdated and no longer reflects the current floodplain status of the Milam RDF.

Mr. Conner described the changes to the FEMA map over the last 25 years, and testified that some of the features on the map are over 25 years old. Tr.3 at 76. The changes included “IDOT Interstate and State highway construction and interchange changes, culvert construction, permitted relocation of Old Cahokia Creek, permitted berm construction at Milam RDF, and restaurant construction.” WMII Br. at 14; Tr.3 at 76-78. Mr. Conner testified that the revised information more accurately characterizes the 100-year floodplain in and around Milam RDF. WMII Br. at 14; Tr.3 at 79. WMII alleges that testimony by Mike Mitchell, St. Clair County Director and Local Flood Plain Coordinator, bolstered Mr. Conner’s statements that the FEMA map no longer depicts existing conditions. WMII Br. at 14; Board Tr. at 418.

WMII challenges the credibility and weight of the letter from Paul Osman with the IDNR, which was submitted by petitioners as public comment after the Village’s March 2000 public hearing. WMII alleges that the letter is hearsay, and that petitioners did not provide the proper foundation for the letter without his testimony at hearing. WMII states that this foundation was necessary to establish his authority and experience in the area of floodplains and the specific issue of the status of the Milam RDF expansion. WMII Br. at 15. WMII also states that cross-examination was necessary to determine whether Mr. Osman reviewed the application, understood the facts in this case, and knew of new circumstances such as the relocation of the Cahokia Canal. WMII Br. at 15. Although the letter by Mr. Osman states additional flood zones existed at Milam RDF, WMII alleges that there are no flood zones in the expansion, and the existing Milam RDF was flood-proofed by permit. WMII Br. at 15.

Finally, WMII alleges that petitioners did not succeed in their attempt to discredit its expert witness, Mr. Conner, by pointing out that his report concerning criterion four is merely a paragraph attached to the application. WMII states that Mr. Conner appropriately included only what was necessary, and this was enough to show that WMII satisfied this requirement.

Milam RDF is flood-proofed. WMII alleges that the Milam RDF is flood-proofed, and it has never flooded. WMII also contends that this issue is irrelevant because Milam RDF is outside the 100-year floodplain. Mr. Conner testified that Milam RDF did not flood in 1993, and that the footprint of the landfill did not flood in 1995. Tr.3 at 83. He stated that Milam RDF experienced ponding, or accumulation of water, but not flooding. Tr.3 at 83. WMII alleges that the existing Milam RDF has been flood-proofed as required in its Agency-issued permit, Permit No. 1991-152-LFM. WMII Br. at 17.

WMII alleges that petitioners wrongly rely on groundwater monitoring well water levels to show that Milam RDF floods. WMII Br. at 17. WMII states that “[t]here is no direct correlation between flooding and groundwater.” WMII Br. at 17; Tr.3 at 86. Both Mr. Conner and Mr. Underwood, an expert hydrogeologist for WMII, testified to this effect at the February 19, 2001 public hearing. *See* Tr.3 at 85-86, 127-28.

WMII lastly alleges that Section 22.19a of the Act does not apply to it because it is the same company that owned and operated the Milam RDF prior to August 19, 1997. WMII Br. at 18. WMII states that petitioners presented no evidence to establish otherwise. WMII Br. at 18.

DISCUSSION

In this section, the Board discusses whether the Village decisions that WMII met the first four siting criteria under Section 39.2(a) is against the manifest weight of evidence.

