65448-POH

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL WATSON, Petitioner, vs. COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondent.	No. PCB 03-134 (Pollution Control Facility Siting Appeal) Consolidated With PCB 03-125, 03-133, 03-135)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on July 7, 2003, we filed with the Illinois Pollution Control Board, the attached **Petitioner, Michael Watson's, Response to County Board of Kankakee's Motion to Strike Michael Watson's Brief**, a copy of which is attached hereto and served upon you.

QUERREY & HARROW, LTD.

Jennifer J. Sackett Pohlenz

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PROOF OF SERVICE

Alesia Mansfield, a non-attorney, on oath states that she served the foregoing **Notice of Filing, along with copies of document(s) set forth in this Notice,** on the following parties and persons at their respective addresses and/or fax numbers, this 7th day of July, 2003, by or before the hour of 4:30 p.m. in the manners stated below:

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65448-POH

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL WATSON,	
Petitioner,	**No. PCB 03-134**
vs.	**(Pollution Control Facility Siting Appeal)**
COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS, and WASTE MANAGEMENT OF ILLINOIS, INC.,	**Consolidated With PCB 03-125, 03-133, 03-135)**
Respondent.	

PETITIONER MICHAEL WATSON'S RESPONSE TO COUNTY BOARD OF KANKAKEE'S MOTION TO STRIKE MICHAEL WATSON'S BRIEF

NOW COMES the Petitioner, Michael Watson ("Watson"), and for his Response to the County Board of Kankakee's ("County Board") Motion to Strike the Briefs of Petitioners Watson and Karlock, states as follows:

1. The County Board moves to strike Watson's brief based solely on section 101.302(k) of Title 35 of the Illinois Administrative Code.[1] Section 101.302(k) provides:

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

The foregoing section does not set forth any requirements with regard to single-spaced "bullet points," charts, or otherwise. The provision solely limits all briefs to fifty pages. Watson has

[1] It is unclear whether the motion to strike is filed only by the County Board, or by the County Board and the County of Kankakee. There is no reference to the County of Kankakee in the body of the motion, but the motion appears to be submitted by both the County Board and the County of Kankakee, as noted under "respectfully submitted" on page 2 of the motion.

complied with this page limitation, and was not "resorting to artificial means" as argued by the County Board.

2. The County Board argues, without statutory, code or case law authority, that Watson's brief should be stricken, due to a chart contained on pages 48-49 of Watson's brief, and single spaced, indented bulleted points which occur starting on page 39 of Watson's brief, while admitting that Watson's brief is 50 pages. There is no Illinois Pollution Control Board case that could be found by Petitioner Watson concerning the granting of a motion to strike a brief for "formatting" reasons, which is otherwise within the page limits of Section 101.302(k). If the aforementioned "formatting" changes are made to Watson's brief, it results in a total of fifty-five pages, thus, five pages over the 50-page limit. Attached hereto and incorporated herein as **Exhibit A** is a true and accurate copy of Watson's brief, where the formatting issues raised by the County have been modified from page 39 to the end, single spacing and with increased font size in the chart, thus, removing the items about which the County complains. **Exhibit A** shows that, even with the changes in formatting, although the brief is now 55-pages long, it is still fewer pages than the brief filed by the County.

3. Given the County Board's own motion to extend the 50-page limit to allow it to file a brief of 64-pages, which is 14-pages in excess of the requisite page limit;[2] that with the

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[2] It is striking that the County Board, who is, itself, seeking permission from the Illinois Pollution Control Board to file a brief which has already been filed in excess of 50-pages, would object to a party who has filed a brief 50-pages in length, based on the County Board's asserted formatting dispute. In another case before the IPCB, a party brought a motion to strike a party's brief for failing to certify compliance with the recycled paper rule, when the moving party failed to comply with the rule in its initial brief. Waste Hauling, Inc. v. Macon County Board, PCB No. 91-223 (April 9, 1992). The IPCB noted in Waste Hauling, Inc. that bringing this motion, under the circumstances of that case, "raises questions about Waste Hauling's reasoning behind the filing of that motion." Id. Similarly, the motives of the County Board are questionable in bringing a motion to strike Watson's 50-page brief for a purported page-limit violation, while requesting a lengthy extension for its own brief.

formatting changes made to address the County Board's contested formatting Watson's brief is merely 6-pages (opposed to the County's 15-pages) over the 50-page limit; and, that the County Board cites to absolutely no law or other authority which provides authority for its argument that Watson's "formatting" choices are incorrect, the County Board's motion is frivolous and without merit. The Illinois Pollution Control Board has noted that while the Board "accepts and considers all relevant motions before it, the Board frowns upon frivolous filings." Raleigh Realty Corp. v. Illinois EPA, PCB No. 96-52 (June 6, 1996); *see also* Kathe's Auto Service Center v. Illinois EPA, PCB No. 96-102 (June 6, 1996) (noting that "...all practitioners before the Board should be aware that frivolous motion practice will not be tolerated and may result in sanctions").

4. Further, the County Board's motion to strike Watson's brief designates page 39 as the page at which to begin striking, and this designation is not explained, is arbitrary, and is not logical, even if the Illinois Pollution Control Board accepted the County Board's arguments. In other words, why should Watson receive only 39-pages for its brief, as argued by the County Board, while the rules provide for 50-pages and the County Board seeks 64-pages? Even if, starting on page 39, the chart about which the County Board complains was put into 12 point font and the bulleted points about which the County Board complains are changed into double-spaced, non-bulleted paragraphs, Watson's brief does not come close to the 64 or 73 pages filed by the County Board and WMII, respectively.

5. However, should the Illinois Pollution Control Board find that leave is necessary for a brief containing single spaced or 12-point font charted items, then Watson seeks leave from the Illinois Pollution Control Board to allow its brief to stand, as originally filed. Further, if the page

limitation or single-spacing argument is going to be enforced against Watson, then Watson seeks it to be enforced uniformly amongst all the parties and, thus, moves to strike WMII's brief after page 50 or such page as designed by the IPCB (specifically pages 51-73) and the County Board's brief after page 50 or such page as designated by the IPCB (specifically pages 51-64), and, additionally, all single-spacing within those briefs,[3] and seeks leave to file Exhibit A, instanter, Watson's re-formatted brief which removes those "formatting" issues complained of by the County.

6. Additionally, the Illinois Pollution Control Board reviews the overall fairness issues in applying consistent format or page limitations on all of the parties to this matter, in considering the County Board's Motion to Strike Watson's brief, the following facts should be considered. Waste Management has not objected to Watson's brief, and is seeking to file a 73-page response brief in this matter. The County and County Board have requested, despite their desire to strike formatting options within Watson's 50-page brief, authority to file a 64-page brief. There are four petitioners in this matter, and all of their opening briefs taken together total 138 pages. Whereas, if the Illinois Pollution Control Board grants the County's, County Board's, and WMII's requests for page extensions, the *two* briefs of these entities will total 137 pages, nearly the exact equivalent to the 138 total pages filed by the *four* petitioners in their briefs in this matter.

7. Therefore, Watson's brief should be allowed to stand, as it does not exceed the 50-page limit imposed under Section 101.302(k) of the Illinois Administrative Code, and the County Board has provided no basis for it to seek to "cut off" Watson's brief at page 39.

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[3] Single-spaced text can be found on pages 11, 49-50, and 63 of Waste Management of Illinois, Inc.'s brief.

8. Alternatively, should the Illinois Pollution Control Board find that formatting options implemented by Watson are not acceptable and, thus, without such options Watson's brief would exceed (by 5 pages as shown in Exhibit A, attached), the Section 101.103 50-page rule, Watson seeks leave of the Illinois Pollution Control Board to allow the brief as formatted when filed or, alternatively, to allow the re-formatted brief to be filed instanter, **Exhibit A**.

9. Alternatively, should the IPCB determine that formatting options utilized in Watson's brief are not acceptable, and not to grant Watson leave for his filed brief to stand (*i.e.*, in essence to deny Watson a 5-page extension), then Watson moves for the Illinois Pollution Control Board to apply this rules equally amongst the parties and strike pages 51-73 of WMII's brief, pages 51-64 of the County's and County Board's joint brief, and all single-spacing within those briefs.

WHEREFORE, Michael Watson respectfully requests the Illinois Pollution Control Board:

A. Deny the County Board's Motion and permit Watson's opening brief to stand as filed;

B. Alternatively, grant Watson leave to allow the filed brief as formatted; or

C. Alternatively, grant Watson leave to allow the format-revised brief (same text) to be filed with 6 pages in excess of the 50-page limit (total of 56 pages); or

D. Alternatively, apply the limitations equally to all parties, striking pages in excess of or formatting contrary to the applicable page

or formatting requirements, respectively, or any extended page or limits set by the IPCB equally among the parties.

Dated: July 7, 2003

Respectfully Submitted,

PETITIONER MICHAEL WATSON

By: _____
One of his Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL WATSON, Petitioner, vs. COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS, and WASTE MANAGEMENT OF ILLINOIS, INC., Respondent.	No. PCB 03-134 (Pollution Control Facility Siting Appeal) Consolidated With PCB 03-125, 03-133, 03-135)

PETITIONER MICHAEL WATSON'S BRIEF CONTESTING THE JANUARY 31, 2003 DECISION OF THE KANKAKEE COUNTY BOARD CONDITIONALLY APPROVING, WMII'S APPLICATION TO EXPAND THE KANKAKEE COUNTY LANDFILL

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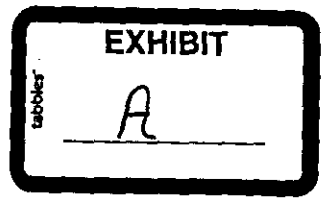

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MICHAEL WATSON, **Petitioner,** **vs.** **COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS, and WASTE MANAGEMENT OF ILLINOIS, INC.,** **Respondent.**	**No. PCB 03-134** **(Pollution Control Facility Siting Appeal)** **Consolidated With PCB 03-125, 03-133, 03-135)**

PETITIONER MICHAEL WATSON'S BRIEF CONTESTING THE JANUARY 31, 2003 DECISION OF THE KANKAKEE COUNTY BOARD CONDITIONALLY APPROVING, WMII'S APPLICATION TO EXPAND THE KANKAKEE COUNTY LANDFILL

Pursuant to Section 40.1(b) of the Illinois Environmental Protection Act (Act), Petitioner Michael Watson (Watson) has filed a petition requesting the Illinois Pollution Control Board (IPCB) review the January 31, 2003, decision of the Kankakee County Board, conditionally approving Waste Management of Illinois, Inc.'s (WMII) Site Location Application for the Kankakee County Landfill Expansion (Application). (415 ILCS 5/40.1(b)). Mr. Watson's Section 40.1(b) IPCB Petition seeks review of Kankakee County's conditional siting of WMII's landfill expansion request for, essentially, three reasons:

(A) Kankakee County did not have jurisdiction to hear and decide on WMII's Application, due to WMII's failure to serve Section 39.2(b) pre-filing notice on Brenda and Robert Keller, who are property owners within 250 feet of the property boundary of the proposed landfill expansion. **(B)** The local siting proceedings in Kankakee County were fundamentally unfair, individually and collectively, due to: (1) the unavailability of WMII's operating record, required to be filed with the Kankakee County Clerk pursuant to Section 39.2(c); (2) perjured testimony of one of WMII's Criterion 3 witnesses and the unavailability of that witness for complete cross-examination; (3) prejudgment; and (4) *ex parte* communications. And, **(C)**, the

decision of the Kankakee County Board was against the manifest weight of the evidence with respect to Criteria (i), (ii), (iii), (v), (vi), (vii), and (viii) of Section 39.2 of the Act.

As a result of lack of jurisdiction, as discussed below in Section III.A., the IPCB should vacate the Kankakee County Board's decision and find it null and void. As a result of the individual and/or collective fundamentally unfair public hearings and local siting procedure, as discussed in Section III.B., below, if the IPCB does not vacate the Kankakee County Board's decision for jurisdictional reasons, the decision should be remanded for new public hearings to cure the fundamentally unfair hearings and unavailability of records. In the alternative, as discussed in Section III.C., below, if the IPCB does not vacate the Kankakee County Board's decision for jurisdictional reasons, that decision should be reversed on the basis that it is against the manifest weight of the evidence. Finally, also in the alternative, and discussed below in Section III.D., should the IPCB deny vacation, remand and reversal of the Kankakee County Board's siting decision as described above, Petitioner respectfully requests and reserves its rights to seek remand of the IPCB appeal process on fundamental fairness, for additional discovery and public hearings to cure evidentiary bars and rulings which are respectfully submitted to have caused the proceeding before the IPCB to be unfair, and prevented Petitioner from developing a more complete record concerning fundamental fairness issues it identified.

I. INTRODUCTION

On March 29, 2002, WMII made its first attempt to file the Application with the Kankakee County Board. On July 22, 2002, WMII, before local Hearing Officer John McCarthy, withdrew the first attempted filing of the Application, as WMII had not adequately served pre-filing notice, pursuant to Section 39.2(b) of the Act. (11/18/02 1:30 pm Tr. 29-30). Subsequently, on August 16, 2002, WMII again filed, in some fashion, the Application.

(11/18/02 9:00 am Tr. 3). The Application seeks a proposed new pollution control site, namely a significant expansion of the Kankakee County Landfill. The proposed Kankakee County Landfill expansion has a total landmass of 664 acres, of which 302 acres, WMII proposes to be landfill with 30,000,000 tons of waste. (11/18/02 6:00 pm Tr. 6). The existing Kankakee County Landfill is 179 acres of property, of which 51 acres are or will be landfilled prior to its closure. Id. Thus, the total horizontal expansion sought by WMII, beyond the existing site, is 485 acres of land and 252 acres of landfill, which translates into a landfill expansion that is more than 5 times larger horizontally (not accounting for increase in volume of waste) than the existing site.

