BEFORE THE ILINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C. Petitioner, vs. CITY COUNCIL OF THE CITY OF ROCHELLE, ILLINOIS, Respondent.	)	No. PCB 03- 218 (Pollution Control Facility Siting Appeal)

NOTICE OF FILING

TO: Counsel or Parties on attached Certificate of Service.

YOU ARE HEREBY NOTIFIED, that on January 16, 2004, we filed an original and nine copies of the attached Petitioner's Post-Hearing Brief with the Illinois Pollution Control Board by Federal Express delivery, a copy of which is herewith served on you.

ROCHELLE WASTE DISPOSAL, L.L.C.

By: _____
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ATTORNEY'S CERTIFICATE OF SERVICE

The undersigned, being first duly sworn on oath, depose and say that I am an attorney and served the foregoing instrument upon the within named:

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by sealing a true and correct copy of the same in an envelope, addressed as shown above, with sufficient United States postage and by depositing said envelope, so sealed and stamped, in the United States Mail at Rockford, Illinois, at or about the hour of 5 o'clock p.m., on the 16 day of January, 2004, and by emailing a true and correct courtesy copy of same to Respondent's counsel at the email address set forth above, at or about the hour of 9 o'clock a.m./~~p.m.~~, on the 16th day of January, 2004.

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PETITIONER'S POST-HEARING BRIEF

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CITY COUNCIL OF THE CITY OF ROCHELLE, ILLINOIS,	)	
	)	
Respondent.	)	

PETITIONER'S POST-HEARING BRIEF

I. Introduction

The Petitioner in this petition to review denial of siting, Rochelle Waste Disposal, L.L.C. ("RWD"), filed an Application for Approval of a Pollution Control Facility with the Rochelle City Council on November 22, 2002, pursuant to Section 39.2 of the Illinois Environmental Protection Act ("the Act"). 415 ILCS 5/39.2. The Application requested local siting approval for expansion of the Rochelle Municipal Landfill No. 2 ("the existing facility" or "the Rochelle Landfill") located in Rochelle. The Application consisted of an eight volume 6,122 page description of the proposed facility ("the Expansion" or "the Subject Site") as well as 11,980 documents filed with the Illinois Environmental Protection Agency ("the Agency") pertaining to the existing facility. See Affidavit of Daniel L. Zinnen, App. Ex. 128.

After a five day public hearing before the Council's Hearing Officer, beginning on February 24, 2003, and ending on March 4, 2003,[1] the Hearing Officer recommended approval of siting (Hearing Officer Findings of Fact, Conclusions of Law and Recommendations 2 ("Hearing Officer Report")), and both he and the City Staff concluded that all the statutory criteria had been met. See City Staff Findings of Fact-Conclusions of Law ("City Staff Report"). Nevertheless, the City Council, without ever meeting to confer with one another, their staff or their expert consultants, convened on April 24, 2003, and, without deliberation, voted to deny siting, finding that the Petitioner had not shown compliance with Criteria (i) (need), (ii) (design, location and operation), (iii) (incompatibility and effect on property value), (vi) (traffic) and (ix) (regulated recharge zone). Four days later the Council purported to reopen the hearing, voting to correct their obvious error on Criterion (ix) and to impose certain conditions in the event of a Board reversal.

The Petitioner filed a timely petition for review, and the Board's Hearing Officer held a hearing on December 10, 2003. The Petitioner asserts both that the Council violated fundamental fairness and that its decision on the various criteria was against the manifest weight of the evidence.

II. The siting process and procedures were fundamentally unfair

A. Introduction

The Rochelle City Council's siting process violated fundamental fairness for three major reasons. First, the Council made a legislative decision based on political

[1] References to the local siting hearing transcript are by date ***and*** page (e.g., Tr. 2/24 70, C6719), and references to the record pages are included but may be slightly inaccurate because some of the record was duplexed. References to the Pollution Control Board ("Board") hearing on December 10, 2003, are by transcript page only with no date.

considerations rather than the evidence. Second, the Council did that because its decision-making process was tainted by inappropriate *ex parte* communications between Council members and opponents of the application, such as the Concerned Citizens of Ogle County ("CCOC"), who was a ***formal party to the proceedings***. See, e.g., E & E Hauling, Inc. v. PCB, 116 Ill.App.3d 586, 606, 451 N.E.2d 555, 571, 71 Ill.Dec. 587, 603 (2d Dist. 1983), aff'd, 107 Ill.2d 33, 41 N.E.2d 664, 89 Ill.Dec. 21 (1985). Third, after the hearing had ended and a final decision rendered on April 24, 2003, the Council met again on April 28, 2003, and purported to reconsider and revise the decision without notice to the Petitioner.

B. The Council made an inappropriate legislative decision based on politics, not evidence

Immediately after the April 24, 2003, meeting denying siting two Council members informed a reporter that they had decided the case in accordance with public opinion. Councilman Kissick stated immediately after the vote:

> My gut feeling go [sic] in was I didn't see any signs in anybody's yard supporting the landfill. . . . I really felt based on public input that they did not was [sic] this landfill. I felt the other members of the council felt they had been elected by the people and that the people had spoken. . . . ***My job up there is to represent the majority of the public . . . . The public opinion against this was overwhelming. It wasn't even close.*** Rochelle News Leader "Councilmen reject landfill expansion" (April 27, 2003), Petitioner's Exhibit No. 2 (emphasis added). Tr. 122.

Councilman Bubik said essentially the same thing:

> ***I voted the way the citizens of this town wanted it to go*** . . . . The people of this area do not want a mega-landfill. The message I was getting was that we didn't want it. Rochelle News Leader "Councilmen reject landfill expansion" (April 27, 2003), Petitioner's Exhibit No. 2 (emphasis added). Tr. 62.

In acting on the RWD siting application, the Council was required to act as an adjudicative body and make its decision in a manner that was consistent with fundamental fairness and due process. Instead, the Council made its decision as if it were a purely legislative body and not subject to due process constraints. The legislative character of the Council's action is demonstrated by the following: (1) the Council members' post-decisional comments, which are admissible;[2] (2) the *ex parte* political pressures applied by the CCOC and other siting opponents (which created an "appearance of impropriety" and "may" well have influenced the decision); (3) the Council members' utter failure to ever confer with one another at any time prior to or during the meeting at which their vote was taken; (4) the failure of the Council to consider or discuss the recommendations of their staff, their counsel or their environmental consultants; (5) the failure of the Council to consider or discuss the recommendations of their own Hearing Officer; (6) the Council's failure to give any legitimate rationale or reasons for its decision on the various criteria; (7) the Council's completely unsupported finding as to Criterion (ix) (regulated recharge zone) and (8) the Council's effort to cover up the essentially political nature of their erroneous decision through an *ex parte* reconsideration four days later.

At the outset it should be said that there has been unfortunate ambiguity and contradiction under Illinois law regarding whether local siting authorities act legislatively or judicially under Section 39.2 of the Act and what that means to the democratic and adjudicative processes. Thus, under the Act a siting authority member can participate in decisionmaking despite having "publicly expressed an opinion" (415 ILCS 5/39.2(d)), but

[2] See, e.g., U.S. v. Hooker Chemicals & Plastics Corp., 123 F.R.D. 3, 12 (Appendix) (W.D.N.Y. 1988), discussed in Petitioner's Hearing Brief (Hearing Officer Ex. 1).

Board and judicially created *ex parte* contact restrictions prevent post-filing lobbying efforts to change such an opinion – at least if "prejudice" can be proven. Proving actual prejudice (i.e., that the political efforts were successful) is nearly impossible because the decisionmakers' "internal thought processes" are not subject to question. See DiMaggio v. Solid Waste Agency of Northern Cook County, PCB 89-138, *3 (1989). Siting proceedings will only be fair and effective if this confusion is eliminated to make clear that the process is adjudicatory and judicial, not legislative, and that the appearance of impropriety will not be tolerated – particularly when caused by a ***party*** to the proceedings.