Criterion 1 – Need

Section 39.2(a)(1) provides that a facility must be necessary to accommodate the waste needs of the area it is intended to serve. 415 ILCS 5/39.2(a)(1) (2000). An applicant for siting approval does not have to show absolute necessity. Clutts v. Beasley, 185 Ill. App. 3d 543, 541 N.E.2d 844, 846 (5th Dist. 1989); A.R.F. Landfill v. PCB, 174 Ill. App. 3d 82, 528 N.E.2d 390, 396 (2nd Dist. 1988); Waste Management of Illinois v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d 542, 546 (3rd Dist. 1984). The Illinois Appellate Court Third District has defined “necessary” as connoting a “degree of requirement or essentiality” and not just that a landfill be “reasonably convenient.” Sierra Club v. City of Wood River, PCB 98-43, slip op. at 4 (Jan. 8, 1998), citing Waste Management of Illinois v. PCB, 122 Ill. App. 3d 639, 461 N.E.2d at 546. The Illinois Appellate Court Second District adopted this construction of “necessary,” adding that the applicant must demonstrate both an urgent need for, and the reasonable convenience of, the new facility. Waste Management of Illinois v. PCB, 175 Ill. App. 3d 1023, 1031, 530 N.E.3d 682, 689 (2nd Dist. 1988); A.R.F. Landfill, 174 Ill. App. 3d at 91, 528 N.E.2d at 396; Waste Management of Illinois v. PCB, 123 Ill. App. 3d 1075, 1084, 463 N.E.2d 969, 976 (2nd Dist. 1984).

The Board finds that petitioners did not show that the Village decision was against the manifest weight of evidence. The record contains evidence on which the Village could reasonably rely to conclude that Milam RDF was necessary to accommodate the waste needs of the area it is intended to serve. The record demonstrates that, although petitioners introduced an updated 1999 Landfill Capacity Report by the Agency, WMII had previously incorporated the projected capacity for the Cottonwood Hills landfill in its analysis of the needs of its service area. It also only deducted 25% of the amount of this capacity even though Cottonwood Hills landfill also services 34 counties outside of the Milam RDF service area. WMII also stated that the capacity for Cottonwood Hills would decrease if Milam RDF and other area landfills closed.

WMII also adequately refutes petitioners’ arguments concerning the expansion of the Fred Weber landfill and the Roxana landfill. Although Fred Weber is permitted to expand its disposal area to 224 acres, and WMII accepts 60% of its waste from Missouri, WMII also

explained why it believes the expansion would not significantly impact the need in the service area. WMII states that the Fred Weber landfill does not accept special waste or out-of-state waste. Although petitioners argued that the prohibition on out-of-state waste was not in the permit issued to Fred Weber, Smith testified that, according to the Weber landfill manager, it was Fred Weber policy not to accept Illinois waste. According to WMII, 22% to 30% of the waste accepted at Milam RDF in the last three years was special waste. C-12,735.

Petitioners state that some of the waste generated in Missouri, which would otherwise be transported to Milam RDF, may now be disposed of at the Fred Weber site. However, WMII provided both testimony and evidence in its application that higher hauling costs and greater tipping fees in Missouri, combined with the location of transfer stations may discourage hauling a significant portion of waste from the service area to Fred Weber. This is compounded by the fact that Fred Weber does not own its own hauling fleet. WMII states that, due to this economic disincentive and the restrictions at the Fred Weber landfill, it excluded the increased capacity at the site.

Petitioners allege that the Roxana landfill recently received local siting approval, which would further increase capacity in the Milam service area. Petitioners refer to the 1999 Landfill Capacity Report by the Agency to show that Roxana accepts special waste, and is located in the adjacent county to St. Clair. WMII states that it did not include the potential expansion of this facility because the appeal period to the Board had not expired, and the Agency had not yet issued a permit to the facility.

Finally, petitioners argue that the Village could not consider the economic need of the Village when reviewing the siting application. However, local authorities can consider economic factors as long as it finds that the landfill facility satisfies the nine criteria under Section 39.2(a) of the Act. Hauling costs and tipping fees are also an appropriate element of need. “While not controlling, the economics of greater hauling distances can be germane to criteria #1.” Waste Management of Illinois, 123 Ill. App. 3d at 1087-88, 463 N.E.2d at 978-79. WMII provides a detailed analysis of the impact on hauling costs and the location of transfer stations in its application. C-12,776-82.

In conclusion, the Board finds that petitioner fails to prove that the Village’s decision that WMII met criterion 1 was against the manifest weight of the evidence. Although petitioners do provide alternate statistics on need in the 1999 Landfill Capacity Report by the Agency, and raised reasons as to why Roxana and Fred Weber should be included in the assessment of the waste needs of the local service area, WMII provides adequate reasons and supporting evidence to show that the Village decision was not against the manifest weight of evidence.