II. STANDARD OF REVIEW

There are three standards of review to be considered in this appeal. **First**, with respect to the jurisdictional and fundamental fairness issues, the standard applied is *de novo*. Land & Lakes Co. v. Illinois Pollution Control Board, 319 Ill. App. 3d 41, 48, 743 N.E.2d 188, 193-194 (3d Dist. 2000)(*de novo* standard of review for fundamental fairness). Unfair practices or procedures such as the unavailability of the record, *ex parte* contacts, introduction of evidence, and prejudgment or impartiality of rulings on the evidence, and others, may individually, or cumulatively, render siting proceedings fundamentally unfair. American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (October 19, 2000); *see*, Hediger v. D& L Landfill, Inc., PCB 90-163 (December 20, 1990); Daly v. Pollution Control Board, 462 Ill. App. 3d 968, 637 N.E.2d 1153, 1155 (1st Dist. 1994).

Second, with respect to that portion of this appeal related to the review of the decision on the nine criteria enumerated in Section 39.2 of the Act, the standard of review is manifest weight of the evidence. E & E Hauling, Inc. v. Pollution Control Board, 116 Ill.App.3d 451, N.E.2d 555 (2d Dist. 1983), aff'd 107 Ill. 2d 33, 481 N.E.2d 664 (S.Ct. 1985); McLean County Disposal, Inc.

v. County of McClean, 207 Ill.App.3d 477, 480-481, 566 N.E.2d 26, 28-29 (4th Dist. 1991). Although the IPCB is not to "reweigh" the evidence on review, the IPCB must determine if sufficient evidence was presented by a credible witness. Metropolitan Waste Systems, Inc. v. City of Marseilles, PCB No. 89-121 (1989); Metropolitan Waste Systems, Inc. v. Pollution Control Bd., 201 Ill. App. 3d 51, 558 N.E.2d 785 (3d Dist. 1990). This includes the IPCB's review of **credibility of witnesses**; as, according to the Illinois Supreme Court, a court should defer credibility determinations to the trier of fact unless such determinations are against a manifest weight of the evidence. Eychaner v. Gross, *et al.*, 202 Ill.2d 208, 779 N.E.2d 1115, 1130 (S.Ct. 2002). A decision is reversed as against the manifest weight of evidence if the opposite result is clearly evident, plain or indisputable from a review of the evidence. Slates v. Illinois Landfills, Inc., PCB No. 93-106 (1993), *citing* Harris v. Day, 115 Ill.App.3d 762, 451 N.E.2d 262 (4th Dist. 1983).

III. ARGUMENT

Mr. Watson's Section 40.1(b) IPCB Petition seeks review of Kankakee County's conditional siting of WMII's landfill expansion request for, essentially, three reasons: **(A)** lack of jurisdiction, due to WMII's failure to serve pre-filing notices pursuant to Section 39.2(b) of the Act; **(B)** on an individual and collective basis, a number of issues rendering the local siting proceedings fundamentally unfair; and **(C)** that the decision of the Kankakee County Board was against the manifest weight of the evidence.

Additionally and in the alternative, should the IPCB deny vacation, remand and reversal of the Kankakee County Board's siting decision as sought for the above reasons, it is respectfully requested that **(D)** the IPCB remand for additional discovery and public hearings to cure evidentiary bars and erroneous rulings, for the reasons discussed in Section III.D., below.

A. THE IPCB SHOULD FIND KANKAKEE COUNTY'S DECISION NULL AND VOID, DUE TO A LACK OF JURISDICTION ARISING FROM WMII'S FAILURE TO SERVE, PURSUANT TO SECTION 39.2(b) TWO OWNERS OF PROPERTY WITHIN 250' OF THE PROPERTY BOUNDARY OF THE PROPOSED SITE

Pursuant to the requirements of Section 39.2(b), WMII claims to have provided service to all owners of property within 1,000 feet in each direction of the lot line of the subject site before the deadline of August 2, 2002. (Application Tab A, Affidavit of Donald J. Moran). Although, Kankakee County's Siting Ordinance requires notice within 1,000 feet of the proposed facility, Section 39.2(b)'s requirements for pre-filing notice on property owners within 250 feet excluding roadways, no more than 400 feet are jurisdictional. WMII failed to serve two property owners, named on the authentic tax records of Kankakee County, and who own property across the street from and within 250 feet of the proposed site's property boundary: Brenda Keller and Robert Keller.

Mr. Watson, through his attorneys, filed, during the local public hearings, a motion to declare WMII's pre-filing notice insufficient and to find that the Kankakee County Board did not have jurisdiction in this matter. In response to this motion, WMII sought the testimony of the subject property owners who signed affidavits (Watson Exhibit 4, and Petitioner Exhibits 20 and 21), and presented testimony from Ryan Jones, the process server who failed to serve Brenda and Robert Keller with pre-filing notice. (12/05/02 6:00 p.m. Tr. 5-58).

Robert and Brenda Keller, property owner's whose service is required by Section 39.2(b), were not served by registered (or certified) mail, were not served personally, and did not receive pre-filing notice from WMII with respect to WMII's August 16, 2002, filing. Mr. and Mrs. Keller's home, located at 765 East 6000 South Road, Chebanse, Illinois, is located across the street from the Northeast corner of WMII's property boundary, and is shown in Exhibit A,

attached to Watson's Motion filed at the public hearings (Watson Exhibit 4, C614-625).[1] Therefore, as WMII did not comply with the jurisdictional prerequisites of Section 39.2(b), the Kankakee County Board was without jurisdiction to proceed with the siting process in this matter, and the IPCB should find the Kankakee County Board's decision to be null and void.

Section 39.2 (b) of the Illinois Environmental Protection Act (415 ILCS 39.2(b))("Act"), provides the notice requirements for applicants involved in landfill siting applications. Section 39.2(b) of the Act provides, in pertinent part:

> *No later than 14 days prior to a request for location approval* the applicant shall cause written notice of such request to be served either *in person or by registered mail, return receipt requested,* on the *owners of all property* within the subject area not solely owned by the applicant, and on the owners of all property within 250 feet in each direction of the lot line of the subject property, *said owners being such persons or entities which appear from the authentic tax records of the County* in which such facility is to be located; provided, that the number of all feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement; provided further, that in no event shall this requirement exceed 400 feet, including public streets, alleys and other public ways." 415 ILCS 39.2(b), emphasis added.

Illinois Courts have consistently held that the notice requirements of this section of the Act are jurisdictional and, accordingly, a failure to comply with this section will render the County Board without the authority to approve a landfill-siting request. Ogle County Bd. *ex rel.* County of Ogle v. Pollution Control Board, 272 Ill.App.3d 184, 649 N.E.2d 545 (1995), *appeal denied,* 163 Ill.2d 563, 657 N.E.2d 625 (1995); Kane County Defenders, Inc. v. Pollution Control Bd.,

[1] There is no dispute as to whether Brenda and Robert Keller's property is located within the 250' requirement. The proximity of the Keller's property is clear from Exhibit A to Watson Exhibit 4 (C614-625), Robert Keller testified his property is located across the street from the proposed expansion property boundary (12/05/02 6:00 p.m. Tr. 130-131), and although additional proof, such as survey, was offered by Watson should WMII have objected to Watson's jurisdiction motion on that basis, WMII did not object to or contest this notice issue on the basis of the distance between the Keller's property and the property boundary for the site.

139 Ill.App.3d 588, 487 N.E.2d 743 (2nd Dist. 1985). Thus, the question of whether Robert and Brenda Keller received proper notice is a threshold issue in considering WMII's Application.

Pursuant to Section 39.2(b), WMII was required to serve both Brenda and Robert Keller, "either in person or by registered mail, return receipt requested." (415 ILCS 5/39.2(b)). WMII admits that Brenda Keller and Robert Keller both appear as the property owners of 765 East 6000 South Road, Chebanse, Illinois, on the County's official tax records. (12/05/02 6:00 pm Tr. 144). Failure to timely serve notice on **any** party entitled to statutory notice "will divest the County Board of jurisdiction over the landfill application." Ogle County Bd. 272 Ill.App.3d at 195, 649 N.E.2d at 553. WMII, starting a mere **4 days** in advance of the 14-day pre-filing notice deadline, began attempting personal service on either one or both of the Kellers at 765 East 6000 South Road, Chebanse, Illinois. Prior to WMII's attempts at personal service, WMII alleges it sent one certified mail letter to Robert Keller, which was unclaimed. (Petitioner's Exhibit 22. C39-517). WMII admits it never attempted to send pre-filing notice to Brenda Keller, and never attempted to send it certified mail. (12/05/02 6:00 pm Tr. 144).

WMII failed to provide pre-filing notice on Brenda and Robert Keller, as **(1)** the undisputed evidence is that neither Brenda nor Robert Keller ever received pre-filing notice of WMII's August 16, 2002, Application; **(2)** WMII's attempts at personal service beginning a mere four days prior to the 14th day before filing, were unreasonable; **(3)** WMII's belatedly produced and unserved certified letter to Robert Keller should not have been admitted into evidence, as no foundation for its authenticity was presented and, even if it is considered, it fails to prove either receipt or recalcitrance; and **(4)** there is no evidence to show that either Brenda or Robert Keller were recalcitrant, thus, WMII's alleged attempt to "post" service is not valid.

(1) The undisputed evidence is that neither Brenda nor Robert Keller ever received pre-filing notice of WMII's August 16, 2002, Application

Personal service is complete when notice is **delivered** to the intended recipient *in person. See*, Ogle County Bd. 272 Ill.App.3d at 195-196. The Illinois Code of Civil Procedure, provides an alternative to personal service for a summons, namely substituted service, which allows for a copy of the document being served be left at the usual place of abode with a person in the family of the person being served, as long as three, strictly construed requirements are met. (*See,* 735 ILCS 5/2-203(a)(2)(requires copy of the document being served be left at the usual place of abode, that a family member is informed of the document being served, and that the person making service sent a copy of the document being served, postage prepaid, to the person at their usual place of abode); State Bank of Lake Zurich, *et al.* v. Thill, *et al*, 113 Ill.2d 294, 487 N.E.2d 1156 (S.Ct. 1986)). Although pre-filing notice in a siting proceeding is not a summons, both forms of service are intended to be proven by the "receipt" of the served document, and, thus, it is an analogous rule to Section 39.2(b).

By the plain language of the statute, service clearly means receipt. Ogle County Bd. 272 Ill.App.3d at 195-196. WMII presented no evidence that either Brenda or Robert Keller "received" notice. In fact, both Brenda and Robert Keller were absolutely consistent both in their affidavit and their testimony that neither of them received notice of any kind in any form (even if not proper form pursuant to Section 39.2(b)). Neither of them received pre-filing notice for the August 16, 2002, Application by **any of the following** methods: certified mail, regular mail, registered mail, personal service, newspaper, or "posting." (Exhibit A to Watson Exhibit 4; 12/05/02 6:00 pm Tr. 61-63, 85, 93, 103, 125). In fact, the **first time** Robert Keller found out that WMII had filed its August 16, 2002, Application was **two Saturdays prior to the first day of the public hearings** (November 9, 2002), when Mr. Watson asked for Robert Keller's help at Mr. Watson's work so that Mr. Watson could attend the public hearings. (12/05/02 6:00 pm Tr.

104-105). This was approximately three months after both Brenda and Robert Keller, individually, should have received pre-filing notice from WMII.

WMII presented testimony from the process server, Ryan Jones, who attempted and failed personal service on Brenda and Robert Keller. Mr. Jones claims he spent 5-10 minutes at the Keller's property on the following dates at the following times: Monday, July 29, 2002 at 6:13 pm; Tuesday, July 30, 2002, 1:03 pm; Wednesday, July 31, 2002 at 2:34 pm and 8:40 pm (12/05/02 6:00 pm Tr. 8, 9, 10, 11, 23, 24-25). Mr. Jones testified that he "posted" notice on August 1, 2002 at 12:19 pm, after knocking on the doors of the home, however, his affidavit does not reflect he attempted service before he allegedly posted service (12/05/02 6:00 pm Tr. 12; Petitioner's Exhibit 7B (C39-517)). Regardless, Mr. Ryan did not find anyone home on all of his attempts of service, except he allegedly encountered an unidentified woman on July 31, 2002 at 2:34 pm. (12/05/02 6:00 pm Tr. 10-11). Mr. Ryan did not attempt to serve this unidentified woman, allegedly because she would not give her name to Mr. Ryan. (12/05/02 6:00 pm Tr. 22-23). The unidentified woman was not Brenda Keller (12/05/02 6:00 pm Tr. 60-61). The unidentified woman was not someone who lived with the Kellers who would be able to accept abode service, even if Ryan attempted service on her, which he did not. (12/05/02 6:00 pm Tr. 10, 34-35, 55-56).

Further Ryan's credibility in encountering this woman must be questioned, as Ryan did not take any notes concerning this encounter, the encounter is not recorded in his affidavit of attempted service, and Ryan has served at least one person a day from July 31, 2002, when he had the alleged encounter with the unidentified woman to the date of the hearing where he testified, totaling over 88 business days and, thus, at least 88 other attempts at service. (12/05/02 6:00 pm Tr. 44). Further, Ryan's recollection, as a general matter, was not accurate, as

evidenced by his inability to recall inaccurate and overestimates of time he spent during each alleged attempt at service at the Keller property.[2]

Therefore, the undisputed evidence is that neither Brenda nor Robert Keller were served or received WMII's pre-filing notice and, thus, the Kankakee County Board lacked jurisdiction and its decision should be vacated and declared null and void.