A local siting authority acts "as a quasi-judicial body" (Waste Management of Illinois, Inc. v. Pollution Control Board, 123 Ill.App.3d 1075, 1080, 463 N.E.2d 969, 973, 79 Ill.Dec. 415, 419 (2d Dist. 1984)) and engages in "adjudication," not "rule making," under Section 39.2 of the Act. See, e.g., E & E Hauling, 116 Ill.App.3d at 598, 451 N.E.2d at 566, 71 Ill.Dec. at 598. However, some precedent has suggested that a local siting authority "may find the applicant has met the statutory criteria and properly deny the application based upon legislative-type considerations." Southwest Energy Corp. v. Pollution Control Board, 275 Ill.App.3d 84, 91, 655 N.E.2d 304, 309, 211 Ill.Dec. 401, 406 (4th Dist. 1995). Contra Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board, 227 Ill.App.3d 533, 550, 592 N.E.2d 148, 159, 169 Ill.Dec. 661, 672 (1st Dist. 1992) (application must be approved if statutory criteria are met regardless of "political or social or economic consequences"). The suggestion that siting is a legislative, rather than a quasi-judicial, function has led to the further proposition that the local governing body "is not held to the same standards as a judicial body." Southwest

Energy, 275 Ill.App.3d at 91, 655 N.E.2d at 309, 211 Ill.Dec. at 406. See also Land & Lakes Co. v. Pollution Control Board, 319 Ill.App.3d 41, 50, 743 N.E.2d 188, 195, 252 Ill.Dec. 614, 621 (3d Dist. 2000) (same); Waste Management of Illinois, Inc. v. Pollution Control Board, 175 Ill.App.3d 1023, 1043, 530 N.E.2d 682, 698, 125 Ill.Dec. 524, 540 (2d Dist. 1988) ("Further, *ex parte* communications from the public to their representatives are perhaps inevitable given a county board member's perceived legislative position, albeit in these circumstances, they act in an adjudicative role as well"). That, in turn, has led to the "catch-22" described in the Petitioner's Hearing Brief (Hearing Officer Ex. 1) – the victims of *ex parte* communications have been required to prove resulting "prejudice" without being permitted to explore the decisionmakers' internal thought processes, but decisionmakers have been improperly permitted to testify that the *ex parte* communications did not affect their decision.

It is time for the Board and the courts to make clear that local siting authorities act in an unequivocally "quasi-judicial" capacity, that their decisions under Section 39.2 of the Act may not be based on political considerations and that *ex parte* contacts will be scrutinized on an ***objective*** basis, not on the basis of the decisionmakers' self-serving assertions of no prejudice, just as they would be in any other judicial or administrative adjudication. Thus, reversal should be required without any showing of actual prejudice if the *ex parte* contacts "***may*** have influenced" the decision in that a "disinterested observer" might question the decisionmakers' impartiality (E & E Hauling, 116 Ill.App.3d at 598, 451 N.E.2d at 566, 71 Ill.Dec. at 598) ***or*** they create an appearance of impropriety.

Where there is an appearance that the decision was based on political pressure, not the evidence, that establishes precisely such an appearance of impropriety. See Ill. S.Ct. Rule 63A(1) ("A judge should be unswayed by partisan interests, ***public clamor***, or fear of criticism") (emphasis added). This standard applies equally to any administrative adjudication. See, e.g., People ex rel. Wangelin v. St. Louis Bridge Co., 357 Ill. 245, 191 N.E. 300, 304 (1934) (tax assessment proceedings in which court held: "The rights of the individual and of the public cannot be determined according to ***public clamor and outcry***. No administrative board and no court can relieve itself of its duty or obligation to follow the law by ***yielding to public demand*** in the administration of the duties intrusted to it") (emphasis added).

If a judge engages in inappropriate *ex parte* communications, the issue of disqualification is not based on the judge's subjective belief as to whether his impartiality had been compromised, but on the objective standard of Canon 3 of the Code of Judicial Conduct: "A Judge shall disqualify himself or herself in a proceeding ***in which the judge's impartiality might reasonably be questioned . . . .*** Ill. S.Ct. R. 63C(1). See also 28 U.S.C. 455(a) (disqualification required if federal judge's impartiality might reasonably be questioned). The question is whether "[a] thoughtful observer aware of all the facts . . . would conclude that [the *ex parte* communication] . . . carries an unacceptable potential for compromising impartiality." Edgar v. K.L., 93 F.3d 256, 259-60 (7th Cir. 1996) (discounting judge's assurances "that he would have an open mind," relying instead on whether "an objective observer would doubt that").

> The issue then is ***not the Court's own introspective capacity*** to sit in fair and honest judgment with respect to the controverted issues, but whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality. This is an objective standard . . . .

U.S. v. Ferguson, 550 F.Supp. 1256, 1259-60 (S.D.N.Y. 1982) (emphasis added).

See also State v. Mann, 512 N.W.2d 528, 532 (Ia. S.Ct. 1994) ("the test is not whether the judge self-questions his own impartiality, but whether a reasonable person would question it. Thus, an objective test is substituted for a purely subjective one"). Parties to siting proceedings who, like the Petitioner in this case, attempt to follow the rules will be inevitably prejudiced by the lobbying efforts of those who choose to treat the process as purely political and legislative.

Fortunately, a recent decision of the Illinois Supreme Court provides specific guidance for the Board on the applicability of due process requirements to this siting proceeding. Under the Illinois Supreme Court's recent ruling in People ex rel. Klaeren v. Village of Lyle, 202 Ill.2d 164, 183, 781 N.E.2d 223, 234, 269 Ill.Dec. 426, 437 (2002), the siting hearing in this case is clearly "administrative or quasi-judicial," not legislative, because "the property rights of the interested parties are at issue," and "[t]he municipal body acts in a fact-finding capacity to decide disputed adjudicative facts based upon evidence." Klaeren involved a special use permit in a zoning case. In a special use permit, the governing body has previously decided that the property in question is suitable for the proposed use if certain conditions or criteria are met. The purpose of the permit hearing is to determine if the specific criteria have been met for its approval. That is exactly the same as the circumstances in this case. Here the Council had already decided that the Petitioner's property was suitable for use as a landfill as evidenced by the Host Agreement (A5208-61) and related intergovernmental, annexation and zoning ordinances and agreements. A5663-5747. The purpose of the siting hearing was to determine if the specific criteria for approval of a landfill were met. Thus, the Petitioner

is just as entitled to "the due process rights normally granted to individuals whose property rights are at stake" (Ibid.) as were the parties to the special use proceedings involved in Klaeren.

If siting hearings continue to be treated as partly legislative and partly quasi-judicial, two unfortunate consequences will follow. First, siting applicants who comply with the ban against *ex parte* communications will be deprived of the First Amendment rights exercised by those who choose to ignore those quasi-judicial restrictions, and the democratic process will be rendered unfair. See, e.g., Greater New Orleans Broadcasting Association, Inc. v. U.S., 527 U.S. 123, 190 (1999) (even commercial speech may not be restricted unless government bears burden of proving substantial interest directly advanced without ***"exemptions and inconsistencies"*** imposing ban on some persons but not others). Second, if the *sine qua non* of siting approval is a successful lobbying effort, the hearing process will become little more than a sham insofar as political success will almost always trump any evidentiary proof. If local politicians are free to base siting decisions upon political considerations, but a nearly impossible standard of review is imposed to set aside their supposedly quasi-judicial determinations, the siting process will offer little protection to the environment. Politically successful applicants will inevitably win siting approval, and unsuccessful opponents will almost never be able to establish that the siting authority's decision was against the manifest weight of the evidence. See, e.g., Lowe Transfer, Inc. v. County Board of McHenry County, PCB 03-221 (October 2, 2003) (county's brief noting that petitioner was only able to locate 12 cases where the Board or appellate courts had actually reversed a local siting decision on

any criteria out of the hundreds of such cases there have been).[3] Thus, it is extremely important to clarify that local siting authorities act in a purely quasi-judicial capacity, that political considerations are completely inappropriate and that *ex parte* communications will be scrutinized for an appearance of impropriety or whether they "may" have influenced the decision without any requirement that actual prejudice be proven because no evidence of the decisionmakers' "internal thought processes" is admissible. See Hearing Brief (Hearing Officer Ex. 1).

What then are the attributes of "due process" that apply in the RWD siting proceeding? Once it is understood that local council members act in a quasi-judicial capacity in connection with siting hearings, it necessarily follows that they indeed should be held to the same standard of impartiality as a judge or administrator involved in any adjudication of property rights or "valuable privilege." Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981). An "appearance of bias or prejudice can be as damaging to the public confidence as actual bias or prejudice," and "judicial conduct principles" are "applicable not just to judges but to administrative agents, commissioners, referees, masters in chancery, or other arbiters of questions of law or fact not holding judicial

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[3] *County of Kankakee v. City of Kankakee*, PCB 03-3 (2003) (Board reversed city's siting approval because decision on Criterion 2 against the manifest weight of the evidence); *CDT Landfill Corporation v. City of Joliet*, PCB 98-60 (1998) (Board reversed city's siting approval because decision on Criteria 2, 6 and 8 against the manifest weight of the evidence); *Larry Slates v. Illinois Landfills, Inc.*, PCB 93-106 (1993) (Board reversed city's siting approval because decision on Criterion 1 against the manifest weight of the evidence 1); *Industrial Fuels v. Pollution Control Board*, 227 Ill.App.3d 533, 592 N.E.2d 148, 169 Ill.Dec. 661 (1st Dist. 1992) (Appellate Court reversed both the PCB and the city's decision to deny siting approval, finding the decisions against the manifest weight of the evidence on five criteria); *Waste Hauling Inc. v, Macon County Board v PCB* 91-223 (1992) (reversal as Criteria 2 and 6); *Clean Quality Resources, Inc. v. Marion County Board*, PCB 91-72 (1991) (reversal as to Criterion 3); *A.R.F. Landfill, Inc. v. Lake County*, PCB 87-51 (1987) (reversal as to Criterion 3); *Industrial Salvage, Inc. v. County Board of Marion*, PCB 83-173 (1984) (reversal as to Criterion 2); *Watts Trucking Service v. City of Rock Island*, PCB 83-167 (1984) (Board reversed city's siting approval because decision on all criteria against the manifest weight of the evidence); *Frinks Industrial Waste v. City of Rockford*, PCB 83-41 (1983), aff'd, *City of Rockford v. Pollution Control Board,* 125 Ill.App.3d 384, 465 N.E.2d 96, 80 Ill.Dec. 650 (2d Dist. 1984) (reversal of city's denial based on irrelevant proximity to school).