Criterion 2 – Public Safety, Health, and Welfare

Criterion 2 requires the applicant to demonstrate that its facility is designed, located, and proposed to be operated in a manner that is protective of public health, safety, and welfare. *See* 415 ILCS 5/39.2(a)(ii) (2000). “Determination of this question is purely a matter of assessing the credibility of expert witnesses.” CDT Landfill, PCB 98-60, slip op. at 13, citing Fairview, 198 Ill. App. 3d at 552, 555 N.E.2d at 1185. WMII provided testimony of three expert witnesses

and reports in its siting application supporting the premise that the design, location, and proposed operation will not jeopardize public health, safety or welfare.

Petitioners' arguments and documents submitted into evidence do not show that the Village's decision that WMII met criterion 2 was against the manifest weight of evidence. There is ample evidence to support the Village's finding that WMII's evidence and witnesses were more credible than those presented by petitioners. Petitioners did not present expert witnesses or provide an analysis of the proposed expansion, showing the leachate management system or other design structures of the landfill could not accommodate 4 million tons of added waste. Petitioners did not provide evidence of any chemicals that would deteriorate the Milam RDF liner.

WMII sufficiently addressed petitioners' assertions that groundwater well levels indicated flooding at the site. WMII presented testimony that groundwater well levels are not related to surface flooding, and gave the example of artesian wells to show that wells can have water levels above the floodplain. Expert witnesses testified to flooding in one instance at the site, but stated that the flooding never reached the footprint of the landfill. The Board cannot reverse the Village's decision merely because the Village credits WMII expert witnesses and not evidence presented by petitioners on this issue. *See Fairview*, 198 Ill. App. 3d at 550-51, 555 N.E.2d at 1184. Accordingly, the Board finds that petitioners failed to prove that the Village's decision with regard to criterion 2 was against the manifest weight of evidence.

Criterion 3 – Incompatibility

Section 39.2(a)(3) of the Act requires WMII to show that the proposed expansion of the Milam RDF is located so as to minimize incompatibility with the character of the surrounding area. *See* 415 ILCS 5/39.2(a)(iii) (2000). This criterion requires WMII to demonstrate more than minimal efforts to reduce the landfill's incompatibility. *File v. D & L Landfill*, 219 Ill. App. 3d 897, 907, 579 N.E.2d 1228, 1236 (5th Dist. 1991). The applicant must demonstrate that it has done or will do what is reasonably feasible to minimize any incompatibility. *Id.* “[A]n applicant cannot establish compatibility based upon a pre-existing facility, and the compatibility of an expansion must be considered as a new and separate regional pollution control facility.” *CDT Landfill*, PCB 98-60, slip op. at 17, *citing Waste Management*, 123 Ill. App. 3d at 1088, 463 N.E.2d at 979.

The Board finds that the Village's decision that WMII met criterion 3 was not against the manifest weight of evidence. There is evidence to support the conclusion that WMII sufficiently analyzed the impact on the surrounding area, primarily within one mile of the site, and took adequate steps to minimize any impact from the expansion. Petitioners did not show by the manifest weight of evidence that WMII failed to take reasonable steps to minimize any incompatibility. Although petitioners argued that the existing landfill was visible from Monk's Mound, and the expansion would dwarf the burial grounds, they did not submit alternate photographs or other evidence to demonstrate this point. No one testified from the Gateway Racetrack, Horseshoe Lake State Park, or surrounding hotels and restaurants that they were impacted by the expansion. One citizen did testify about the odor of the landfill, which was not contested by WMII. The Village acknowledged this complaint in its decision.

The Village could reasonably have found that WMII demonstrated through testimony and expert reports in its application that it planned to take measures to reduce the visibility of the vertical expansion through landscaping. WMII detailed the types of plant life and the heights of trees, provided photographs of the current view of the landfill as well as projected images of the expansion. WMII also included a detailed analysis of the financial impact of the expansion on the surrounding community. Petitioners failed to produce evidence to contradict the economic report, or the lack of impact on property values. Accordingly, the Board finds that the petitioners failed to prove that the Village's decision with regard to criterion 3 was against the manifest weight of the evidence.