(2) WMII's attempts at personal service beginning a mere four days prior to the 14th day before filing, were unreasonable

Notice must be initiated "sufficiently far in advance to reasonably expect receipt of notice 14 days in advance of filing of a notice." Waste Management of Illinois, Inc. v. Village of Bensenville, PCB 89-28 (1989), *rev'd on other grounds*, 201 Ill 3d 614, 558 N.E.2d 1295 (1st Dist. 1990). The IPCB has found that attempted service a mere four days in advance of the pre-filing notice deadline is not reasonable. ESG Watts, Inc. v. Sangamon County Board, PCB No. 98-2, p. 19-20 (1999). Thus, WMII's personal service attempts on Brenda and Robert Keller, began only four days in advance of the pre-filing notice deadline and, like in ESG Watts were not reasonable.

Additionally, WMII's attempts at personal service all occurred on weekdays, and all except for two occurred during typical work hours. Even Ryan Jones admitted the best time for him to serve people is after 5:00 pm, yet of his alleged attempts at serving the Kellers, only two times did he attempt service after 5:00 pm. (12/05/02 6:00 pm Tr. 26). Further, even thought the

[2] For example, Ryan who just started working as a process server in April 2002, testified he spent 5-10 minutes attempting to serve the Kellers each time he made such an attempt and that service attempts take about 5-10 minutes. (12/05/02 6:00 pm Tr. 18-19, 36). However, Ryan's own affidavit proves that to be highly unlikely. For example, on July 31, 2002, Ryan left a home at 43 West 6000 South Road, Chebanse, which Ryan admits is at least a half mile from the Kellers' residence at 8:33 pm, drove to the Kellers' home, allegedly attempted service, left the Kellers' home at 8:40 pm, drove to Bernette Benson's home, served Bernette Benson, and got back into his car by 8:42 pm (12/05/02 6:00 pm Tr. 38-39, 42-43). So, just on the Keller to Benson end of the service attempt, Ryan drove out of the Keller's driveway, drove to Benson's house, up Benson's driveway, parked his car, went to the

Kellers are listed in the phone book, they have an answering machine, their neighbor knows at least where Brenda Keller works, and there was one vehicle parked at the house[3] with Illinois plates (which Jones could have looked up through the Secretary of State's Office), Ryan Jones made no attempts to locate them except arriving at their house allegedly five times, four days in a row to see if he could serve them. Thus, due to WMII's failure to begin service attempts sufficiently far in advance to reasonably expect receipt of notice 14 days in advance of filing its Application, and for its lack of diligence (making no attempts other than coming to the door) in informing itself as to where and how it could have served Brenda and Robert Keller, WMII's attempts to serve the Kellers should be found to be unreasonable, and the IPCB should find that the Kellers were not served by WMII and, thus the Kankakee County Board lacked jurisdiction and its decision should be vacated and declared null and void.

(3) WMII's belatedly produced and unserved certified letter to Robert Keller should not have been admitted into evidence, as no foundation for its authenticity was presented and, even if it is considered, it fails to prove either receipt or recalcitrance

In response to Watson's Motion concerning defective pre-filing notice, WMII produced an alleged unclaimed certified letter addressed to Robert Keller (Petitioner's Exhibit 7B). Counsel for Watson objected to the admission of Petitioner's Exhibit 7B, as no foundation was provided for the alleged certified mailing. (12/05/02 6:00 pm Tr. 155-157). WMII's affidavit, filed as part of its Exhibit 7B, in particular, Paragraph 5, failed to provide foundation for the alleged certified mailing, including as simple information as to certification from someone who says they mailed and from where they allegedly mailed the purported certified letter. Exhibit 7B

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door, knocked, someone answered, he served Ms. Benson, talked to Ms. Benson, went back to his car and recorded the time, all in two minutes. (12/05/02 6:00 pm Tr. 41).

[3] The Kellers have three cars, so one is always parked at the house when Brenda and Robert are at work. (12/05/02 6:00 pm Tr. 62).

is simply a certified mailing that has no actual evidence of ever being actually mailed, and has a checkmark by "unclaimed" on the green card to indicate that it was not picked up by its addressee.

However, even if the IPCB were to consider Exhibit 7B, it is not evidence of pre-filing notice being received by Brenda or Robert Keller, as it was never received and was allegedly returned to WMII's counsel. It is not even evidence of attempted service on Brenda Keller, as it is addressed only to Robert. And, it being "unclaimed" is not evidence of either of the Kellers being recalcitrant, which, as discussed in Section III.A(4), below, there is no evidence to support. Finally, if IPCB concludes that the only date for this mailing referenced by WMII, July 25, 2002, is the date of mailing (although there is no certification with this information), the timeframe, approximately 6 days before the deadline for serving pre-filing notice is unreasonable for arguing "constructive service," plus, we know the certified mailing in this case was not actually served. Thus, the ICPB should reverse the local hearing officer's decision to admit Petitioner's Exhibit 7B or, even if the IPCB considers Exhibit 7B, it should find that this Exhibit does not show and is not evidence of either receipt of pre-filing notice or recalcitrance.

(4) There is no evidence to show that either Brenda or Robert Keller were recalcitrant, thus, WMII's alleged attempt to "post" service is not valid

Although serving pre-filing notice is an absolute requirement, the IPCB appears to have carved out an exception in the limited circumstance where a recalcitrant property owner attempts to frustrate a siting process by refusing service prior to the notice deadline, by acknowledging the possibility of "constructive notice" in those specific circumstances. *See*, ESG Watts, Inc. v. Sangamon County Board, PCB 98-2 (1999). This possible "exception" to the rule that service must be through registered/certified mail or in person, is not applicable in this case, as neither Brenda nor Robert Keller refused service prior to the deadline. Both Brenda and Robert Keller

signed affidavits and testified at he public hearings that they did not refuse service and no one attempted service on them concerning WMII's August 16, 2002, Application. (12/05/02 6:00 pm Tr. 60-62, 93, 103; Watson Ex. 5, Aff. Robert Keller (C626)).

Further, Ryan Jones did not present any credible evidence that either Brenda or Robert Keller refused service. The only thing Mr. Jones mentioned when he was asked this question at the public hearing, was that he found the unidentified woman to be suspicious. (12/05/02 6:00 pm Tr. 34). However, Jones admitted that he never attempted to serve the unidentified woman, and, even if he did, it would not be abode or substitute service pursuant to the Illinois Code of Civil Procedure, as absolutely no woman other than Brenda Keller lived in the Kellers' home in 2002, and Brenda Keller was not Ryan Jones' "unidentified woman." (12/05/02 6:00 pm Tr. 60-61, 69, 102-103).

Which ever way it is viewed, WMII's likely claim, that Ryan Jones' alleged August 1, 2002, "posting" of service was "in person" service, or that the "posting" was required due to alleged (and clearly not shown by the evidence) recalcitrance, must fail. Posting is not only **not** "in person" service; it is not compliant with substitute service, which is allowed under the Illinois Code of Civil Procedure. Further, although there is one IPCB case in which service "under the door" is discussed, Waste Management of Illinois, Inc. v. Village of Bensenville, PCB 89-28 (August 10, 1989), the IPCB makes no holding as to whether such service is sufficient under Section 39.2(b), and there is no Illinois Court decision in which "personal service" of a Section 39.2(b) notice was found sufficient by a "posting."

"Posting" service carries with it no "proof" that someone received the posting. A "posting" can be taken with the wind, a person, or some other way, such that the intended recipient does not receive it. Since a proof of service is the intent (through its plain language) of

Section 39.2(b), "posting" does not meet that requirement. Furthermore, "posting" is not only **not** "in person" service, and, thus, should not be recognized as a manner for service under Section 39.2(b) of the Act, particularly since its recognized use in forcible entry and detainer cases, is provided for, specifically, in statute (Section 10.1 of the Forcible Entry and Detainer Act). Even if the IPCB, *in arguendo*, were to determine "posting" an acceptable method of Section 39.2(b) service, the facts in this case do not amount to recalcitrance, which is the only circumstance wherein posting is allowed. *See*, Edward Hines Lumber Co. v. Erickson, 29 Ill. App. 2d 35, 172 N.E.2d 429 (2d Dist. 1961)(service by posting only proper after doing "all that was possible under the circumstances," in this case repeated calls and 4 or 5 visits to defendants home, finally talking to wife of defendant who refused service after she called husband on telephone). Therefore, WMII's "posting" should be found to be insufficient under Section 39.2(b).

(5) WMII's alleged attempt at service via regular, U.S. Mail, allegedly sent on August 1, 2002, the day prior to its pre-filing notice deadline, is not compliant with the notice requirements of Section 39.2(b) of the Act

The IPCB has noted "if mere mailing of...notice were sufficient service, then proof of mailing would be all that was required to show service and there would be little reason to require a returned receipt." ESG Watts, Inc. v. Sangamon County Board, PCB No. 98-2 (1999), *citing* Ogle County Bd. at 196. Thus, any mailing less than certified mailing is not sufficient. Beyond the plain language of the Act, this further reflects the intent of the legislature to require actual receipt of notice. Thus, U.S. Mail is not sufficient for service under 39.2(b), and WMII's alleged attempt at such mailing on August 1, only one day prior to its pre-filing notice deadline, is woefully inadequate not only in terms of timing, but also in terms of an allowable method to serve a party under the statute.

B. THE SITING PROCESS AND RESULTING KANKAKEE COUNTY BOARD DECISION WERE FUNDAMENTALLY UNFAIR AND THIS MATTER SHOULD BE REMANDED FOR A NEW HEARING

The siting process and decision of the Kankakee County Board approving WMII's Application were fundamentally unfair for several reasons, individually and collectively: **(1)** the complete Application, most notably WMII's operating record required to be filed pursuant to Section 39.2(c) and an exhibit (the property value protection plan) to the host agreement, was unavailable for review at the Kankakee County Clerk's Office until, at least, the first day of the public hearing. Next, **(2)** the decision of the Kankakee County Board and the public hearings were fundamentally unfair, as they relied on the perjured testimony of WMII's Criterion 3 witness, Patricia Beaver-McGarr and the proceedings were rendered fundamentally unfair when WMII failed to produce Ms. Beaver-McGarr's diploma (which it could not produce, because Ms. Beaver-McGarr did not have a diploma) and failed to produce Ms. Beaver-McGarr for further questioning. Third, **(3)** the Kankakee County Board predetermined and prejudged its approval of WMII's proposed landfill expansion, essentially treating it as a formality in furtherance of the Kankakee County Solid Waste Plan and Host Agreement. Finally, **(4)** *ex parte* communications between attorneys for WMII and Kankakee County prior to the final decision of the Kankakee County Board rendered the proceedings fundamentally unfair.

(1) WMII's Complete Application Was Not Provided To the Participants Or Properly Made Available For Public Review In Violation of 415 ILCS 5/39.2(c) and rendered the proceedings fundamentally unfair

Section 39.2(c) of the Act provides an applicant must file a copy of its request and "**all such documents or materials on file** with the...governing body of the municipality **shall** be made available for public inspection..." (415 ILCS 5/39.2(c))(emphasis added). This explicit language has been strictly construed by the IPCB and Illinois Courts, in determining that

unavailable documents filed with the governing body of the municipality render the process fundamentally unfair. In this case, not only was the site's IEPA operating record unavailable to the public, an additional section of the Application (namely the property value protection plan which should have been an exhibit to the host agreement) was not provided to the participants and the Hearing Officer until after the hearings had started. Because of these errors, the public and participants did not have the full filing to hearing time (minimum of 90 days) available to them to review this mass of materials, and were prejudiced such that siting hearings in this matter were fundamentally unfair.

The IPCB has followed a strict reading of the clear statutory language in Section 39.2(c). For example, in Residents Against A Polluted Environment v. County of LaSalle, PCB No. 96-243 (September 19, 1996), a local county ordinance required applicants to disclose financial information to the county, and provided that such information could remain confidential upon request. The volume of the application file which contained financial information, was not provided to the public or County Board members, pursuant to the local hearing officer's order requiring it to be kept confidential.Id. As "[s]ection 39.2(c) provides no exceptions to its mandate that *all* documents filed with the county board be available for public inspection," the IPCB held that withholding this volume of the application was inconsistent with the Act and rendered the proceedings fundamentally unfair. Id. (emphasis in original).

Additionally, in American Bottom Conservancy, petitioners were unable to review any part of the siting application until two weeks prior to the hearing. PCB 00-200 (October 19, 2000). The IPCB again cited Section 39.2(c) of the Act and found the fact scenario in American Bottom Conservancy fundamentally unfair and prejudicial to petitioners. Claims that petitioner should have "asked around" the Village Hall were dismissed by the IPCB, which stated,

"[p]etitioners and members of the general public should not be forced to inquire of every person in and around the Village Hall in order to examine a siting application." Id. Furthermore, the IPCB noted the "clerk has a full time job" and cannot avoid its statutory obligation to provide the documents to the public. Id. Accordingly, the IPCB found this prejudiced the petitioners. Id.