office." Business and Professional People for the Public Interest v. Barnich, 244 Ill.App.3d 291, 296, 614 N.E.2d 341, 345, 185 Ill.Dec. 207, 211 (1st Dist. 1993) (ICC Commissioner's recusal required based on his friendships and *ex parte* phone calls). In Pioneer Processing, Inc. v. Environmental Protection Agency, 102 Ill.2d 119, 140-44, 464 N.E.2d 238, 248-50, 79 Ill.Dec. 640, 650-52 (1984), the Illinois Supreme Court held that where the contested-case provisions of the Administrative Procedure Act were applicable to proceedings before the Agency, the Agency's *ex parte* communications with a waste site applicant made the Agency's decision to issue a permit void without any consideration of prejudice.

If it is recognized that the local siting authority is really acting in a quasi-judicial capacity, a long line of authority establishes that no such actual prejudice need be established and that the real question is whether there has been an appearance of impropriety.

> [T]he propriety of the contact depends on the nature of the administrative proceeding. There are two basic types of agency actions: rulemaking (quasi-legislative) and adjudication (quasi-adjudicative). . . . adjudication covers the resolution of disputes between specific parties. Sokaogon Chippewa Community v. Babbitt, 929 F.Supp. 1165, 1174 (W.D. Wis. 1996), reconsidered in part, 961 F.Supp. 1276 (W.D. Wis. 1997).

Thus, although *ex parte* communications are scrutinized for actual prejudice in quasi-***legislative*** proceedings, in quasi-***adjudicative*** matters *ex parte* communications are condemned where they have merely compromised the "appearance of impartiality." Sokaogan, 929 F.Supp at 1174. Thus, in quasi-judicial proceedings, parties challenging *ex parte* communications "have prevailed even without showing that the pressure had actually influenced the . . . decision." D.C. Federation of Civic Associations v. Volpe,

459 F.2d 1231, 1246-47 (D.C. Cir. 1971). That is because "[w]ith regard to judicial decision making, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality." Ibid. D.C. Federation makes clear that in quasi-judicial matters a mere appearance of impropriety will require reversal, whereas in quasi-legislative matters "the test for improper interference was whether the congressional action ***actually*** affected the decision." Peter Kiewit Sons Co. v. U.S. Army Corps of Engineers, 714 F.2d 163, 169 (D.C. Cir. 1983) (emphasis original). See also Pillsbury Co. v. Federal Trade Commission, 354 F.2d 952, 964 (5th Cir. 1966) (those who exercise judicial function must be free from external influences that sacrifice "the appearance of impartiality"). In Jarrott v. Scrivener, 225 F.Supp. 827, 834-35 (D.D.C. 1964), where three of the five zoning board members were secretly informed that highly placed government officials desired that a foreign embassy's zoning application be denied, the appearance of impropriety alone required a rehearing even though "the Board members denied being influenced by these contacts." In other words, "fundamental fairness" is not a term unique to local siting decisions and is in fact "required by the Fifth Amendment." Koniag, Inc. v. Andrus, 580 F.2d 601, 610 (D.C. Cir. 1978) (letter from congressman to Secretary of the Interior "compromised the appearance of the Secretary's impartiality" and required remand without any showing of prejudice). See also Klaeren. Permitting Section 39.2 hearings to be partially political and legislative simply cannot be squared with the ban on *ex parte* communications and remain consistent with the due process requirements of the Fifth Amendment or consistent with the rights of the Petitioner under the First Amendment. If the proceedings are legislative and political, the ban on *ex parte* communications violates the Petitioner's First Amendment rights. The constitutional

infirmity is exacerbated if political pressure by opponents is permitted unless the Petitioner can meet the nearly impossible burden of proving actual prejudice.

C. The *ex parte* communications violated fundamental fairness

An analysis of *ex parte* communications or political pressure "must focus on the *nexus* between the pressure and the actual decision maker." ATX, Inc. v. Department of Transportation, 41 F.3d 1522, 1527 (D.C. Cir. 1994). The nexus in the Rochelle proceeding is crystal clear -- two council members immediately announced that they had voted in accordance with what they perceived to be the wishes of their constituents, strongly suggesting that they had not made the decision based on the evidence, but on "public clamor." In addition, the CCOC and other opponents engaged in an extensive, post-filing lobbying campaign, making personal, *ex parte* contacts with Council members before, during and after the siting hearing to make their political opposition known.

The CCOC President, Frank Beardin, who sat at counsel table with the CCOC's attorney during the hearing, contacted Councilman Ed Kissick on approximately six occasions ***after the application was filed*** to express the CCOC's opposition. Pet. Ex. 1, p. 2 (Interrogatory Answer: "Frank Bearden [sic] telephoned Mr. Kissick at Mr. Kissick's office on approximately one-half dozen occasions after the filing of the application"). Mr. Kissick attempted to back off that admission, claiming he was no longer sure just when Mr. Beardin had called him (Tr. 110-16 & 119-20), and Mr. Beardin claimed to not remember making such post-filing calls because he "knew that we were not to talk to them," but that Mr. Kissick's "memory may be better than mine." Tr. 174. However, that interrogatory answer constitutes a binding judicial admission (See, e.g., Van's Material Co. v. Department of Revenue, 173 Ill.App.3d 284, 290, 527 N.E.2d 515, 518, 123

Ill.Dec. 52, 55 (1st Dist. 1988)), which could not be contradicted at trial. See, e.g., In re Estate of Rennick, 181 Ill.2d 395, 406-07, 692 N.E.2d 1150, 1156, 229 Ill.Dec. 939, 945 (1998).

Mr. Beardin also twice contacted Councilman Wendell Colwill ***after the application had been filed*** to express the CCOC's opposition to siting. Tr. 128-29. Although Mr. Colwill claims the same thing that all the Council members say – that they always told people who approached them they could not discuss the issue – the real point is that the CCOC regularly flexed its political muscle after the application had been filed and before, during and after the hearing. The CCOC encouraged such *ex parte* contacts, organizing an extensive letter writing campaign whereby dozens of letters were sent to the Council members expressing opposition to the expansion. Pet. Ex. 4 (letters saved by Councilman Alan Hann) & Tr. 198-200. During a weekend recess in the hearing Mr. Beardin went to the homes of Councilmen Bubik and Hann and possibly also to those of Kissick and Colwill to ask them to view a video he obviously felt might influence them to vote against the siting. Tr. 193-96.

Councilman Bubik saved the video (Pet. Ex. 14 & 15), admitting that he was approached ***during the hearing*** by the CCOC President, who asked him to watch a taped television program, "Touched by an Angel," that was supposedly "about landfills." Tr. 64. Although Mr. Beardin disingenuously denies that he provided that video to the Council members on a Sunday ***during a weekend recess in the hearing*** to influence their vote (Tr. 186), that is clearly not true. The television program, which was aired on Saturday, March 1, 2003, during the hearing's weekend recess (Tr. 31-32), dramatizes the same theme (See Pet. Ex. 20) that Mr. Beardin repeatedly used in his many letters to the

editor of the local newspaper expressing his opposition to the landfill. In his letters to the editor, Mr. Beardin argued that the Council should not "sell your children's and grandchildren's health" (Petitioner Exhibit No. 11), that we are "entrusted by the Lord with a very small portion of this Earth for a short time" and that the Council should be more concerned about the good quality of life for future generations, not the "short term greed" of the host fees (Petitioner Exhibit No. 10).[4]

Thus, ***right in the middle of the hearing*** (during which Mr. Beardin sat at counsel table as the president of a party to the proceedings), Mr. Beardin made contact with up to four of the Council members (Tr. 183, 193-94) and offered them a religiously-oriented video dramatizing precisely his political argument that government should worry more about the environment and future generations than about the potential host fees. Mr. Beardin's denial that he did that in order to influence the Council's vote is disingenuous. Tr. 186. Mr. Beardin did not offer the video to Mayor Gingerich precisely because he knew the Mayor's "stance" on the landfill. Tr. 195-97. Pet. Ex 17 (Gingerich votes for siting approval). That Mr. Bubik chose not to watch the video is not as important as the fact that the CCOC, a party to the proceedings, initiated ***ex parte*** contacts with Council members ***during the hearing*** in order to influence the decision politically and to remind

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[4] The bookmarked DVD (Pet. Ex. 15) quickly reveals that the CCOC President was clearly attempting to dramatize the theme of his letters:

"The government ought to be paying more attention to topsoil erosion, industrial pollution, global warming. These things are real, ocean levels are rising, coral reefs are disappearing. Oh, it's happening and we know it. No one seems to care."