Criterion 4 – Floodplain Issues

The Board discusses in this section whether the Village's decision that WMII met the floodplain criterion in Section 39.2(a)(iv) of the Act (415 ILCS 5/39.2(a)(iv) (2000)) is against the manifest weight of evidence. The Board cannot reweigh the evidence, but only determine whether the record shows that the manifest weight of evidence supports the Village's conclusion. This section provides a summary of the law that governs criterion 4, and then discusses three issues concerning criterion 4. The Board first addresses whether the Milam RDF vertical expansion is within the 100-year floodplain. The Board then discusses the application of the Section 22.19a exemption to WMII for the current expansion. Lastly, the Board addresses whether WMII had to show that the expansion was flood-proofed, and if so, whether the manifest weight of evidence indicated that it met this portion of the criterion 4 requirement.

Statutory Framework

Section 39.2(a)(iv) of the Act requires a sanitary landfill or waste disposal site to be located outside the boundary of the 100-year floodplain. Facilities that are exempt under Section 22.19a of the Act must only be flood-proofed. 415 ILCS 5/39.2(a)(iv)(B) (2000). Section 22.19a(a) states that “[o]n or after January 1, 1998, no sanitary landfill or waste disposal site that is a pollution control facility, or any part of a sanitary landfill or waste disposal site that is a pollution control facility, may be located within the boundary of the 100-year floodplain.” 415 ILCS 5/22.19a(a) (2000). Section 22.19a(b) lists four exemptions for these facilities, including one for owners of landfills who owned or operated the facility since August 19, 1997, that request to expand in the floodplain. 415 ILCS 5/22.19a(b) (2000).

The Boundary of the 100-Year Floodplain

Petitioners first allege that the Milam RDF expansion is within the 100-year floodplain. Petitioners state that the FEMA map, DNR letter by Osman, testimony by WMII witness, Conner, and other evidence shows that the existing Milam RDF is below the 100-year floodplain elevation of 405 feet. Petitioners allege that, since the existing facility is the foundation for the Milam RDF expansion, this expansion also sits within the floodplain.

The manifest weight of evidence supports the Village's decision that the Milam RDF expansion is outside the 100-year floodplain. WMII expert, Mr. Conner, raised several reasons

why the FEMA map relied upon by petitioners was outdated, and how the Milam RDF now falls outside of the 100-year floodplain. Although petitioners provided a letter from DNR floodplains expert, Mr. Osman, they did not present any expert testimony on this issue. “Where there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other.” Sierra Club v. City of Wood River, PCB 98-43, slip op. at 12, citing File, 219 Ill. App. 3d at 897, 579 N.E.2d at 1228. “Simply because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for the Board to reverse their findings.” Sierra Club, slip op. at 12, citing File v. D&L Landfill, PCB 90-94 (Aug. 30, 1990), *aff’d*, 219 Ill. App. 3d 897, 579 N.E.2d 1228 (5th Dist. 1991). The Board finds that, for the above reasons, the manifest weight of evidence is not against the Village’s decision that WMII met criterion 4.

WMII also alleges that petitioners apply the wrong legal standard to the proposed expansion by evaluating whether the existing landfill, rather than the expansion, sits in the 100-year floodplain. WMII states that petitioners inappropriately subject the existing permitted Milam RDF to a second review by challenging whether the existing facility, not the expansion, is within the floodplain. WMII alleges that the petitioners must limit their review to the expansion, which is at an elevation of 410 feet, 5 feet above the floodplain level of 405 feet.

The Board previously reviewed a similar landfill siting appeal of a vertical expansion above the floodplain, where it found the county’s decision on criterion 4 was not against the manifest weight of the evidence. *See Hediger*, PCB 90-163, slip op. at 14. Although the Board agrees that the proposed expansion will rest on the existing Milam RDF, the Board finds it is not appropriate to review the elevation of the existing permitted facility, and focuses on the expansion at issue in this matter. To do otherwise would require a review of previously issued Agency permits formerly issued to Milam RDF that are not subject to review in this proceeding. The manifest weight of evidence supports the Village’s decision that the Milam RDF expansion is above the floodplain.