Unavailability of the record is also of great concern, if the decision makers do not have an opportunity to review the complete record. In Ash v. Iroquois County Board, the standard for determining if the County Board adequately considered the evidence was articulated. PCB No. 87-29 (July 16, 1987). Although the IPCB can not inquire into the mind of the decision maker, whether the transcripts and application materials were reasonably available to provide the decision maker an opportunity to review them and whether the decision maker was sufficiently exposed to the record to support a finding the evidence is to be considered. Id. Because the transcripts of the hearings in Ash were not made available to the county board until immediately before the meeting which the board voted on approval, the IPCB found there was no reasonable opportunity to consider the record and the proceedings were found to be fundamentally unfair. Id.

The record and recent hearings in the instant matter are replete with evidence the complete application was not properly available for public inspection and, pursuant to the aforementioned IPCB opinions, the hearings should be found fundamentally unfair. The following testimony is clear evidence the application was not properly available and the Kankakee County Clerk did not meet his statutory obligations:

- Kankakee County Clerk Jeffery Bruce Clark testified in his deposition that he was responsible as keeper of the records for County Records and all records filed with the County Clerk's Office. (Clark Tr. 8).

- Mr. Clark's office was responsible for receiving the Application and making it available to the public. (Clark Tr. 16, 21).

- Because of the volume of the documents expected to be filed in the local level siting proceeding, Mr. Clark designated only three or four of his ten staff members to accept WMII documents. (Clark Tr.28).

- Mr. Clark noted if someone came in to review the WMII documents and asked for all of the WMII's application or documents on file, his office **should have made** the three-ring binders, maps, and boxes of documents available. (Clark Tr.37-38).

- Mr. Clark does not know if those responsible for accepting documents would know the boxes containing the operating record were part of the Application, further, the **six employees not specifically assigned to the materials would "probably not" have gotten instruction that the boxes were part of the application and "quite possible" they would not know even about the three-ring binders.** (Clark Tr. 41)(emphasis added).

- Mr. Clark **admits that his office would not have been doing its job** if someone requesting the Application had received only the three-ring binders. (Clark Tr. 39)(emphasis added).

- Ester Fox has been Chief Deputy County Clerk of Kankakee County for 15 years. (Fox Tr. 4). As Chief Deputy, Mrs. Fox must fill-in for the Clerk when he is absent and is ultimately responsible for everything in the office. (Fox Tr. 5). As such, **she was one of the staff designated to handle the WMII documents.** (Clark Tr. 28).

- Mrs. Fox testified about the October 9. 2002 visit by Mr. George Mueller, counsel for Petitioner Merlin Karlock, where he requested review of the Application. (Fox Tr. 7). Mrs. Fox recalled providing Mr. Mueller the two binders and, after searching the office at Mr. Mueller's request, the maps, and represented these were **all of the materials on file.** (Fox Tr. 8). Ms. Fox's representation to Mr. Mueller was **not accurate**, as legal boxes filled with WMII's operating records at the site were allegedly also filed with the Clerk's Office. In fact, Mrs. Fox was not made aware of the additional documents known as the operating record until the first day of the hearings and, to her knowledge, the operating record was not made available to anyone prior to the first day of the hearing. (Fox Tr. 11).

- Additionally, Michael Watson visited the Kankakee County Clerk's Office on October 22, 2002 and November 21, 2002, to review the Application, Operating Record and receive complete copies of the re-filed application. Watson Written Comment Ex. O (C1837-2204). Mr. Watson specifically requested all documents filed by WMII. Id. The clerk Mr. Watson spoke with showed him the two volume, bound Application filed by WMII in this matter, and told him that those two binders were the total extent of the documents available. Id.

- Further, Daniel J. Hartweg, an attorney for petitioner Michael Watson visited the County Clerk's Office to review the Application and Operating Record on November 15, 2002. He requested review of the Application and Operating Record and was given a copy of the application after being referred through two staff members, eventually to a supervisor. Watson Written Comment Ex. P (C1837-2204). Two additional staff members were questioned regarding the availability of IEPA Operating Records by Mr. Hartweg, however they were unaware of any additional available documents and Mr. Hartweg was never

given the WMII operating record to review. Id.

- Finally, **Darrell Bruck was able to see the operating record, when he requested the entire application, but only on the first day of the public hearings, and after a clerk who had attended the public hearing and heard the participants raise this issue returned to the Clerk's Office.** Mr. Bruck provided public comment during the IPCB hearing regarding his attempts to review the Application at the County Clerk's office. (IPCB Hearing Tr. 5/5 p12-13). On the first day of the hearings, Mr. Bruck asked several employees, including Deputy Clerk Ester Fox, to review the Application, however it appeared information on where the Application and operating record were located was not told to all employees as he waited 10-15 minutes before "Dan" appeared at the office and was able to show him the Application. (IPCB Hearing Tr. 5/6 p12-13). **"Dan" had attended the public hearings earlier that day, where the issue of unavailability of the operating record was raised. When he returned to the Clerk's Office, Mr. Bruck was coincidentally still there, and "Dan" was able to help the other Clerks locate the operating record for Mr. Bruck.** Mr. Bruck admitted he viewed the Application at this time, but expressed his concerns that he had to ask numerous employees over the course of 10-15 minutes before someone with knowledge of the Application finally appeared. (IPCB Hearing Tr. 5/6 p14).

Based on this extensive testimony, clearly the Kankakee County Clerk did not meet its obligations required by Section 39.2(c). In fact, the staff, including County Clerk Jeffery Bruce Clark, was woefully uninformed regarding the Application materials. This resulted in the operating record (contained in legal sized boxes) being unavailable to everyone who requested them, including those people who requested them from multiple people within the Clerk's Office, until the first day of the public hearings. Like American Bottom Conservancy, clearly the Kankakee County Clerk did not meet its duties pursuant to the Act. Unlike American Bottom Conservancy where the unavailable documents were made available to the petitioner two weeks prior to the first hearing, in this case, the unavailable documents (which were quite voluminous) were not made available at the Clerk's Office until the first day of public hearing, Participants and members of the public alike were not granted access to various portions of the Application and properly prepare for the hearings.

Of additional concern is the fact that Exhibits A1 and A2 to the Host Community Benefit

Agreement were not included in the "official copies" of the Application presented to the Participants. It became apparent during the course of the public hearings that other than the Applicant and attorneys for the County, none of the participants, including the local Hearing Officer, had a copy of Exhibits A1 and A2. (11/21/02 9:00am Tr. 92-96). These exhibits were essential to the proceedings, because they contain what is purported to be WMII's property value protection plan and, thus, relate not only to the host agreement (which is required by 39.2 to be disclosed), but also to Criterion 3.

Although the County Board's attorney represented that the County Clerk had a copy of those Exhibits in the Application (11/21/02 9am Tr. 96), the participants were seriously disadvantaged, because the County Clerk had represented to, at least Mr. Watson (and obviously others, who had incomplete copies of the Application) that "official" copies of the Application were maintained at Adcraft Printers, Inc. (Watson Summary, Ex. O (C1837-2204)). However, Adcraft did not have the Exhibits that were missing from everyone's but the County's and Applicant's copies of the Application. Id. Additionally, although it was represented at the hearing that these exhibits were included in the re-filing of the Application, and thus, presumably not in the original Application, when Mr. Watson went to the County Clerk's office after the August 16, 2002, filing, and asked what new documents were filed, he was told only new proofs of pre-filing notice were filed in addition to the previously existing and filed Application. Id. As in Residents Against a Polluted Environment and American Bottom Conservancy, these missing materials prejudiced the participants as they could not properly review the complete Application in preparation for the hearings.

Finally, as additional evidence of unavailability of records, in general, County Board Members Whitten and Wilson testified about the materials made available to them to review

during the local hearing process. Mr. Whitten testified that the only documents made available to him from the time of filing to the time he made his decision, were the Host Agreement and transcripts. (Whitten Tr. 24-25). Additionally, Mr. Wilson testified he had an opportunity to review the "two volumes of stuff" that everyone could pick up and made his decision when he voted on the Application based on this review. (Wilson Dep. Tr. 18). Finally, neither WMII, nor the County provide any evidence that the entire record was made available for the County Board Members' consideration.

In this matter, the Petitioners and other were prejudiced by the unavailability of the operating record, the property value protection plan, and of the entire record to the County Board. The IEPA operating record and property value protection plan is of the utmost importance to many of local residents, particularly those like Watson, with property and his living quarters situated adjacent to the proposed landfill expansion. Accordingly, pursuant to the Act and the holdings in Residents Against a Polluted Environment and American Bottom Conservancy, the siting hearings were fundamentally unfair and should be remanded, with instructions to the Kankakee County Clerk concerning institution of a procedure to assure that the record (including, but not limited to the Application and operational documents) is available to everyone who requests it.

(2) The decision of the Kankakee County Board and the public hearings were fundamentally unfair, as they relied on the perjured testimony of WMII's Criterion 3 witness, Patricia Beaver-McGarr and WMII failed to produce Ms. Beaver-McGarr's diploma and failed to produce Ms. Beaver-McGarr for further questioning

The fundamental fairness issues concerning Ms. Patricia Beaver-McGarr's testimony not only concerns the fact that her entire testimony was fundamentally unfair, since she perjured herself and, thus her testimony should not have been considered and relied on by the Kankakee

County Board; but also, from a hearing procedural perspective, that Petitioner Watson was denied the opportunity to finish his examination of Ms. Beaver-McGarr. As a result of not being able to complete cross-examination of this witness, based on WMII's representation (that was later retracted when WMII could not produce a diploma for Ms. Beaver-McGarr) that it would produce Ms. Beaver-McGarr and/or a certified copy of her degree at a later time during the hearing, Watson was denied due process.

Ms. Beaver-McGarr swore, under oath, among other things, that she obtained from Daley Colleges. No subpoena powers are provided for in the local-level siting process, therefore, Petitioner Watson was not able to obtain Ms. Beaver-McGarr's Daley College records below.[4] However, Watson did subpoena those records in this proceeding, and at the IPCB public hearing admitted them into evidence, as an offer of proof, through the testimony of Ms. Mary Ann Powers of Daley College. The result is clear and uncontested evidence that Ms. Beaver-McGarr lied, under oath, concerning her credentials. The basis of the IPCB Hearing Officer's ruling to grant WMII's Motion in *Limine* and exclude the evidence concerning Ms. Beaver-McGarr's perjury, was in error, and thus, should be reversed and the testimony of Ms. Powers and exhibits admitted during such testimony should be admitted into evidence. The IPCB Hearing officer, in denying the admission of this evidence, held that the IPCB does not reweigh the credibility of witnesses. While that is true, it is not a complete articulation of the rule of law. The Illinois Supreme Court, provides that a court should defer credibility determinations to the trier of fact unless such determinations are against a manifest weight of the evidence. Eychaner v. Gross, *et al.*, 202 Ill.2d 208, 779 N.E.2d 1115, 1130 (S.Ct. 2002). Therefore, the evidence should have

[4] Watson did, however, seek voluntary production of these records from WMII and was denied such production. (Watson written comment, Exhibit H, C***).

been admitted, because perjury must render a determination of credibility against the manifest weight of the evidence.

a. ***Kankakee County's decision is fundamentally unfair, since it was allowed to consider and relied on perjured testimony***

Ms. Patricia Beaver-McGarr repetitively swore, under oath, that her qualifications were accurately represented and that she had a degree from Daley College: her curriculum vitae in the Application contains a certification that it is true and correct; she testified in this and at least one other proceeding that her curriculum vitae was true and correct (when they were different curriculum vitae); and she testified in this proceeding, not only that she had a degree and diploma from Daley College, but that it was in her attic. (Application, Criterion 3; Watson Exhibit 7 (C630); 11/19/02 6:50pm Tr. 5-9, 36-37; Watson Written Comment (C1854-1857); Watson IPCB Hearing Exhibit 6; 11/20/02 9:00 am Tr. 13-14). Additionally, Ms. Beaver-McGarr represented that she could, and would get a copy of her diploma and present it at the hearings. (11/19/02 6:50pm Tr. 37). Obviously, this never occurred.

During the course of the public hearings, three curriculum vitae for Ms. Beaver-McGarr, all representing different qualifications, were admitted. Her curriculum vitae that was part of this Application represents that Ms. Beaver-McGarr obtained an Associates Degree from Richard J. Daley College in 1981. (Application Criterion 3, Section C1). The second, represented that Ms. Beaver-McGarr obtained that degree in a different year, namely, 1980. (Petitioner's Exhibit 6). The third, represented that Ms. Beaver-McGarr obtained an associates degree from DePaul University (which does not offer such degrees) and is silent in 1980/1 concerning Daley College. (Watson Exhibit 6, C630).

During the IPCB public hearing, as part of an offer of proof on this issue, Watson subpoenaed and called Mary Ann Powers Richard J. Daley College Supervisor of the

Admissions and Marketing Office to testify. Ms. Power's confirms Ms. Beaver-McGarr's perjury. Ms. Powers has been the Supervisor of Admissions and Marketing Office for approximately ten years and her responsibilities include maintaining records. graduation roster and everything involved in the records and admissions office. (IPCB Hearing 5/6 Tr. 61). Approximately one year ago, Mr. Powers was asked by Ms McGarr to research the school's records to determine if she had graduated from Daley College. (IPCB Hearing 5/6 Tr. 61-62). At this time Ms. Powers informed Ms. Beaver-McGarr that she had not graduated. (IPCB Hearing 5/6 Tr. 61-62, 68). In 1980, 60 credit hours were required to graduate and Ms. Beaver-McGarr had acquired 57 hours, thus she was not entitled to a degree. (IPCB Hearing 5/6 Tr. 63-65). Ms. Powers provided Ms. Beaver-McGarr a copy of her transcript and explained that with two incomplete classes, she did not graduate. (IPCB Hearing 5/6 Tr. 68, 83). Ms. Beaver-McGarr understood this, stating so to Ms. Powers, and asked Ms. Powers to explain to Ms. Beaver-McGarr how to change her grades to graduate, which Ms. Powers did. (IPCB Hearing 5/6/03 Tr. 68, 73, 76, 85, 87). However, school records indicate no subsequent attempt by Ms. Beaver-McGarr to change her grades or apply for a degree. Id.