"Money isn't the answer to everything."

"You know there comes a time in everybody's life when you have to decide what is most important and it usually isn't money."

"You think this is about money. This isn't about money. This is about the lives of our grandchildren. It's about leaving them a planet where they can live healthy lives. It's about creating a better world for all of us, and it's about doing it before it is too late."

"You have a responsibility to think about the future of this planet, but you didn't. You just thought about the money."

"So the future of the world is in your hands."

those decisionmakers of CCOC's involvement and strong – even religious – beliefs in the matter. Tr. 93-94. Notably, Mr. Bubik was also warned by another local merchant that if he voted in favor of siting he might well end up sitting alone in church. Tr. 146-47.

Another inappropriate *ex parte* communication, which the facts would indicate impacted Mr. Bubik, was Ken Roeglin giving Mr. Bubik a March 16, 2003 (i.e., post-hearing and pre-decision), article from a Florida newspaper stating unequivocally that landfill "liners meant to contain leachate often fail over time, allowing leachate to leak out and contaminate the aquifer." Pet. Ex. 8. After the decision Mr. Bubik explained to Tom Hilbert that one of the reasons he had voted against the expansion was because he had seen that article. Tr. 79. That post-decisional statement is admissible, and it indicates that Councilman Bubik relied on matters directly contrary to the evidence.

There was utterly no sworn testimony that landfill liners leak, and the only testimony in the record was exactly to the contrary. Hydrogeologist Steven Stanford testified that he was unaware "of any Subtitle D landfills anywhere in the nation that have indicated detectable releases, and I am also aware that the dean of the College of Engineering at the University of Illinois has indicated the same finding on his own." Tr. 03303, p. 121. Thus, Mr. Bubik's "impartiality might reasonably be questioned" by an objective observer. Although the same article was made part of the public comment record, this document came to Mr. Bubik's attention because of Mr. Roeglin's *ex parte* contact.

The Council engaged in utterly no discussion of the issues, never conferred with one another, never conferred with their legal counsel, never conferred with the environmental consultants retained by the City to advise them, and they issued findings

on the various criteria without providing any reasons for those findings. See Resp. Ex. 5 (Minutes of 4/24/03 meeting); Pet. Ex. 17 (Transcript).[5] Although some cases in this area have suggested such procedure passes muster (See, e.g., E & E Hauling, 116 Ill.App.3d at 616, 451 N.E.2d at 577-78, 71 Ill.Dec. at 609-10), these cases pre-date Klaeren. Moreover, their suggestion is not appropriate where *ex parte* political pressures have been applied (and, based upon decisionmakers' statements, apparently have been successful) and an appearance of impropriety exists, particularly where that has been created by an actual ***party*** to the proceedings, such as the CCOC, who does not disclose the contacts and unabashedly treats the whole process as political.

In ATX, for example, the decisionmaker was insulated from the congressional influence, he "issued a lengthy opinion based on the administrative record" and he had not suddenly reversed course or reached a weakly-supported determination from which one "might infer that pressure did influence the final decision." 41 F.3d at 1529. In this case, by contrast, the City's counsel and environmental consultant recommended that the Application be approved, and the Hearing Officer recommended that the Application be approved, but without any discussion, without any explanatory opinion, without any reference to the administrative record and with an obviously erroneous finding that Criterion (ix) had not been met, the Council simply voted "no" on criteria as to which there had been no rebuttal evidence. Then, the Council members publicly justified their decision on the basis of purely political "public clamor" considerations. This is not due process. Under these circumstances, there is a clear appearance of impropriety, and an objective observer would question whether the *ex parte* contacts "may" have influenced

[5] With only five members, no two members of the Council could have met alone under the Open Meetings Act, and this record is devoid of any Council meeting involving any such conferral or discussion.

the decision. A siting decision reached in this manner should be reversed because it violates due process and is fundamentally unfair.

In E&E Hauling, Inc. v. PCB, 116 Ill.App.3d 586, 607, 451 N.E.2d 555, 571, 71 Ill.Dec. 587, 603 (2d Dist. 1983), aff'd, 107 Ill.2d 33, 41 N.E.2d 664, 89 Ill.Dec. 821 (1985), the court used the five-part inquiry set forth in PATCO v. Federal Labor Relations Authority, 685 F.2d 547, 564-65 (D.C. Cir. 1982), to determine "whether, as a result of ex parte communications, the [local siting authority's] decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the [siting authority] unfair." That five-part inquiry has been utilized by courts and the Board ever since, and the inquiry includes consideration of gravity, influence, benefit, disclosure and whether vacating the decision and remanding for new proceedings would serve a useful purpose. 116 Ill.App.3d at 607, 451 N.E.2d at 751, 71 Ill.Dec. at 603.

Although the five-part test is a reasonable outline of the factors to be considered, the Petitioner respectfully suggests that it has been applied incorrectly in cases such as E&E Hauling and Land and Lakes Co. v. Randolph County Board of Commissioners, PCB 99-69 (2000), in that decisionmakers have been improperly permitted to testify that such *ex parte* contacts did not influence them even though the victims of such contacts have been precluded from proving the opposite. See Hearing Brief (Hearing Officer Ex. 1). The Petitioner respectfully also suggests that, particularly following Klaeren, this is an issue of due process, and the issues of gravity, influence, benefit, disclosure and useful purpose should be analyzed under an objective standard (i.e., without regard to the subjective and self-serving opinion of the decisionmakers) using the standards normally applied to judges or jurors subjected to *ex parte* communications. The issue is whether

the contacts "may" have influenced the ultimate decision, and that should be analyzed objectively similar to the issue of whether a "judge's impartiality might reasonably be questioned." Illinois Supreme Court Rule 63C(1).

With respect to the "gravity" of the communication, it is certainly relevant that many of the *ex parte* communications in this proceeding were by a ***party*** to the proceedings – the CCOC. Similarly, the CCOC directly benefited from those *ex parte* contacts in that they were able to persuade the council to vote against the siting application, and there is good evidence that the Council decided the issue based not upon the record, but upon the influence of that special interest group.

Also, these contacts ***were not disclosed*** until after the hearing. Just as Illinois Supreme Rule 63A(4)(a)(ii) requires that a judge promptly notify all parties of the substance of any *ex parte* communication and allow an opportunity for response, the Council members who were approached and the ***party*** who approached them, such as the CCOC, should have immediately disclosed such *ex parte* communications. See also Louisville Gas and Electric Co. v. Commonwealth of Kentucky, 862 S.W.2d 897, 901-02 (Ky.Ct. Apps. 1993) (parties' and Public Service Commission members' "failure to disclose" *ex parte* contacts required that the decision be vacated).

In a case such as this, where a ***party*** to the proceedings makes repeated, undisclosed efforts before, during and after the hearing to influence the decision through improper *ex parte* communications, and where members of the Council announce that they have voted in accordance with what they believe to be that political sentiment, there is strong reason to believe that the siting process has been subverted and that a new and fairer hearing should be required. Those persons who avail themselves of the right to

participate in these proceedings as parties (e.g., the CCOC) should not be permitted to use such tactics, particularly where it appears, as here, that the tactics were successful, that the wrongdoers benefited from their conduct and where the decisionmakers indicate that political concerns were an important basis for the decision. The Petitioner was denied a fundamentally fair hearing because of those tactics.

D. The Council's *ex parte* reconsideration violated fundamental fairness.

On April 24, 2003, the hearing ended with a final decision by the Council to deny the Application on the grounds that the Petitioner had, among other things, failed to meet Criterion (ix). Four days later, without notice to the Petitioner, the Council reconsidered its decision and reversed its obviously erroneous finding under Criterion (ix) that the site was in a regulated recharge zone. In addition, the Council purported to impose special conditions which it had failed to impose at the time of its final decision on April 24, 2003.

That reconsideration of an already final decision was illegal and violated fundamental fairness in that the Council's purported action was designed to correct an obvious error in the siting decision and to make it appear as though the Council had actually based its decision on the record rather than political influence. The transcript of that subsequent April 28 meeting (Pet. Ex. 19) sets forth the so-called "City's Staff's Attorney's" explanation as to why these changes supposedly needed to be made: (1) the Criterion (ix) error was evident and might result in the Board's reversal of the entire decision (See also Pet. Ex. 22) and (2) if the decision were reversed, the attorney thought the Council should "conditionally" adopt the conditions the Council's staff and Hearing

Officer had recommended – recommendations the Council had ignored just as they had ignored their staff's and Hearing Officer's recommendations that siting be approved.