Application of Section 22.19a of the Act

Petitioners allege that 22.19a of the Act does not exempt WMII from the requirement that Milam RDF must be outside of the floodplain because WMII is not the same company that owned Milam RDF on August 19, 1997. Petitioners provided financial documents concerning a merger between WMII and USA Waste, which detailed the issuance of stock shares. Petitioners failed to provide any other evidence or reasons to show that WMII has changed ownership. WMII argued that WMII is the same company that owned and operated Milam RDF on August 19, 1997, and that petitioners failed to prove otherwise. The Board finds that the manifest weight of evidence does not support a finding that WMII is a separate entity than the owner of Milam RDF on August 19, 1997.

Flood-proofing the Milam RDF Expansion

The last issue involves whether the Milam RDF is flood-proofed in accordance with Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2000)). Section 39.2(a) requires that a new facility, such as the Milam RDF expansion, must either be outside the 100-year floodplain, or be

flood-proofed if exempt under Section 22.19(a) of the Act (415 ILCS 5/22.19(a) (2000)). The Board does not need to reach a decision on this issue because it found above that the Village's decision that the site is not within the floodplain is not against the manifest weight of evidence. Even if the Board found differently, WMII provided sufficient evidence challenging petitioners' allegations of flooding, that the Village's decision concerning the flood-proofing of the expansion is not against the manifest weight of evidence.

CONCLUSION

The Board finds that the manifest weight of evidence supports the Village's decision that WMII met the four challenged criteria under Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2000)). First, WMII sufficiently defended its methodology and resulting numbers showing that the expansion was necessary to accommodate the needs of the area it intends to serve. WMII included the capacity for Cottonwood Hills, a recently developed facility in St. Clair County, in its analysis. WMII also showed how hauling costs, tipping fees, acceptance of special waste, and hauling patterns would affect the shipment of waste to Fred Weber and other alternate facilities.

Second, petitioners failed to provide adequate proof of threats to groundwater due to overflow of leachate from flooding or new chemical compounds that could break down the Milam RDF liner, to show that the expansion was not protective of the human health, safety and welfare of the surrounding area. Third, WMII provided sufficient evidence of taking into account the surrounding area and attempting to eliminate incompatibility with scaled landscaping. WMII also provided studies on the financial impact of the expansion on surrounding property values. Petitioners did not provide any expert or lay testimony by surrounding residents or businesses, such as hotels or restaurants, as to any drop in value to nearby homes or businesses. Finally, WMII provided sufficient evidence to show that the Milam RDF expansion sits outside the 100-year floodplain.

Since the Board cannot reverse merely because the Village credited WMII experts over evidence provided by the petitioner, it finds that the Village decision on this criterion is not against the manifest weight of evidence. Accordingly, the Village's decision to grant local siting to WMII is upheld.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

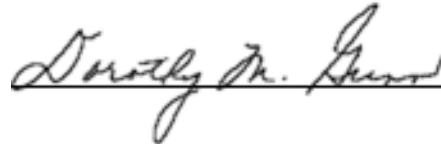
- 1) For the reasons presented in the Board's opinion, the Board affirms the April 18, 2001 decision by the Board of Trustees of the Village of Fairmont City to grant the siting of the expansion of the Milam Recycling and Disposal Facility for Waste Management of Illinois, Inc.
- 2) The Board grants petitioners' motion to withdraw the document filed as Public Comment 2 from the record, and strikes references to this document in paragraphs 2 and 3 of Section IV in the petitioners' reply brief.

- 3) The Board also grants the motion by WMII to bar Public Comment 1 from the record, and grants in part the motion by WMII to strike Section I of petitioners' reply brief. The Board also strikes the reference to the Agency's public comment in an unrelated proceeding in the last paragraph of Section III in the petitioners' reply brief. The Board finds that WMII's motion to strike paragraphs 2 and 3 in Section IV of petitioners' reply brief is moot because the Board is striking the same references in response to petitioners' motion to withdraw public comment 2 and subsequent references in their reply brief.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 18, 2001, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board