It is clear from this testimony that Ms. Beaver-McGarr did not graduate, knew this as of the time of the hearings, and has perjured herself on numerous occasions concerning her qualifications. **The use of perjured testimony is fundamentally unfair and it cannot be relied upon by a trier of fact.** People of the State of Illinois v. Moore, 199 Ill. App. 3d 747, 557 N.E.2d 537 (1st Dist. 1990). It is clear from the testimony and evidence presented, particularly the testimony and records provided by Ms. Powers (which records include a certified copy of Ms. McGarr's transcript, Watson IPCB Exhibit 6), that Ms. Powers actually informed Ms. Beaver-McGarr that Ms. Beaver-McGarr had no degree (prior to Ms. Beaver-McGarr's

testimony at the subject public hearings), yet Ms. Beaver-McGarr took the stand, under oath, and testified not only that she had a degree, but that her degree was in her attic. There is an enormous difference between perjury and credibility. While judgment on credibility of a witness is deferred to the trier of fact hearing the initial testimony, however, perjury is against the manifest weight of the evidence on its face, and must be reviewed on appeal. To hold otherwise, and to allow Ms. Beaver-McGarr's testimony to stand, would set forth a policy that lying is allowed in siting proceedings and an applicant does not have to present **appropriately credentialed witnesses** to be considered, as, so long as the local government is accepting of the perjury, the testimony should be allowed to stand, unchallenged. This is hardly the rule of law in Illinois.

As a result of Ms. Beaver-McGarr's perjury, her testimony should have been stricken during the local public hearings (the motion made by Watson was denied), and since it was not stricken, and instead was considered and relied on by the Kankakee County Board, the Kankakee County Board's decision should be reversed. Without Ms. Beaver-McGarr's testimony, WMII simply does not meet Criterion 3 and, therefore, since Ms. Beaver-McGarr lied about her qualifications (which forms the basis for admission of an expert's testimony), her testimony should be stricken and the Board's decision reversed as against the manifest weight of the evidence.

b. ***The public hearings were fundamentally unfair, as Watson was denied the opportunity to finish his examination of Ms. Beaver-McGarr and, as a result, denied due process***

Petitioner Watson was denied the opportunity to finish his examination of Ms. Beaver-McGarr and, as a result, denied due process, based on WMII's representation, that was later retracted when WMII could not produce a diploma for Ms. Beaver-McGarr, that it would

produce Ms. Beaver-McGarr and her diploma at a later time during the hearing. Upon Ms. Beaver-McGarr representing that she could not find her degree, WMII responded that it would produce a certified copy of Ms. Beaver-McGarr's degree. (11/20/02 9am Tr. 13-14). The local hearing officer further directed counsel for WMII to obtain a certified copy of Ms. Beaver-McGarr's degree, or in the alternative recall Ms. Beaver-McGarr for additional cross-examination. (11/20/02 9am Tr. 14-15). Despite Watson's repetitive requests during the course of the public hearings for the production of the certified degree or Ms. Beaver-McGarr for further cross-examination, neither was produced. (*E.g.*, 11/20/02 9:00 am Tr. 15; 12/04/02 6:00pm Tr. 52-53; 12/05/02 6:00pm Tr. 164; 11/19/02 6:50pm Tr. 37) Additionally, at the end of the hearings, when it became apparent that WMII was retracting its promise to produce the certified degree and ignoring the local hearing officer's direction to produce such certification or Ms. Beaver-McGarr, Watson asked for Ms. Beaver-McGarr to take the stand. The hearing officer denied Watson's request. (12/05/02 6:00 pm Tr. 164-165). This denial, and WMII's retraction of its representation that it would provide either the certified degree or Ms. Beaver-McGarr, resulted in the cross-examination of Ms. Beaver-McGarr being prematurely terminated and deprived Watson of his right to cross-examine this witness concerning her qualifications, an issue at the crux of whether her testimony is credible and whether she is qualified to testify as the expert she purported to be.

(3) The Kankakee County Board predetermined and prejudged its approval of WMII's proposed landfill expansion, essentially treating it as a formality in furtherance of the Kankakee County Solid Waste Management Plan and Host Agreement

The Kankakee County Solid Waste Management Plan (SWMP) and Host Agreement evidence a clear understanding that WMII's proposed expansion was identified as the only landfill in Kankakee County and WMII was identified as its only operator, prior to siting ever

being approved and, in fact, prior to the Application being filed. The IPCB Hearing Officer barred all discovery and testimony concerning the SWMP (not the Host Agreement), and its amendment. However, evidence was presented as an offer of proof. All evidence concerning the SWMP discussed and cited to below was presented as an offer of proof. Petitioner seeks the IPCB Hearing Officer's ruling barring this evidence to be reversed and for this evidence to be considered.

The standard in evaluating whether a siting authority's hearing and decision should be vacated due to bias or prejudice is if a "disinterested observer might conclude" that the County Board had "in some measure adjudged the facts as well as the law of the case in advance of hearing it." E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2d Dist. 1983), *citing,* Cinderella Career & Finishing Schools, Inc. v. F.T.C., 425 F.2d 583 (D.C. Cir. 1970), *aff'd,* 107 Ill. 2d 33, 481 N.E.2d 664 (1985).

The facts in this case however show not only a "mere disposition" and prejudgment of the Kankakee County Board, but actual obligations to approve the Application and a lack of evidence in support of the statutory criteria. The October 2001 Amendment to the SWMP identified the County's desire to expand the Kankakee Landfill. Resolution No. 01-10-09-393. This Amendment provided further language that the County would not support, and in fact would affirmatively contest, any other proposed landfill in the County. The 2002 Amendment to the SWMP further limited the scope of the County's planned activities citing WMII as the current, and assumed future operator of this single landfill. Resolution No. 02-13-12-481.

The SWMP clearly identifies the County's intention to expand the Kankakee Landfill and maintain WMII as its sole provider of landfill services. The County Board has gone beyond public pronouncements regarding its acceptance of the landfill expansion, however, and with the

Host Agreement, accepted accelerated payments for the expansion which was not yet approved at the time of the Host Agreement or the time at least one of the advance payments were made. Financial concerns of the County were clearly and admittedly the primary concern in negotiating the Host-Fee Agreement with WMII. (Whitten Tr. 20; Lee Tr. 67-69; Graves Tr. 14; Wiseman Tr. 7, 21). Additionally, unlike other host agreements considered in IPCB or Court decisions concerning pre-judgment or bias, the time of the hearings, the County had already received $500,000.00 and additional considerations, such as payments for squad cars, and were to receive an additional $500,000.00 in 2003 pursuant to the Host Agreement. (Lee Tr. 67). These were "accelerated payments" for approval of the expansion and/or landfill expansion fees. (Lee Tr. 67-68).

Further, in this case, one County Board Member admitted his understanding that WMII and its expansion was already a "foregone conclusion." (Martin Tr. p.10-12, 15). Mr. Martin stated that he shared this understanding with other Board Members around this time and that they agreed with him. Id. at 12.

Thus, in consideration of the combination of: the SWMP's pronouncement that WMII's proposed expansion, *i.e,* the expansion of the Kankakee County Landfill would be the only landfill in the County (which is pre-approval of the site location, at a minimum, and thus, prejudgment of the location portion of Criterion 2 and of Criterion 3); the SWMP's announcement that WMII would be the only operator of that landfill (prejudgment of the operation portion of Criterion 2, and Criterion 5); and payment of over $500,000 pre-siting decision, as part of a host agreement, at a minimum, shows that the Kankakee County Board pre-judged the location and operation related Criteria of Section 39.2 and, thus, rendered the proceedings and its decision fundamentally unfair.

(4) Improper *Ex Parte* Communications Between WMII and the County Prior to the Decision of the Kankakee County Board Violated Fundamental Fairness

Finally, *ex parte* comments between attorneys for the County and WMII rendered the proceedings fundamentally unfair. An *ex parte* communication occurs without notice and outside the record between a decision maker and an interested party for the benefit or on behalf of one party only. Waste Management v. Pollution Control Board, 175 Ill. App. 3d 1023, 1043, 530 N.E.2d 682 (2d Dist. 1988). In determining if *ex parte* contacts violated fundamental fairness, however, a court must consider whether the ultimate decision making process was tainted. E & E Hauling, 116 Ill. App. 3d 586, 606-607. A number of considerations may be relevant in this determination; "whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose." Id., *citing*, PATCO v. Federal Labor Authority, 685 F.2d 547, 564-65 (D.C. Cir. 1982).

The IPCB has held that communications between attorneys, and not the parties themselves, can rise to the level of improper *ex parte* contacts. Citizens Opposed to Additional Landfills v. Greater Egypt Regional Environmental Complex, PCB No. 97-29 (December 5, 1996)(C.O.A.L.). The scenario in this case is strikingly similar to the instant matter. In C.O.A.L., after the public hearing, before the governing body's siting decision, without public notice, and outside the record, the attorney for the governing body and the attorney for the applicant discussed potential conditions to siting. Like C.O.A.L., in this case, after the public hearings, in January 2003 prior to the decision by the Kankakee County Board, without public notice, and outside the record, the attorney for the Kankakee County Board (Elizabeth Harvey)

and the attorney for WMII (Donald Moran) communicated regarding conditions that the Kankakee County Regional Planning Commission proposed to the County Board. (WMII's Answers to Interrogatory No. 15 propounded by Michael Watson, submitted at hearing pursuant to an offer of proof which it is requested that the IPCB reverse and admit this document into evidence[5]).

County Board Member Whitten substantiated this communication between Ms. Harvey and Mr. Moran, when he testified that it was his understanding that "all give and take" between the County and WMII occurred before the date of the County's decision on siting. and that he understood that Ms. Harvey was the source of the information that WMII was in favor of the Planning Commission's proposed conditions. (Whitten Tr. 17, 24-25). Mr. Whitten, however, did not have a specific recollection of Ms. Harvey telling him WMII agreed to the conditions. and other than his understanding was not able to point to specific facts to support his testimony. (Whitten Tr. 32).

In addition, subject to an offer of proof, Kankakee County Board Chairman Karl Kruse testified that he communicated with the attorney for the County (Charles Helston), between March 2002 and January 31, 2003 regarding the Amendment to the SWMP. (Kruse Dep. Tr.. 40). Although an amendment to the SWMP is not, necessarily, related to anything to do with the proposed site, in this case, the amendment was intended that the County only wanted WMII's Kankakee Landfill to be the only expansion or new landfill in the County. Additionally, County Board Member Martin testified regarding communications of Mr. Helston with WMII regarding the proposed conditions prior to January 31, 2003. (Martin Dep. Tr. p.23-24). These contacts are of particularly heightened concern when considering improper contacts. especially in light of

[5] Copies of both the WMII and Kankakee County Answers to Interrogatories were entered as offers of proof at the

Dale Hoekstra of WMII's reference to Mr. Helston as "our attorney" when discussing the negotiation of the Host Agreement. (Hoekstra Tr. p. 47).

Therefore, as a result of the individual and collective issues presented above, the IPCB should find that the Kankakee County Board's decision and the local public hearings werer fundamentally unfair, and remand this proceeding for new hearings and decision by the Kankakee County Board.

C. THE KANAKAKEE COUNTY BOARD'S DECISION TO CONDITIONALLY APPROVE THE PROPOSED LANDFILL EXPANSION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

WMII failed to meet its burden of proof with respect to Criteria 1, 2, 3, 5, 6, 7 and 8. Although Kankakee County's decision approved the proposed site, with conditions, presumably an applicant has to meet the statutory Criteria, without the necessity of the conditions being imposed. In other words, conditions certainly can be imposed to assure that an applicant who has met its evidentiary burden of proof continues to meet it throughout the development and operation of the proposed facility, however, what about the applicant who doesn't meet its evidentiary burden of proof, can the governing body impose conditions so that the statutory criteria or preconditions have been met? In either case, the evidence presented by WMII does not meet the aforementioned Criteria and, even if the Kankakee County Board is allowed to "patch" the evidentiary holes to meet the Criteria, it's patches do not cover the evidentiary gap needed to be filled in order for WMII to met the criteria.

(1) The Kankakee County Board's Decision as respects Criterion 1 (Need) was Against the Manifest Weight of the Evidence

The first listed Criterion under section 39.2 requires the applicant demonstrate "the facility is necessary to accommodate the waste needs of the area it is intended to serve." (415

IPCB Hearing as Watson Exhibit 3. (Tr. 5/5 p140-141).

ILCS 5/39.2(a)(i)). In this case, WMII did not provide sufficient, clear evidence to establish a prima facie showing that a 30 million ton expansion of the Kankakee Landfill was necessary. The evidence presented by WMII was inconsistent, speculative, biased, such that the Kankakee County Board's was against the manifest weight of the evidence.