Earlier that same day Mr. Helsten had called one of the in-house attorneys for the Petitioner (but not the attorney who handled the siting proceedings and was counsel of record for the Petitioner) and told him that Mr. Helsten was concerned that the clearly erroneous finding on Criterion (ix) could cause the PCB to reverse the Council's decision outright and that he would appear that evening to suggest these changes ***but that no action could be taken by the Council until the following Wednesday (April 30)***. Tr. 159 & Pet. Ex. 22.

The purported reconsideration on April 28 was illegal because although a Council may reconsider final action "at the same meeting," it may not do so once that meeting adjourns. "The City Council, upon adjournment of its meeting, has no power to reconsider its action where the rights of other persons have intervened." City of Kanakee v. Small, 317 Ill. 55, 61-64, 147 N.E. 404, 407-408 (1925). See also Ceresa v. City of Peru, 133 Ill.App.2d 748, 754, 273 N.E.2d 407, 411 (3d Dist. 1971) (motion to reconsider may not take place at subsequent meeting). The supposed "reconsideration" of the decision to impose conditions and to correct the Criterion (ix) finding are fundamentally unfair because they evince an effort to cover up and conceal what really happened – the Council, influenced by numerous, inappropriate undisclosed ***ex parte*** communications by a party, sought to give an appearance of legitimacy to its decision which it did not deserve. In effect, through the illegal reconsideration, the Council sought to prevent the Board from ascertaining whether the *ex parte* communications had resulted in actual prejudice to the Petitioner and tainted the decision. The reconsideration, although wholly

ineffective, is evidence to be considered by the Board on the issue of fundamental fairness and prejudice. It was designed to create an appearance that the Council based their decision on the record (an appearance which, as the true record reflects, is not correct), and the reconsideration was ineffective because the Petitioner's right to show that the decision was based on political pressure, not the record, "had intervened." Village of North Barrington v. Village of Lake Barrington, 8 Ill.App.3d 50, 52, 288 N.E.2d 242, 244 (2d Dist. 1972) (where annexation petitioners' rights had intervened, Village could not reconsider annexation ordinance "at subsequent meeting").

III. The Council's denial of siting was against the manifest weight of the evidence

The Council found that the Petitioner had failed to prove compliance with Criterion (i) (need), Criterion (ii) (design, location and operation), Criterion (iii) (incompatibility and effect on value of surrounding property), Criterion (vi) (traffic) and Criterion (ix) (regulated recharge zone).

When the Board reviews a local siting decision, the scope of review is to determine whether that decision was against the "manifest weight of the evidence." Land and Lakes Co. v. Pollution Control Board, 319 Ill.App.3d 41, 48, 743 N.E.2d. 188, 193, 252 Ill.Dec. 614, 619 (3rd Dist. 2000). A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain or indisputable from a review of the evidence. Land and Lakes, 319 Ill.App.3d at 53, 743 N.E.2d at 197, 252 Ill.Dec. at 623. "The province of the hearing body is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of witnesses. Merely because the Board could reach a different conclusion, is not sufficient to warrant reversal." Lowe Transfer, Inc. v. County Board of McHenry County, PCB 03-221, pp. 8 & 22 (2003) (siting denial upheld

based on "abundance of contradictory expert testimony"). Where – as in this case – the Petitioner has presented a *prima facie* case on each of the various criteria based on the ***unrebutted testimony*** of impressive expert witnesses, a decision denying siting is clearly against the manifest weight of the evidence. Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board, 227 Ill.App.3d 533, 549, 592 N.E.2d 148, 159, 169 Ill.Dec. 661, 672 (1st Dist. 1992) (siting denial reversed where city "did not offer contradicting or impeaching evidence to rebut" applicant's "*prima-facie* showing as to each criterion"). In this case, there was utterly no testimony rebutting the Petitioner's *prima facie* evidence as to ***any*** of the criteria, the only conceivable exception being the testimony of the CCOC's hydrogeologist who, although he testified to certain "concerns" regarding the "location" element of Criterion (ii) (Tr. 3/4 57, 78, 112, 158, 159 & 160, C7406, C7416B, C7456B-57B), provided absolutely ***no opinion*** as to whether or not the Expansion was so located as to protect the public health, safety and welfare under Criterion (ii). Thus, there was actually no rebuttal as to Criterion (ii) either. The Council's negative decision on Criteria (i), (ii), (iii), (vi) and (ix) was contrary to the recommendations of its environmental consultants, contrary to the recommendation of the Hearing Officer and against the manifest weight of the evidence.

CRITERION (i). NEED

The only witness who testified as to Criterion (i)[6] was Ms. Sheryl Smith called by the Petitioner. Ms. Smith, a solid waste consultant with 20 years of experience in the industry (Tr. 2/25 15-16, C6963-63A) who has reviewed or prepared need reports for

[6] Criterion (i) requires that the Applicant demonstrate that ***"the facility is necessary to accommodate the waste needs of the area it is intended to serve."*** 415 ILCS 5/39.2(a)(i). All the Applicant needs to show is "that the proposed facility is 'expedient' or 'reasonably convenient' *vis-à-vis* the area's waste needs, not that it is "necessary in absolute terms." *E & E Hauling*, 116 Ill.App.3d at 609, 451 N.E.2d at 573, 71 Ill.Dec. at 605.

fifteen waste disposal facilities (Tr. 2/25 16-17, C6963A-64), determined that the Expansion was necessary to serve the waste needs of its designated service area. Tr. 2/25 33-34, C6972-72A. The proposed service area includes the 21 northernmost counties in Illinois comprising the Agency's Regions 1 and 2. Tr. 2/25 22, C6966A; App. Ex. 44.

Ms. Smith determined the projected population for each county in the service area over the projected 25 year life of the Expansion from 2006 to 2030. Tr. 2/25 20, C6965A. She then reviewed those counties' solid waste plans to determine the expected per person waste generation rates, which provided a total waste generation number for the service area. That figure was reduced in accordance with the recycling goals from each county plan to "come up with the net amount of waste requiring disposal from the service area over the 25-year planning period." Tr. 2/25 20, C6965A. In addition to reducing the net waste generation figure by the recycling goals, Ms. Smith's calculation further (and more conservatively) also reduced that figure by a "waste capture rate" based on the likelihood that the waste from any specific county in the service area would actually be disposed of at the Expansion. Tr. 2/25 24-25, C6967A-68. Thus, although her "broad brush" approach preliminarily suggested that the service area would have a capacity shortfall of 123 million tons, Ms. Smith used a "market share analysis" to more conservatively assess whether there was need for the Expansion. Tr. 2/25 24-26, C6967A-68A. Using that methodology, Ms. Smith determined that during the anticipated life of the Expansion, the service area would actually have a shortfall of between 17,360,954 million tons and 67,978,296 million tons of solid waste depending upon whether or not each county met its recycling goal, the likelihood of which, Ms. Smith

concluded, was "not very high." Tr. 2/25 30-31, C6970A-71. Ms. Smith's calculation of this net capacity shortfall is shown in App. Ex. 48. See also A173.

Ms. Smith derived that shortfall by first calculating net waste generation of the service area for the anticipated life of the Expansion and then determining the permitted disposal capacity available to the service area as of January 1, 2006. She determined that, depending on recycling, the service area would generate between 73.1 million and 123.7 million tons of solid waste. See App. Ex. 46 & A155.

Ms. Smith then evaluated those disposal facilities available to receive waste from the service area in order to ascertain "whether there's enough capacity at those facilities to receive the waste required to be disposed of from the service area over the planning period." Tr. 2/25 20, C6965A. Facilities which have been planned and locally sited need not be considered in determining need if they have not yet been permitted by the IEPA. See Tate v. Pollution Control Board, 188 Ill.App.3d 994, 1019-20, 544 N.E.2d 1176, 1193-94, 136 Ill.Dec. 401, 418-19 (4th Dist. 1989). Ms. Smith's investigation indicated that of the 37 disposal facilities servicing the service area (App. Ex. 47), more than half will be closed by 2006 when the Expansion opens. Tr. 2/25 29, C6970. The remaining capacity of those landfills available to the service are is only 55.8 million tons, which means the service area has a capacity shortfall of between 17,360,954 tons and 67,978,296 tons (depending on the achievement of recycling goals). App. Ex. 48 & Tr. 2/25 30-31, C6970A-71. Ms. Smith thus concluded there is need for the Expansion's capacity of 17,274,000 tons (A130), particularly because it is unlikely the recycling goals would actually be achieved.

In addition to the service area's capacity shortfall, Ms. Smith also based her opinion of need on the basis that the existing facility will reach capacity in 2006, that the Expansion will provide a minimum of 20 years of capacity for Ogle County, that the use of alternate facilities (which will be required if the Expansion is not approved) will be a more costly alternative for the City, that the Ogle County Host Agreement and Solid Waste Management Plan both contemplate the economic benefits and environmental safeguards to be provided by the Expansion and acknowledge an expansion of the Rochelle Landfill and that the capacity serving the service area will be depleted by 2010. Tr. 2/25 33-35, C6972-73. App. Ex. 49.

The Council's determination that the Petitioner failed to prove need is clearly erroneous because there was utterly no testimony to the contrary, and the arguments made by the attorney for the CCOC were, as the Council's Hearing Officer determined, essentially "political." Hearing Officer Report 15. In essence, the CCOC's attack on Ms. Smith's determination of need was their suggestion that

> Ms. Smith's opinion is based on the assumption that no additional disposal capacity will come on-line during the life of the proposed expansion and that the Orchard Hills has sufficient disposal capacity to dispose of Ogle County's waste for more than 20 years. ***CCOC's argument is more political than legal as it contravenes well established legal principles.*** Hearing Officer Report 14-15 (emphasis added).

The Hearing Officer determined that the Petitioner had "successfully proven compliance with Criterion 1" and recommended that the Council find that the facility was necessary to accommodate the waste needs of the area it was intended to serve. Hearing Officer Report 17. Basically, the Hearing Officer noted correctly that consideration of Ogle County's need alone would be inappropriate "and would result in the reversal of any special condition limiting the service area or a reversal of the denial of siting." Hearing

Officer Report 15. In addition, the Hearing Officer correctly stated that "[c]ontrary to the suggestion of CCOC, it is inappropriate to consider unpermitted capacity in determining the available disposal capacity." Hearing Officer Report 16. There was simply no basis in the record for determining that the Petitioner had failed to prove need, and the City Staff Attorney (who now attempts to defend the Council's decision) also concluded that the Petitioner had satisfied Criterion (i). City Staff Report 14. The Council's decision on Criterion (i) was contrary to the unrebutted expert testimony establishing need, was based on political considerations, not evidence, is against the manifest weight of the evidence and should be reversed.

CRITERION (ii). DESIGN, LOCATION AND OPERATION

The Petitioner called three witnesses with respect to Criterion (ii),[7] Mr. Daniel L. Zinnen, the engineer who designed the landfill, Mr. Steven Stanford, the hydrogeologist who investigated the Subject Site, and Mr. Clyde Gelderloos, the landfill operator. Mr. Zinnen testified to location standards, landfill design and the proposed plan of operations (also relevant to Criterion v). Mr. Stanford testified to location from the standpoint of hydrogeology, and Mr. Gelderloos also testified regarding the plan of operations. There was no rebuttal testimony regarding the design and operations, and, significantly, the Council concluded that the Petitioner had proven compliance with Criterion (v) – plan of operations. Resp. Ex. 5. Thus, it is apparent the Council based its Criterion (ii) decision on merely the hydrogeology aspect of the location element of that criterion. That was, according to the Council's Hearing Officer, the "real issue." Hearing Officer Report 21.

[7] Criterion (ii) requires that the Applicant demonstrate that ***"the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected."*** 415 ILCS 5/39.2(a)(ii).

In that regard, the CCOC called only one witness, Charles F. Norris, a hydrogeologist who testified to "concerns" regarding the hydrogeology, but who, significantly, ***failed to offer any opinion as to whether or not there was compliance with Criterion (ii)***. Thus, the Petitioner's three experts were unrebutted as to their opinions that Criterion (ii) had been met, and under Industrial Fuels the Council's decision on that criterion was against the manifest weight of the evidence.

(a) Design

Mr. Zinnen is a licensed professional engineer in Illinois, Indiana, Wisconsin and Michigan as well as an Illinois professional land surveyor and has worked extensively in the field of environmental and solid waste engineering since 1985, having worked on over 100 landfills and transfer stations. Tr. 2/25 132-35, C7022-23B.

After graduating from the University of Illinois with a Bachelor of Science degree in agricultural engineering with a concentration in soil and water conservation engineering, Mr. Zinnen worked with several consulting engineering firms in the field of environmental and solid waste engineering. Tr. 2/25 134, C7023. Since 1998 Mr. Zinnen has been with Weaver Boos Consultants, Inc., and is currently a principal, managing the Downers Grove office with a staff of approximately 25 people including four professional engineers and one land surveyor. Tr. 2/25 134-35, C7023-23B.

Mr. Zinnen is quite familiar with the existing facility, having first worked there in 1993 when he was employed by Foth and Van Dyke, which had been hired by the City of Rochelle to study the feasibility of continuing the Rochelle Landfill operations. Tr. 2/25 136, C7024. Mr. Zinnen also worked for the City of Rochelle and for the Petitioner on the existing facility from 1994 to 1998 in connection with the significant modification

permit allowing the construction of Unit 2, Phases I and II. From 1998 to the present Mr. Zinnen has continued to work on the existing facility while at Weaver Boos. Mr. Zinnen had primary responsibility for compiling the various expert reports into the present eight volume Application. Tr. 2/25 137, C7024B.

Mr. Zinnen testified that the existing facility was originally permitted in 1972, beginning operations on the 80 acre parcel at the southeast quadrant of the intersection of the Union Pacific Railroad and Mulford Road. The original disposal unit, Unit 1, is the easterly-most 31 acres of that 80 acre site and is depicted App. Ex. 82. Unit I was built without any liner or leachate collection and removal system. Tr. 2/25 138, C7025.

Unit 2 is a 27 acre site developed under the modern Subtitle D landfill regulations and includes a composite liner system and a leachate collection and removal system. Unit 2 is the westerly-most 27 acres of the existing facility and is separated from Unit 1 by a narrow "separation zone" known as Unit 3. Tr. 2/25 138-39, C7025-25B. Unit 3 is basically a French drain intended to intercept any groundwater impacted by the waste from Unit 1 so that it can be collected before it gets to the new Unit 2 area. Tr. 2/25 139, C7025B. As part of the Expansion, the Petitioner has proposed to exhume the waste in the old, unlined Unit 1 and to relocate it in the new, lined Expansion. Tr. 2/25 139-140, C7025B-26.

Mr. Zinnen testified in detail as to the design of the landfill, concluding that the Expansion is so designed that the public health, safety and welfare will be protected if the Expansion is permitted. Tr. 2/25 182, C7047. Mr. Zinnen testified that the purpose of a landfill is to provide for the permanent disposal of waste in a manner that "minimizes the potential release of contaminants to the environment." Tr. 2/25 146, C7029. That is done

by designing the landfill so that it includes "engineered control systems." A342 & Tr. 2/25 146 & 162, C7029 & C7037. Those systems include the bottom composite liner system (A342), the leachate collection and disposal system (A350-53), the final cover system (A361-63 & App. Ex. 108), the landfill gas management system (A363-66 & App. Ex. 110) and the storm water management system. A366-68 & App. Ex. 111.

Using photographs to illustrate how a landfill is constructed (App. Exs. 88-107), Mr. Zinnen explained how all of those systems are designed and constructed pursuant to rigorous quality control standards. See Tr. 2/25 151-62, C7031B-35B (liner); App. Ex. 100; Tr. 2/25 163-67, C7037B-39B & Tr. 2/25 218-220, C7064B-7065B (leachate collection and removal system having five days storage although only one day required); Tr. 2/25 168-70, C7040 & App. Ex. 108 (final cover system); Tr. 2/25 172, C7042 (gas management system); App. Ex. 111 & 112, A336-367 & Tr. 2/25 174-77, C7043-44B (storm water management system including interior system providing 152 acre feet of storm water storage even though the 100-year, 24 hour storm event would generate only 90.4 acre feet).[8] Mr. Zinnen also testified that his firm had provided several other "geotechnical evaluations" regarding the landfill, the details of which are set forth in the Application. A345-50 & Tr. 2/25 177-78, C7044B-7045. Under all of those analyses, the Expansion design "met all of the factors of safety required by the regulations." Tr. 2/25 178, C7045. There was no rebuttal testimony on this point.

(b) Location

[8]Many aspects of the proposed Expansion have been designed well beyond what is required by the minimum state standards. Thus, this interior drainage system has been designed with an excess storage capacity of 61 acre feet over what would be required for the 100-year, 24 hour storm, the regulations only requiring that the design be able to handle the 25-year, 24 hour storm event. Tr. 2/25 176, C7044. This interior drainage system provides more detention capacity than any other facility Mr. Zinnen knows. Tr. 2/25 177, C7044B.

Mr. Zinnen

Mr. Zinnen testified that there are three different kinds of location standards -- natural conditions, manmade conditions and natural conditions potentially impacting the landfill's performance. The first are standards meant to minimize the effect the landfill may have on any nearby natural conditions, such as sensitive natural areas, historic sites (archeologically or architecturally), proximity to regulated recharge zones or sole source aquifers, proximity to wild or scenic rivers, impact on endangered species or habitats and proximity to any water quality management area. Tr. 2/25 142-43, C7027-27B.