At least one Illinois Court has meeting the need Criterion does not require the applicant to demonstrate absolute necessity, but rather, must requires a demonstration of expediency, indicating some urgency in need. Clutt's v. Beasley, 185 Ill.App.3d 543, 546, 541 N.E.2d 844, 846 (5th Dist. 1989). To show that a proposed site is reasonably required by the waste needs of the area, an applicant must take into consideration the waste production and disposal capabilities of the proposed service area. Waste Management of Illinois, Inc. v. Pollution Control Board, 175 Ill. App. 3d 1023, 1031, 530 N.E.2d 682, 691 (2d Dist. 1988); Waste Management of Illinois, Inc. v. Pollution Control Board, 122 Ill. App. 3d 639, 645, 461 N.E.2d 542, 546 (1984). Furthermore, it has been found appropriate to consider facilities outside of the service area and proposed facilities that would be capable of handling a portion of the waste disposal needs of the service area in determining need. Waste Management (1988), 175 Ill. App. 3d at 1032.

Although a "black line" threshold for need has not been established by the statute, regulations or case law, two of the aforementioned cases highlight a certain range and analysis that would allow a siting authority to determine that need was reasonably established. In Waste Management (1984), the Third District upheld the local siting authority's decision that Waste Management had not demonstrated need for the proposed expansion of their existing Will County ESL Landfill. 122 Ill. App. 3d 639, 645, 461 N.E.2d 542, 546 (3d Dist. 1984). In this case, the IPCB had accepted the County's determination that 10-years remaining capacity was provided by existing facilities in the area, thus the expansion was unnecessary. Id. at 641. The

IPCB found, and the Appellate Court agreed, that the applicant's arguments were "generalized and incomplete." Id. at 643. Only some of the potential alternate sites remaining capacity was included and only general discussions on potential increased hauling cost information was presented. Id. The applicant failed to include a landfill that had been issued a developmental permit as well as an experimental operating permit and several special and hazardous waste facilities outside of the service area. Id. at 641-645. Because it was reasonable to expect these facilities would remain open and continue to collect from the service area, the Court found these sites and hard data concerning proposed service areas should have been included in the need calculations. Id.

Likewise, in Waste Management (1988), the applicant failed to consider landfills located near the service area. 175 Ill. App.3d 1023, 530 N.E.2d 682 (2d Dist. 1988). Furthermore, additional landfills planned for future development which would provide additional capacity were not included. Id. Although the court noted neither the Act nor the established law suggested need be determined by application of an arbitrary standard of life expectancy, it opined "the better approach is to provide for consideration of other relevant factors such as future development of other sites, projected changes in amounts of refuse generation within the service area, and expansion of current facilities." Id.

Both of the prior cases distinguished the finding of need in E & E Hauling, Inc. v. Pollution Control Board, where even though the service area had an existing nine-year capacity, the court found need had been established. 116 Ill. App. 3d 451, N.E.2d 555 (2d Dist. 1983), *aff'd* 107 Ill. 2d 33. 481 N.E.2d 664 (S.Ct. 1985). In distinguishing the case, both Waste Management courts found that a determination of need must be viewed with respect to the facts in the case. 175 Ill. App. 3d 1023, 1033-1034, 530 N.E.2d 682, 691 (2d Dist. 1988); 122 Ill

.App. 3d 639, 645, 461 N.E.2d 542, 546 (3d Dist. 1984). The major difference between the cases was that in E & E Hauling, no other permitted facilities existed and no other facilities were slated to be opened in the intended service area. 175 Ill.App.3d at 1033, 530 N.E.2d at 691; and 122 Ill. App. 3d at 644-645, 461 N.E.2d at 546, *citing* E & E Hauling, 116 Ill. App. 3d at 608-609, 451 N.E.2d at 572-573. Thus, the court considered not only the life expectancy of current facilities, but additional factors and likely disposal options in affirming the denial of the expansion.

In the instant matter, only one witness testified for WMII in support of the Criterion, Ms. Sheryl Smith, who also prepared a written report, titled, Need for the Kankakee Landfill Expansion (Application, C1-2). Ms. Smith's testimony and report are replete with inconsistencies and unfounded claims. Different bases, and within these bases, incorrect rates, for recycling were utilized for the different counties in the service area resulting in a drastic overstating of waste generation and need. Additionally, several permitted facilities were left out of the available capacity calculations without an established basis for doing so, violating the requirement established in Waste Management (1984) that an applicant must provide a complete and specific analysis. Further, even if the IPCB found a capacity shortfall before 2028, agreeing with WMII on the asserted need for the proposed expansion, the numbers do not compute to the 30 million ton capacity sought by WMII. Accordingly, the IPCB should find that the Kankakee County Board's decision, as respects Criterion 1, is against the manifest weight of the evidence and reverse that decision. Alternatively, even if the IPCB finds that there is some capacity shortfall adequately shown by the evidence, then the IPCB should find that the Kankakee County Board's determination that there is a need for a 30-million ton site is against the manifest weight

of the evidence, and it should reverse the County Board's decision or adjust the volume of the proposed site to coincide with the need determined to be shown.

a. ***WMII overstated waste generation totals for the service area by utilizing inconsistent and incorrect recycling data and, thus, did not present a prima facie case in support of need for the capacity it sought***

Ms. Smith testified that her methodology for determining need began with WMII's designation of an 11 county service area and proposed operating life of 27 years. (11/20/02 6:00 pm Tr. 10). Ms. Smith calculated the population and waste generation rates in the service area to arrive at an annual and total 27-year waste generation figure, based on the geographic boundaries provided by the Applicant and data provided by the Counties within the service area. (11/20/02 6:00 pm Tr.12-13). Her total net waste generation figure, adjusted for recycling, for the 27-year period, 2004 to 2030, was 186,367,304 tons. (Application, Criterion 1, Table 2). Ms. Smith determined the service area, with no additional capacity added, has available capacity for her generation calculations until 2011. (Application, Criterion 1 Report p. 34).

However, Ms. Smith understated actual recycling taking place in the service area, and thus, overstated the waste generation in the service area. (11/20/02 6:00 pm Tr. 48-52). If the **actual** recycling rates are applied to Ms. Smith's waste generation numbers, even without any increases in recycling over 27-years, the result is very different and the waste generation estimates are much less than what Ms. Smith estimated.

For example, although Ms. Smith used a 40% recycling rate for the City of Chicago (identified as "Cook (City)" waste in Table 2 of her report), she agreed that in 2000 the City had a recycling rate of 48%, which, if 48% rather than 40% was used as the recycling rate, would reduce her waste generation numbers for the City of Chicago by 8,449,945 tons. (11/20/02 6:00 pm Tr. 47). If the same was done for Kankakee County, another County for which she decided

to utilize a smaller recycling percentage than what is being achieved, (11/20/02 6pm Tr. 50-51), it reduces her waste generation figures for Kankakee County by 875,117 tons.

Additionally, Ms. Smith's results must be discounted as she utilized incorrect calculations, resulting in an additionally overstated waste generation for the service area. For example, in her report, Ms. Smith notes that Suburban Cook County stated recycling goals of 42% in 2000, 49% in 2010 and 56% in 2020. (Application, Criterion 1 Report, Table 2 Notes p. 1). However, in Table 2, Ms. Smith utilized rates of 44% in 2004, 45% in 2006, 46% in 2007, 47% in 2008, 48% in 2009, and 49% in 2010 and thereafter. Id. at Table 2. Although earlier year projections with these numbers end up providing lower waste generation totals than utilizing the correct numbers, the later, higher generation years are drastically understated by Ms. Smith's calculations. As this error was made with respect to the second highest generation rates in her table, the result is an overstatement of 2,570,479 tons.

It is important to note that Suburban Cook County is just an example, and as noted in Michael Watson's Summary of The Siting Proceedings, Proposed Findings and Written Comments, submitted to the Kankakee County Board (C1837-2204), Ms. Smith applies recycling rates inconsistently in other calculations as well. These inconsistencies and inaccuracies in Ms. Smith's calculations, her agreement that the long holding trend has been for increased recycling, and her agreement that the recycling trend in more than 50% of the Counties specifically included in her analysis is for recycling to increase, is evidence that that the calculations and estimates contained in her report are strained, not accurate, and overstated by a minimum of 8,449,945 tons.

b. ***WMII also understated available capacity for the service area, arbitrarily overstating need for the expansion***

Ms. Smith determined the total disposal capacity currently available (permitted) by considering 28 existing landfills that accept waste from the service area. (*See*, 11/20/02 6:00 pm Tr. 35-36). Ms. Smith then reduced the capacity available at those facilities, per year, from the reported capacity date of January 1, 2001, to January 1, 2004, and additionally reduced the available capacity by applying a "waste receipt factor." There is no reference, study or statistical support provided by Ms. Smith for her reduction of capacity in this manner and it results in a reduction of **one half** of the available capacity as of January 1, 2001. Additionally, Ms. Smith's application and choice of figure to be applied to such a waste receipt factor, like her "waste capture" figure, is just a number she decided to apply to the estimates she developed. (*See*, 11/20/02 6:00 pm Tr. 138).

Although an applicant or local siting authority is not required to examine every possible scenario in determining capacity, it is not proper to mischaracterize or ignore available capacity, but as noted in Waste Management (1988), it is proper to consider all relevant factors affecting capacity. As in both Waste Management cases, and as opposed to E&E Hauling, there are numerous permitted sites in this case that should have been considered, and were not completely or accurately considered in Ms. Smith's analysis and testimony. For example, Forest Lawn Landfill in Berrien County, Michigan, was dismissed as unpermitted, however this facility was permitted in July 30, 20002, adding 7,700,000 tons of capacity to the mix. (Watson Written Comment, C1837-2204, Exhibit A). Likewise, Pheasant Run RDF is mentioned in Ms. Smith's analysis, however ignored in capacity calculations, as are Brickyard Landfill and Kestrel Hawk Park Landfill, together, an additional 11,001,830 tons capacity. Id. Spoon Ridge Landfill is sited and permitted, but not currently being used, thus, Ms. Smith excluded its 39,500,000 ton capacity. (11/20/02 6:00 pm Tr. 68-69). Spoon Ridge however is targeted to serve much of the

service area, and Ms. Smith even admitted economics may change to make it a viable option, nonetheless, it was not included. (11/20/02 6:00pm Tr. 68-71).

In summation, accepting Ms. Smith's utilization of only the 29 landfills, the total available capacity, considering only the 29 landfills chosen by Ms. Smith as of January 1, 2001, was 126,209,558 tons. Without the "waste receipt factor," but including Ms. Smith's reduction in capacity between 2001-2004, the total available capacity from the 29 landfills considered by Ms. Smith for the service area is 89,433,450 tons. However, as discussed above, and fully in Michael Watson's Written Comments (C1837-2204), Ms. Smith did not include all the available capacity in, or available to, the service area in her capacity calculation. If this additional capacity is included, (without including Town & Country Landfill) it brings the total **available capacity to 201,219,388 tons.**[6] Ms. Smith's understatement of capacity, when considered in conjunction with her overstated generation totals, results in a "capacity shortfall" that will not occur until 2028 and that is less than half the requested 30,000,000 tons sought by WMII for its expansion. Thus, the Kankakee County Board's conclusion that WMII presented sufficient evidence to show a need for a 30,000,000-ton site is against the manifest weight of the evidence.[7]

(2) The Kankakee County Board's Decision as respects Criteria 2 and 5 was Against the Manifest Weight of the Evidence

Criterion 2 provides that the "facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." This Criterion contains three components: design, location and operation. Criterion 5 provides that he plan of operation for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other

[6] 126,209,558 tons as determined by Ms. Smith + 75,009,830 tons from Prairie View, Streator Area #3, Forest Lawn, Brickyard, Spoon Ridge, Pheasant Run and Kestrel Hawk Park. (*See*, table on p. 7 of Watson's written comment, C1843).

[7] In all fairness, a much smaller capacity total may be necessary for Kankakee County's waste needs, however, that is not what was proposed or approved in this expansion.

operational accidents. The decision of the Kankakee County Board was against he manifest weight of the evidence regarding both Criteria 2 and 5. In this analysis, since the operational evidence related to Criterion 5 is also related to the operational portion of Criterion 2, they are both addressed in this section of the brief, rather than being duplicated in another section.

These Criteria cannot and should not be considered in a vacuum. they must be looked at in terms of not only what is stated on paper today, but how it will perform centuries from now. This expansion, once built, will be a resident of Kankakee County forever. The decision being made by the County Board is one that will effect every generation living in Kankakee, particularly those residents living near the proposed facility, forever. One overwhelming theme of WMII's presentation on Criterion 2, in addition to the fact that WMII designed the landfill expansion to meet only the minimum Illinois State standards for landfills, is that WMII did not adequately investigate and failed to address the location of the proposed expansion, as discussed further below.[8] Kankakee County's conclusion that Criterion 2 was met by WMII, is against the manifest weight of the evidence, as WMII's primary engineer testifying concerning the design and operation of the proposed expansion, Andrew Nickodem, admitted that he did not consider the location of the facility as a factor of the design (11/21/02 1:45pm Tr. 60-61; 11/22 1:30pm Tr. p. 11-12), and, additionally, for at least the following reasons, in addition to those articulated by Petitioner Karlock in his brief (concerning the geology and hydrogeology of the location)[9]:

Mr. Nickodem, an engineer hired by WMII, testified that he included in the Application only what was required by Kankakee County's siting ordinance, however, he failed to include

[8] As a backdrop. when the existing landfills at this location were built, they were allegedly designed and constructed to meet the minimum standards, and they have historically, currently, and will likely continue in the future to have problems with migration of chemicals from the site (be it through leachate or gas).