In this regard, Mr. Zinnen testified that the only regulated recharge area designated in Illinois is near Peoria and that therefore the Expansion meets Criterion (ix) (Tr. 2/25 143, C7027B); that the Expansion is not located in a 100-year flood plain and that therefore the Expansion also meets Criterion (iv) (Tr. 2/25 145, C7028B); that the Expansion impacts no nature preserve, natural area, historic site, wild or scenic river (Tr. 2/25 142-43, C7027-27B), endangered species or habitat or water quality management area. Tr. 2/25 143, C7027B. The Expansion also complies with all applicable location standards involving manmade conditions, such as setbacks from dwellings, schools or hospitals, distance from airports, setbacks from wells and screening by fencing, berms and landscape plantings. Tr. 2/25 143-46, C7027B-7029. The nearest municipal well, which is located in Creston, is approximately 5,000 feet from the Expansion, which is approximately five times further than the maximum setback zone that could be applied to that well. Tr. 2/25 144, C7028. As far as location standards minimizing the potential effects of natural features on the landfill's performance (Tr. 2/25 145, C7028B), the landfill is not located in the 100-year flood plain (Tr. 2/25 145, C7028B), not within 200

feet of an active fault, not in an area of underground mines or karst features and not within a seismic impact zone. Tr. 2/25 145, C7028B. Thus, Mr. Zinnen testified that his review of the applicable location standards indicated that the Expansion meets or exceeds all applicable regulatory location standards. Tr. 2/25 145- 46, C7028B-29. There was no rebuttal testimony.

Mr. Stanford

The Petitioner called Mr. Stanford, a hydrogeologist employed by Weaver Boos Consultants as a senior project manager, to testify regarding the Expansion's location from the standpoint of the Subject Site's geology and hydrogeology. Tr. 3/3 56,C7255B. Mr Stanford prepared three reports for the Application. The first is a voluminous Description of the Hydrogeology (A2008-3844) appearing in volumes IV and V of the Application. Mr. Stanford's Groundwater Impact Assessment ("GIA") (A3939-4590) and Groundwater Monitoring Program ("GMP") (A4591-696) comprise volume VI. Such a GIA and GMP are Agency requirements and will be reviewed by Agency experts before any permit is ever issued, but these are ***not*** required as part of a local siting application. Nevertheless, the primary criticism of the CCOC hydrogeologist was regarding the GIA and GMP – exactly the same criticism that witness always makes in all the siting hearings in which he is involved.

Mr. Stanford has a Bachelor of Science degree in geology from Indiana University, 1985, as well as a Master of Science degree in hydrogeology and geochemistry from Purdue University, 1998. Tr. 3/3 57, C7256. He is a licensed professional geologist in the States of Illinois and Indiana. Tr. 3/3 57, C7256. Mr. Stanford has worked as an environmental hydrogeologist for more than 17 years, during

that time logging over 15,000 feet of exploratory borings, personally supervising the installation of more than 300 monitoring wells and investigating the hydrogeology of dozens of facilities, including municipal solid waste landfills, hazardous waste facilities and other installations. Tr. 3/3 58, C7256B. Those investigations have included geophysical surveys, hydraulic testing of aquifers and aquitard materials, the analysis of thousands of soil samples and groundwater samples, groundwater flow modeling and transport modeling. Tr. 3/3 58, C7256B. Mr. Stanford has taught college level geology at Purdue University and had mentored more than 30 geologists, engineers and environmental scientists on hundreds of consulting assignments. Tr. 3/3 58, C7256B.

Mr. Stanford concluded, after an extensive hydrogeological investigation, that the Subject Site "is an excellent location for a landfill as proposed by the applicant" (Tr. 3/3 115, C7285B) and "that the proposed facility is so located from a geologic and hydrogeologic standpoint that as required by Criterion (ii) the public health, safety and welfare will be protected were the landfill permitted." Tr. 3/3 115-16, C7285B-86. Mr. Stanford explained there were several bases for that opinion.

First, the Subject Site has thick and laterally continuous deposits of the highly impermeable Tiskilwa clay till, which "serves as an effective aquitard and separates the base of the landfill from the top of the uppermost aquifer." Tr. 3/3 116, C7286. That till is a minimum of 20 feet thick under the base of the proposed landfill, and in many places it is in excess of 100 feet thick. Tr. 3/3 64, C7259B.

The second basis for Mr. Stanford's opinion is that the uppermost aquifer is itself separated from the sandstone aquifer by the lower dolomite aquitard or the fine grain tills in the bedrock valley at the north central part of the Subject Site. Tr. 3/3 116, C7286.

Third, the development of a landfill will reduce the already low rates of vertical recharge and further slow the already slow rates of groundwater movement. Tr. 3/3 117, C7286B. Fourth, because the landfill will be separated from the lower sandstone aquifer (which serves as a regional aquifer) by several confining units, there are many opportunities to monitor for potential releases before the sandstone aquifer could be impacted by any leak from the landfill. Tr. 3/3 117, C7286B. Thus, Mr. Stanford concluded, the Subject Site is, "from a hydrogeological standpoint . . . an excellent location for a landfill" (Tr. 3/3 117, C7286B) – the site geology and hydrogeology being the most favorable he had ever seen for such a facility. Tr. 3/3 132, C7294.

Mr. Stanford explained the interrelationship between the hydrogeological investigation, the GIA and the GMP. The hydrogeological investigation identifies the aquifers beneath the site. Tr. 3/3 60, C7257B. Based on that information, the GIA evaluates potential impacts in each aquifer (i.e., what would happen to those aquifers – and when – if leachate leaked from the landfill). Tr. 3/3 60, C7257B. Based on the GIA, "the groundwater monitoring program specifies a network of monitoring wells to be regularly tested and analyzed to check for evidence of contamination at the locations where you would first expect in the event of a release." Tr. 3/3 60, C7257B.

In order to conduct his hydrogeological investigation, Mr. Stanford, who was already familiar with the geology of Illinois, conducted a review of the literature available for the area of the Subject Site, finding over 30 useful reports and publications from the Illinois Geological Survey, the Illinois State Water Survey and the United States Geological Survey. Tr. 3/3 61, C7258. In addition, because the Subject Site had already been extensively investigated by other engineering firms and geologists, Mr. Stanford

had a great deal of site specific information. Tr. 3/3 61, C7258. Mr. Stanford testified he "was impressed by both the quantity and the quality of the data" available regarding the Subject Site. Tr. 3/3 62, C7258B.

Preliminarily noting that the topography of the area slopes from east to west so that the Village of Creston to the east occupies the high ground (App. Ex. 56), Mr. Stanford testified that surface water drained from east to west and that he would expect groundwater to also move that way. Tr. 3/3 63-64, C7259-59B. The general geology of the area is depicted in App. Ex. 57. Mr. Stanford explained that the first formation encountered at the Subject Site consists of a thick, "relatively impermeable" layer of clay rich till known as the Tiskilwa formation. Tr. 3/3 64, C7259B. That till is 50-100 feet thick over much of the Subject Site (and will be a minimum of 18 feet thick under the base of the proposed landfill (Tr. 3/3 109, C7282B)) and acts as an aquitard or confining unit through which groundwater would move "only very slowly." Tr. 3/3 65, C7260. At the base of the Tiskilwa formation in many areas beneath the Subject Site, there is a layer of sand, which sits above the first bedrock encountered beneath most of the Subject Site, which is the Platteville dolomite. Tr. 3/3 64, C7259B. The upper portion of the Platteville dolomite is weathered and "relatively permeable, but at deeper depths that dolomite rock is unweathered, much less permeable and behaves like an aquitard restricting the downward flow of groundwater. Tr. 3/3 65, C7260. Mr. Sanford explained that the overlying sands and the upper, weathered portion of the dolomite together comprise the Subject Site's "uppermost aquifer" (Tr. 3/3 88 & 99, C7272 & C7277B), which is the appropriate focus for the Groundwater Monitoring Program. Tr. 3/3 128, C7292. Beneath the unweathered dolomite aquitard lie the shale and sandstone

of the Glenwood/St. Peter formation, which comprise the top half of the main regional aquifer. Tr. 3/3 66-67, C7260B-61.

Mr. Stanford testified the Subject Site's geology was determined by drilling soil boring all across the Subject Site and keeping boring logs and samples. That provides a picture of the geology, and the hydrogeology is then determined through several other methods, including completing some of those borings as monitoring wells. By comparing the water levels or heads of wells terminating in the same aquifer, a picture of the hydrogeology or groundwater flow emerges because water flows downhill. Tr. 3/3 68-69, C7261B-62. In addition to the direction of flow, one also needs to know the rate of flow, and that in turn depends upon the gradient (i.e., the slope of the flow), the permeability of the geologic strata and the porosity of the material. Tr. 3/3 68-70, C7261B-62B.