[9] Petitioner Watson joins and adopts that portion of Petitioner Karlock's brief concerning Kankakee County's decision on Criterion 2 being against the manifest weight of the evidence, on the basis of the geological and hydrogeological evidence or lack thereof.

substantive or meaningful responses to many portions of the siting ordinance. (11/22/02 1:30pm Tr. 15; 11/25/02 9:00am Tr. 14-22). Despite the fact that Mr. Nickodem admitted that in designing landfill, the designer need to take into consideration the proposed location of the design in order to prepare that design, when asked what factors he considered in designing the proposed expansion, Mr. Nickodem, interestingly, **did not consider the location of the facility as a factor of design**. (11/21/02 1:45pm Tr. 60-61; 11/22 1:30pm Tr. p. 11-12). Although Mr. Nickodem later testified that the hydrogeological investigation was done prior to his design and that he took this into consideration in his design (11/21 1:45pm Tr. p. 63-64), this statement is not accurate, since Mr. Nickodem finished his design of the depth and liner of this facility in January 2002, before or at the time the borings for the hydrogeological investigation were taking place and before the hydrogeological investigation was concluded (11/21 6pm Tr. 10-11; Application, C2, Appendix B-1). In fact, during questioning by Mr. Moran, WMII's attorney, in further support of the fact that the location wasn't considered as part of this design, Mr. Nickodem testified that the geology of the site is not necessary to his opinion that the design meets Criterion 2, and he testified that the basis for his opinion that the design meets Criterion 2 is the engineered elements of the design. (11/22 6:04pm Tr. p. 61; 11/21 1:45pm Tr. 95). Further Mr. Nickodem, **did not consider key factors regarding this location**. Mr. Nickodem testified that he **did not consider** and did not include in the Application, the **location of nearby nature preserves** in designing the site; whether there was historical importance to the property on which the landfill was going to expand; and other requirements set as "location standards" by the State of Illinois, since those, under Mr. Nickodem's understanding, were not included in Kankakee's siting ordinance (11/22/02 1:30pm Tr. 12-17). Apparently, as discussed under Criterion 8, below, Mr. Nickodem didn't read the County's solid waste management plan, which requires

those items and more to be considered. Additionally, even though Mr. Nickodem admits that public records used to identify potable water wells in the area of the expansion are not always accurate, and even though Mr. Nickodem new of the existence of "something over there" on the East of the Eastern proposed site property line, he did not investigate whether it was a potable well and whether his design violated the State of Illinois required setback for that well. (11/22/02 1:30pm Tr. 27-28). It is further disturbing that, the limited information Mr. Nickodem did consider concerning the location of the nearest **municipal water intake is not accurate**. (11/22/02 1:30pm Tr. 31). In fact, the closest water intake is **7 miles downstream** of the proposed facility. (*See*, Exhibit C, documentation from the Illinois Environmental Protection Agency, to Watson's written comment, C***). This water source provides **12.8 million gallons of water a day to an estimated population of 70,000 persons in Kankakee County.** Mr. Nickodem did not know about this information when he designed the facility and, the information he did locate after his design of the facility, was not accurate or, at the very least, was not complete.

Finally, beyond the location issues identified during the course of the public hearings, the suitability of this location for the existing landfill has previously been seriously questioned by personal from or working for the State of Illinois and U.S. Environmental Protection Agency (U.S. EPA). (*See*, Exhibit D to Watson's written comment, C***). In one of the attached reports, U.S. EPA incorrectly refers to the existing landfill as "CID Landfill," however, correctly describes its location in the text and correctly depicts its location on a map attached to the report. In this report, it was found that "the landfilled wastes constitute a possible source of contamination for several migration pathways," and referenced the inspector's observations of leachate seeps at the site with concerns that "run-off from the site is captured by an intermittent

stream that flows 0.75 miles to the Iroquois River" and that there are two water intakes 7.5 miles downstream serving over 50,000 people. Additionally, the report notes that the Iroquois and Kankakee Rivers are designated as fisheries, and several sensitive environments and wetlands are located along both rivers.

One of the "engineered elements" of the design is the leachate collection system. The depth of leachate that is allowed to collect at the bottom of the landfill needs to be limited to no more than one foot, as the depth of leachate creates a force that can push the leachate through potential defects in the liner. (1/21/02 1:45pm Tr. 65-66, 81-82). There are a number of problems with the Applicant's proof as respects its ability to minimize leachate depth at the proposed expansion under one foot. For example, the existing landfill has a requirement that the leachate be no more than two feet in depth, however, according to Illinois Environmental Protection Agency documentation (Watson Written Comment, Ex. B, p. 2 (C1837-2204), WMII has never been able to maintain leachate at two feet or under at the existing site. WMII presented no evidence that, despite its site-specific failures in this regard, it would be able to maintain an even lower depth, one foot, at the expansion. Additionally, WMII's testimony with respect to depth of leachate is confusing and inconsistent, as the liner itself has a 12-14 foot difference in height, so from where will the one-foot depth of leachate be measured? Finally, despite a condition to approval imposed by Kankakee County concerning this 2-foot requirement, the decision of the Kankakee County Board is against the manifest weight, as the evidence is simply not in the record to support WMII's conclusions.

WMII's proposed leachate recirculation system, *i.e.*, the bioreactor, it proposes will be so designed to protect the public health, safety and welfare. WMII proposes to make the expansion into a bioreactor. (11/21/02 6:00pm Tr. 50). However, the person who was in charge of the

design of this bioreactor, Mr. Nickodem, knows of no other operational bioreactor in the State of Illinois, admits that the effects of recirculating leachate on a landfill are not completely understood, admits that the specifics of when the recirculation will begin are not contained in the Application, doesn't know how much settlement or deformation the recirculation will cause and whether such deformation will cause the landfill's cover to fracture, and testified that he doesn't event know if he would call himself an expert in this subject. (11/21/02 6:00 pm Tr. 50, 51, 54, 60; 11/22/02 9:00am Tr. 17). Further, Mr. Nickodem admitted that the bioreactor, since it accelerates decomposition of waste, also accelerates settlement and production of landfill gas. (11/22/02 9:00am Tr.18-19). The testimony was inconsistent and no plan exists in the Application as to how over six million cubic yards of excess soil from excavating the areas to be filled with waste, will be managed at the site, if daily cover other than soil is utilized. (*See*, 11/22/02 1:30pm Tr. 42-47). Additionally, since alternative daily cover (*i.e.*, non-soil cover) is preferred to soil cover, as it conserves air space in the landfill and allows leachate to flow through the landfill, rather than potentially buldge up through the final cover, there appears to be strong preferences for use of non-soil covers, which leaves a greater potential of a six million cubic yards problem at the site. (Id.).

Although the Applicant admits that landfill gas, if it reaches five percent of the lower explosive limit, is a threat to public health, safety and welfare, there is no plan contained in the Application as to what will be done to assure the neighboring residents to the landfill expansion are not so threatened if such a level is found in one of the gas monitoring probes. In defense of this missing element, Mr. Nickodem testified that it is something that will be addressed when it is raised by the Illinois Environmental Protection Agency (11/22 1:30pm Tr. p. 56-59). For something as dangerous as explosive gas, isn't it better to have a plan in place ahead of time?

Likewise, there is no schedule for installing the gas collection wells in relation to the phased construction of the proposed landfill expansion. (11/22 1:30pm Tr. p. 72-73).

Mr. Nickodem testified that it is important to know about the types of operational problems and alleged or actual violations the existing landfill and the existing operator, WMII, has had, so that he can develop an operational plan that can proactively address those problems and violations and prevent them from possibly happening again. (11/23/02 9:00am Tr. 17). In developing the operational plan for the proposed expansion, Mr. Nickodem assumed, based in the material provided to him by WMII, that WMII had no past notices of or actual violations at the existing landfill. (11/23 9:00am Tr. p. 16). However, this is simply not accurate and not true. Mr. Rubak testified that: **nothing was given to Mr. Nickodem** by WMII with respect to compliance and Mr. Rubak only knew of 3-4 notices of violation from IEPA for the existing facility which were received by WMII in the 1980's, after an allegedly thorough search of records by WMII. (11/25 1:30pm Tr. p. 67, 68-69). However, there are actually, at least, **21 notice of violation sent to WMII concerning the existing site** (Waston Hearing Exhibit 3; 11/25 1:30pm Tr. p. 70-93). It is truly an example of either closing your eyes to the past and wishing it would go away, or severe miscommunication in compiling this Application, since these numerous violations which were important to know about from an operational planning perspective, and which were unacceptable to WMII, according to Mr. Rubak had clearly been overlooked. Further, with the three-four notices of violations which Mr. Rubak testified he knew about, those were not provided to Mr. Nickodem.

Therefore, the IPCB should find that the Kankakee County Board decision as respects Criterion 2 was against the manifest weight of the evidence.

(3) The Kankakee County Board's Decision as respects Criterion 3 (compatibility with the surrounding area and minimize impact on) was Against the Manifest Weight of the Evidence

Pursuant to Criterion 3, an applicant must establish that the facility is located so as to minimize incapability with the character of the surrounding area and to minimize the affect on the value surrounding property. (415 ILCS 5/39.2(a)(iii)). This Criterion contains two components, character of the surrounding area and value of the surrounding property. For the reasons articulated in Section II.B(2), due to Ms. Beaver-McGarr's perjury, the IPCB should find that the Kankakee County Board's decision on Criterion 3 is against the manifest weight of the evidence. Additionally, even if Beaver-McGarr's testimony is considered, the following summary of evidence supports an IPCB's finding that the Kankakee County Board decision was is against the manifest weight of the evidence.

The proposed facility intends to re-circulate the leachate, which will require vertical leachate re-circulation wells. The design has the pipes protruding four feet above the final cover. (11/22/02 1:30pm Tr. 64-65). There will be 25 of these wells protruding four feet over the cover of the landfill. (11/22/02 1:30pm Tr. 77). There will be 88 gas wells, which will protrude 5 to 6 feet above the final cover. (11/22/02 1:30pm Tr. 67-68). In essence, there will be 113 pipes protruding 4 to 6 feet above the final cover. Despite this, Mr. Lannert opines that the proposed facility is compatible with the character of the surrounding area as it may be used for a golf course or recreational space at some point in the future. However, WMII's engineer, Andrew Nickodem, contradicts Lannert's testimony (and report, neither of which address these 113 pipes) that with 25 leachate re-circulation wells and 88 gas wells protruding from the cover over the site, a golf course cannot be built, and furthermore, he is unaware of any facility in the State

of Illinois with these types of protruding wells that has actually been used as open space with a recreational use. (11/22/02 1:30pm Tr. 79-80).

Mr. Lannert's landscaping plan does not call for any landscaping on the East side of the proposed facility. If landscaping is necessary on the north, west and south sides of the proposed facility to minimize incapability, it is logically necessary on the East side as well.

The Kankakee Comprehensive Plan requires that the local plan as well as the County plan be considered when considering land use for areas within 1.5 miles of a municipal boundary. Watson local hearing Exhibit No. 1 is the "County Regional Planning Department Map dated 2002". The map depicts a portion of the facility as falling within the 1.5 mile planning boundary. If a portion of the proposed facility is within the 1.5 mile planning boundary then the City of Kankakee Comprehensive Plan must be considered and evaluated. Mr. Lannert did not consider the City of Kankakee Comprehensive Plan.

Ms. Beaver-McGarr claims that she reviewed 1,292 transactions in performing her analysis. It is important to note that 922 of the transactions are resale transactions of residential properties in Kane County related to the Settler's Hill Landfill. Therefore, 75% of the transaction occurred outside of Kankakee County. Ms. Beaver-McGarr claims that 370 transactions that occurred in Kankakee County were considered. However, it is important to note that most of these transactions were not part of her analysis. In fact, her residential analysis between the target and control groups near the existing facility involved a total of 22 transactions.

Ms. Beaver-McGarr claims that 263 transactions were reviewed concerning her agricultural study. It is important to note that the only agricultural transactions incorporated into Ms. Beaver-McGarr's analysis for the target/control areas involved 15 transactions. It is

important to note that those 15 transactions span ten years and amount to 1.5 transactions per year.

Essentially, Ms. Beaver-McGarr considered a total of 37 transactions in the target and control areas for both the residential and agricultural analysis. Of those 37 transactions, 8 transactions (5 agricultural and 3 residential) most be excluded as they are clearly inapplicable.[10] Therefore, when Ms. Beaver-McGarr claims that she reviewed 1,292 transactions, she only considered 37 transactions in the target and control areas for both agricultural and residential properties 8 of which are inapplicable. Her analysis is based on 29 transactions over the course of 10 years, which is inadequate for a finding on Criterion 3, when far more than those few transactions actually occurred over the 10-year study period.[11]

Once the apparitional transactions are removed, the average price for residential properties in the target area is $79,556.00 as oppose to the $119,954.00. Ms. Beaver-McGarr's representation that properties in the target area are approximately $30,000.00 more than in the control area is thus, not only misleading, it is inaccurate.

Ms. Beaver-McGarr's conclusion that farm property in the target area has been increasing at a rate of 201.29% as compared to an increase of 145.89% in the control area is likewise flawed. When considering farmland in Kankakee County as a whole, there was an increase of 13.82% when comparing farms sold between 1990 through 1994 with farms sold between 1995

[10] Ms. Beaver-McGarr did not have a definition or any logic in deciding whether a particular transaction involved a farm or not. By ordinance, the County of Kankakee defines a farm as consisting of at least 20 acres. Of the 15 agricultural transactions in the target/control areas reviewed/considered by Ms. Beaver-McGarr only 10 of them involved transactions of 20 acres or more. Essentially, one-third of the transactions labeled agricultural/farm were not. If one reviews the individual transactions, they can easily ascertain that the properties of less than 20 acres are something other than farms. For example the average price per acre for all farms in Kankakee County sold between 1995 and 1999 was $2,512.00 per acre. One of the transactions listed by Ms. Beaver-McGarr as a farm sale involved 11 acres with a cost of $11,045.00 per acre. When the average price of a farm acre in Kankakee County is $2,512.00 and one transaction involves a price of $11,045.00 per acre, clearly farmland is not being compared to farmland.

and 1999. Once the non-farm transactions are excluded from Beaver-McGarr's study, the rate of appreciation in the control area is 32% and in the target area it is actually a 17% decrease.

Thus, contrary to Ms. Beaver-McGarr's testimony, her study actually establishes that property values residential and/or farm is higher in the control area as oppose to the target area which is the entirely opposite conclusion proper by Ms. Beaver-McGarr.

Additional flaws in Ms. Beaver-McGarr's analysis and resulting opinions are listed on pages 22-24 of Watson's written comment (C1837-2204),and due to space limitations, are referenced and incorporated rather than repeated herein.

Therefore, in the first instance, the IPCB should find that the Kankakee County Board's decision on Criterion 3 is against the manifest weight of the evidence due to Ms. Beaver-McGarr's perjury and, alternatively, if Ms. Beaver-McGarr's testimony is considered, that the Board's decision is against the manifest weight of the evidence, for the reasons stated above and due to the incomplete and inaccurate analysis presented by WMII.

(4) The Kankakee County Board's Decision as respects Criterion 6 (Traffic) was Against the Manifest Weight of the Evidence

Criterion 6 requires that the applicant show that the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows. The Kankakee County Board's decision concerning this Criterion is against the manifest weight of the evidence for, at least, the following reasons:

Mr. Corcoran, WMII's expert relies on traffic counts taken by his consulting firm, Metro, in formulating his opinions with respect to Criterion 6. However, these counts are not representative and not accurate of actual or typical traffic on Rte. 45/52, as they were taken

[11] Watson public hearing Exhibit No. 10 removes the residential transactions that clearly are not relative samplings of the property in the target area.

during February and, thus, do not include tourist, farming, fair ground or other similar traffic which does not occur in the winter, and do not identify whether the vehicles counted were cars or trucks or other types of vehicles. (11/19/02 1:38pm Tr. 26, 43). Mr. Corcoran relied on counts that stated traffic on Rt. 45/52 to be between 252 to 435, "going north or southbound" and not identifying the type of vehicle. (11/19/02 1:38pm Tr. 24, 26). The existing landfill is generating 200 vehicle trips per day according to Mr. Corcoran, and the proposed expansion will generate 600 vehicle trips per day, **more than three times the traffic, not taking into consideration type of vehicle,** currently experience at and near the site. (11/19/02 1:38pm Tr. 25-26).

Mr. Corcoran admits that the **size of the vehicles on the roadway system in addition to volume, is important in doing a traffic analysis**, and an increase traffic flow of trucks may be equivalent of three to four times that number of cars. (Id. at p. 46-47). On the day that Metro did its traffic count, no transfer trailers entered or exited the site. (Id. at p. 47). The difference between a 30-40 foot long truck and a 60-65 foot truck would require additional analysis in a traffic study, such as the gap studies as "the larger truck obviously has different acceleration characteristics when it's pulling into traffic." (Id. at p. 48). However, despite Mr. Corcoran's admission, the size of the vehicles, the addition of at least 320, 60-65 foot transfer trailers to the traffic flow and Rt. 45/52 **was not considered**.

One basis of Mr. Corcoran's opinion that an increase of three times the exiting amount of traffic of the site is minimized is that the peak travel times of the roadway system are different than the peak travel times for the site. However, Mr. Corcoran never analyzed whether there are any secondary peak travel times on the roadway system and, as discussed above, the traffic count data on which Mr. Corcoran based his opinions, is faulty and not representative of typical or average traffic conditions on Rt. 45/52. (11/19/02 1:38pm Tr. 44-45).

Mr. Corcoran or Metro performed the traffic analysis contained in Criterion 6 of the Application on the assumption that the proposed expansion would be accepting no more than a maximum of 4,000tpd. (11/19/02 1:39pm Tr. 49). The amended and restated Host Community Agreement between the applicant and the County of Kankakee allows for up to 7,000 tons of out of County waste to be accepted on any given day. (Amended and restated Host Community Agreement contained at the end of volume I in the Application, p. 7-8). The amount of traffic will almost be double for 7,000 tons of garbage per day as oppose to 4,000 tons of garbage per day.

Due to WMII's failure to perform a complete and adequate traffic study, and for the other reasons stated above, the Kankakee County Board's decision that Criterion 6 is met, is against the manifest weight of the evidence, and should be reversed by the IPCB.

(5) The Kankakee County Board's Decision as respects Criterion 7 was against the Manifest Weight of the Evidence

The Applicant asserted that Criterion 7 is not applicable, however, the witness who the Applicant had testify concerning and in support of this Criterion had not seen the analysis for the leachate currently generated by the existing landfill and, although he had never seen leachate classified as a hazardous waste before, he could not confirm that the existing leachate was not a hazardous waste. (11/23 9:00am Tr. 37-39). Additionally, although a hazardous waste would not be able to be disposed of at a typical POTW, Mr. Nickodem testified that the leachate from the current site was going to CID for treatment. Although, there is no conclusive evidence that the leachate of the existing site is a hazardous waste, should it not be the applicant's burden (in this case WMII) to reveal that from the start, rather than requiring it to be uncovered by petitioners? If so, and since WMII did not present evidence whether or not the leachate at the existing site was hazardous waste (the only evidence is that Nickodem *could not confirm* whether or not it

was hazardous), the Kankakee County's Board's decision finding Criterion 7 inapplicable, is against the manifest weight of the evidence.

(6) The Kankakee County Board's Decision as respects Criterion 8 (Consistency with the SWMP) was Against the Manifest Weight of the Evidence

Criterion (viii) of section 39.2 of the Act provides: "[I]f the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act [415 ILCS 10/1 et seq. or 415 ILCS 15/1 et seq.], the facility is consistent with that plan." (415 ILCS 5/39.2(a)(viii)) WMII's Criterion 1 witness, Ms. Sheryl Smith, also testified on behalf of the Applicant in support of Criterion 8. Ms. Smith's analysis, however, failed to consider a number of substantive requirements of the SWMP, which were neither discussed nor met by WMII in its Application and testimonial presentation, thus, Ms. Smith's conclusions, and therefore, the Kankakee County Board's conclusion that Criterion 8 was met, is against the manifest weight of the evidence.[12]

Kankakee County solid waste management plan, requires the following items of which no proof is contained in the Application that they have been provided by the Applicant: (1) performance bond or off-site environmental impairment insurance in a form and amount acceptable to the County (11/21/02 9:00 am Tr. 81-82); (2) a property value protection plan *prepared by an independent entity satisfactory to the County* (11/21 9:00 am Tr. 86-87, 90). In fact, Ms. Smith concluded the property value protection plan was satisfactory merely because it

[12] There is likely to be some discussion concerning the validity of the 2001 and 2002 Amendments to the SWMP, since those amendments were not submitted to the Illinois Environmental Protection Agency for review and comment, as required by the Illinois Solid Waste Planning and Recycling Act. (415 ILCS 15/1, *et seq.*, *see also*, 11/21/02 9:00 am Tr. 76-77). Petitioner Watson is specifically reserving and not waiving that argument by addressing other portions of WMII's failures to meet the SWMP, in this brief.

was attached to the host agreement, however she did not know if it was prepared by an independent entity, as required. (11/21/02 9:00 am Tr. 85-89).

Kankakee County's solid waste management plan requires an applicant in siting comply with the siting ordinance, in terms of providing the information sought by that ordinance. However, the Applicant in this circumstance did not review and provided not testimony concerning the consistency of the Application with this requirement and, in fact, Ms. Smith testified that she is not qualified to answer questions concerning and did not review the County's siting ordinance for consistency with the Application. (11/21/02 9:00 am Tr. 98).

Additionally, the SWMP, requires the following be shown in a proposal for a new facility (this list is not exhaustive, just merely examples). Since the Application complies with none of these requirements in substance, and includes none of the information that is required by the County to be reviewed during siting, the Application is not consistent with the County's solid waste management plan.

Accordingly, and for the reasons summarized in the chart below, whether or not the October, 2001 and March, 2002 purported amendments to the SWMP are valid, the decision of the Kankakee County Board with respect to Criterion 8 is against the manifest weight of the evidence, as WMII did not provided the required and sufficient evidence to support approval.

Solid Waste Management Plan Requirements (Examples)	**Is information included in the Application?**	**Discussion**
"The facility shall not jeopardize historically or archaeologically significant features, or endangered or threatened species of plant, fish	No.	The expansion is proposed to be developed on property that was owned by and the farmstead of Thomas and Simeon Sammons, who are historically

or wildlife" (Watson IPCB Hearing Ex. 7 (offer of proof) p. 329)		significant persons in Kankakee County. WMII **failed to submit any information** to the County in its Application concerning the historical background of the property on which it proposes to develop its expansion. However, both Mr. Watson and Judith Furia, a researcher from the Kankakee Historical Society (C1792-1806, C1810-1811)
"No part of the landfill shall be located within a setback zone for water supply wells established in accordance with the Illinois Environmental Protection Act which provides for wellhead setback zones between 200 and 1,000 feet depending upon the local hydrogeological conditions in the area" (Watson IPCB Hearing Ex. 7 (offer of proof) p. 329).	Only partially.	The Application only included a survey from the ISGS and ISWS. Mr. Andrew Nickodem testified on behalf of WMII that these sources or surveys are not, in his experience, always accurate and that, he knew of the existence of a well on adjacent property to the East of the proposed expansion and, although it was not in the ISGS and ISWS survey, he did not seek to determine whether the proposed landfill violated the setback requirements to that well. (11/22/02 1:30pm Tr. 27-28).

"A landfill site has an extensive environmental impact and it is essential to locate the naturally most desirable site in order to reduce that impact." (Watson IPCB Hearing Ex. 7 (offer of proof) p. 330).	No.	The only reason for this particular location is that it is an expansion of an already existing landfill. Just because it is by an existing landfill, doesn't mean that the existing landfill was properly or appropriately located, and doesn't mean the expansion is properly or appropriately located.
The protection of groundwater is one of the primary concerns in siting a landfill. A site should not be located above or near a groundwater recharge zone or a heavily utilized water supply aquifer." (Watson IPCB Hearing Ex. 7 (offer of proof) p. 330).	Testimony shows that the proposed site is **not** compliant with this requirement.	The proposed expansion is located above a heavily utilized aquifer and above or in a recharge zone. (** Tr. **).
"The site should be located as not to adversely affect streams, lakes or other waterways." (Watson IPCB Hearing Ex. 7 (offer of proof) p. 330).	Addressed in a conclusory manner.	The Application fails to address this requirement and only provides a conclusory statement with respect to this requirement.

D. IF THE IPCB DETERMINES NOT TO REVERSE OR REMAND THE KANKAKEE COUNTY BOARD DECISION, THE IPCB PROCEEDING ON FUNDAMENTAL FAIRNESS SHOULD BE REMANDED FOR FRUTHER DISCOVERY/HEARINGS

Petitioner respectfully submits that the following rulings of the IPCB Hearing Officer were in error, resulted in prejudice to the Petitioner in the IPCB proceedings, and reserves his rights to raise the error of these rulings (in addition to those discussed above in conjunction with offers of proof), summarized briefly below, on appeal:

The Hearing Officer barred discovery and admission of evidence concerning communications related to the SWMP; The Hearing Officer barred the discovery depositions of Ms. Harvey and Mr. Moran concerning their January 2003 *ex parte* communication concerning siting conditions; The Hearing Officer granted WMII's and the County's respective motions to quash the depositions of Lee Addleman and Efraim Gill, based on statements from counsel and, in Gill's case a uncertified and unsworn letter from Mr. Gill's alleged doctor (no sworn medical provider's affidavit was presented), and also barred these individuals from testifying; The Hearing Officer denied Watson's motion to present additional written questions to Efraim Gill;The Hearing Officer's discovery rulings, including but not limited to his ruling barring Kruse's cell phone record (but allowing it from WMII for only one day), barring the full time frame requested for cell phone and other phone records; The statutory deadline (as a violation of due process) for a IPCB decision, including, as part of the collective issues during this process, the County's incomplete and delayed production of discovery, as most dramatically evidenced by the information and communications referenced in the invoices of Hinshaw & Culbertson and the County's belated production of the audio tapes sought in discovery); andThe Hearing Officer's granting of WMII's motion to quash the subpoenas for records issued to Metro (including Mr. Corcoran, *et al.*) and Integris (including, Ms. McGarr, *et al.*).

As a result of these erroneous rulings, the petitioners were deprived of due process in this proceeding and prejudiced in their ability to obtain evidence related to and in support of the fundamental fairness issues raised in their Petition's before the IPCB for review.

V. CONCLUSION

WHEREFORE, Michael Watson respectfully requests the Illinois Pollution Control Board to vacate the decision of the Kankakee County Board approving the Application of Waste Management of Illinois, Inc. Alternatively, Michael Watson respectfully requests that the Illinois Pollution Control Board remand the decision of the Kankakee County Board for further hearings and proceedings, to cure the fundamental unfairness of the subject decision and hearings.

Dated: June 2, 2003

Respectfully Submitted,
PETITIONER MICHAEL WATSON

By:_____
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