Mr. Stanford testified that a geologist refers to the investigation of subsurface conditions as the "characterization" of a site – the drilling and other efforts put into understanding those subsurface conditions. Tr. 3/3 71, C7263. Explaining that the Subject Site had been the subject of 118 borings at 79 separate locations forming a grid across the Subject Site (depicted in App. Ex. 58), Mr. Stanford testified that he had never seen as many borings at any proposed landfill site. Tr. 3/3 71, C7263. The available data, which Mr. Stanford verified for accuracy or gathered anew, included not only those 118 borings (62 advanced to the top of the bedrock, 36 penetrating 10 or more feet into the bedrock and 7 advanced 50 or more feet into the bedrock), but also 81 monitoring wells, 144 soil samples, 23 sets of water level measurements from May 1996 through July 2002, and numerous field and laboratory tests of permeability or hydraulic

conductivity, including 79 slug tests, 36 packer tests and 30 laboratory permeability tests. Tr. 3/3 80-81, C7267B-68. See also App. Exs. 60 & 61.

The Subject Site had been so thoroughly characterized that Mr. Stanford testified it was "most extensive site characterization" he had ever seen, far more than is typical for local landfill siting approval application and much more than what the Agency would require even for a construction permit – an investigation that "far exceeded the minimum site characterization requirements in the State of Illinois." Tr. 3/3 82, C7268B. For example, the Agency requires a minimum of 20 soil borings, whereas the Subject Site has 118. Tr. 3/3 82, C7268B. The Agency only requires four quarterly water level measurements, whereas the Subject Site has had 23 such sets of data. Tr. 3/3 82, C7268B. This additional data merely confirmed Mr. Stanford's preliminary opinion that the Subject Site would be an excellent location for a landfill. Tr. 3/3 79, C7267.

After assuring himself that the characterization data for the Subject Site was adequate, Mr. Stanford then used that data to assess the geology and hydrogeology of the Subject Site. He started by preparing a topographic map of the bedrock surface (App. Ex. 62) from the 62 borings advanced to the bedrock. Tr. 3/3 82-84, C7269-70. Understanding that bedrock topography was important because the bedrock surface is the major part of the uppermost aquifer, and "the shape and structure of the surface is going to have an influence on the groundwater flow beneath the site." Tr. 3/3 84, C7270. Also, one of the important features of that bedrock surface map is the valley in the north central part of the Subject Site.

Using the grid of 118 boring across the Subject Site (App. Ex. 58), Mr. Stanford prepared 14 cross sections of the Subject Site, A-A' through E-E' running east and west

and F-F' through N-N' running north and south. A2148-61. Those cross sections, each representing a slice through the earth to show the subsurface geology, were done with 10:1 vertical exaggeration, meaning that in order to best illustrate the geological strata, the scale is ten times greater in the vertical direction. For that reason, vertical details, such as the so-called bedrock valley, are greatly exaggerated. As shown on cross section E-E' (App. Ex. 63), the true scale drawing at the bottom reveals that the bedrock valley is really just a "broad depression in surface of the bedrock," not a steep valley at all. Tr. 3/3 86, C7271.

Mr. Stanford used three of the cross sections (E-E', J-J' and M-M') to illustrate the geology of the Subject Site during the hearing. Each depicts the laterally continuous, low permeability Tiskilwa till at the top of the Subject Site having a thickness of generally 50-100 or more feet. App. Exs. 63-65. Tr. 3/3 85-86, 92-94, C7270B-71, C7274-75. Over most of the Subject Site, the subsurface is much like M-M' (App. Ex. 65), which in turn is very much like the idealized cross section (App. Ex. 57) that Mr. Stanford expected at the Subject Site based on the regional geology. Tr. 3/3 94, C7275. The bedrock valley is somewhat different, but over most of the Subject Site, the geology consists of 50-100 feet of the Tiskilwa clay, which overlies the sands and weathered surface of the dolomite (forming the uppermost aquifer of about 20-35 feet), which overlies 35-75 feet of the lower dolomite aquitard, which overlies 200 feet of the Glenwood/St. Peter sandstone aquifer. App. Ex. 57. Thus, the majority of the Subject Site looks like cross section M-M' with the bedrock forming "a relatively broad plain" under 50-100 feet of clay. Tr. 3/3 94-95, C7275-75B & App. Ex. 65.

Mr. Stanford used cross sections E-E' and J-J' to illustrate that small area of the Subject Site over the bedrock valley, pointing out that where the dolomite is eroded away, the Petitioner already has monitoring wells in the Glenwood/St. Peter Sandstone, which is an excellent place to monitor groundwater flow in the area of the bedrock valley. Tr. 3/3 88, C7272. Cross section J-J' illustrated another important relationship between the landfill design and the hydrogeology because it reflects an outline of the base of the landfill. App. Ex. 64. The shallow, more permeable sands and gravels of the so-called Henry formation will be largely excavated during the course of landfill construction. Tr. 3/3 91-92, C7273B-74.

Once having determined the geology of the Subject Site, Mr. Stanford then prepared potentiometric surface maps of the water table, the uppermost aquifer and the Glenwood/St. Peter in order to better understand the hydrogeology. A2123-37 (maps of water level surfaces on four dates in 1999, 2001 & 2002). Using the potentiometric maps for July 10, 2002 (App. Exs. 66-68), Mr. Stanford testified that groundwater flow in the shallow water table was essentially the same as surface water flow – from east to west. Tr. 3/3 98-99, C7277-77B. In the uppermost aquifer the flow corresponded to the ridge in the bedrock at the westerly portion of the Subject Site with groundwater flowing in basically all four directions from that high point. Tr. 3/3 100, C7278. The steepest horizontal gradients were into the bedrock valley, and that might indicate some connection between the uppermost aquifer and the Glenwood/St. Peter sandstone in the area of the valley, but Mr. Stanford said that also may be nothing more than that the seals of the two wells at that location (the G57 well) are cross connected. Tr. 3/3 251-52, C7353B. In any event, because of the possibility of connection between the uppermost

aquifer and the Glenwood/St. Peter, Mr. Stanford testified he took that possibility into account in performing the GIA. Tr. 3/3 100, C7278B.

The potentiometric map for the Glenwood/St Peter was not a reliable indicator of flow direction or gradient, according to Mr. Stanford, because there were only five wells for the entire site, and they are completed in different geologic units at dissimilar elevations. Tr. 3/3 102, C7279. Therefore, all the map indicated was that the gradients in that formation are rather shallow. Tr. 3/3 102-03, C7279-79B. Thus, in order to understand flow direction in that regional aquifer, Mr. Stanford looked to a more regional view as reflected in App. Ex. 69. That exhibit shows the results of the 1995 Illinois Water Survey analysis of the water levels in the Glenwood/St. Peter with the heads at the Creston municipal wells at about 800 feet MSL and the Rochelle wells to the west about 740 feet MSL. That study also indicated that the groundwater divide (also depicted on App. Ex. 69) was several miles east of Creston with water to the west of that divide flowing to the west in the Glenwood/St. Peter sandstone. Tr. 3/3 103-04, C7279B-80. At the Subject Site the heads in the Glenwood/St. Peter wells are at about 780 feet MSL, which is entirely consistent with such an east to west flow (i.e., away from the Creston wells, not towards them as suggested by the CCOC's witness, Mr. Norris). Tr. 3/3 104, C7280.

The other significant fact about the potentiometric maps is that they indicate a downward vertical gradient with head levels getting lower in the lower aquifers. Tr. 3/3 104-06, C7280-81. If the aquifers were actually connected (as Mr. Norris has suggested (Tr. 3/4 82-83, C7418-18B)), there would not be three different water tables. Tr. 3/3 106, C7281. Thus, the potentiometric surface maps indicate that the aquifers are in fact

confined, not directly connected to one another and that the direction of flow at the Subject Site is downward, not upward as is the case at some sites. Tr. 3/3 104-08, C7280-82. Mr. Stanford further explained that similar fluctuations in water table levels in the various aquifers did not indicate direct hydraulic connection between them (as Mr. Norris suggested), but were likely just the result of the result of the weight of water and the effect of that pressure on lower confined aquifers. Tr. 3/3 252, C7354. Other likely causes of that similar fluctuation in confined aquifers would include the effect of storage and barometric pressure. Tr. 3/3 252-53, C7354-54B.

Mr. Stanford also testified that he had calculated the rate of flow horizontally in the uppermost aquifer, concluding that the rate horizontally is from 4 inches to 4 feet per year, which is from 12 to more than 200 times faster than the vertical flow rates. Tr. 3/3 108-10, C7282-83. That makes the uppermost aquifer the best formation to monitor because any contaminants leaking from the landfill would move more quickly laterally than vertically in that formation. Tr. 3/3 109-10, C7282B-83. Mr. Stanford also did a water balance analysis to check his calculations against the reported recharge rate for the area, and that confirmed that "water currently moves downward at a very slow rate at approximately one-quarter of an inch per year." Tr. 3/3 114, C7285.

Mr. Stanford thus concluded that the proposed Expansion is so located from a geologic and hydrogeologic standpoint that the public health, safety and welfare will be protected if the Expansion is permitted. Tr. 3/3 115-16, C7285B-86. He proceeded to further confirm that opinion by performing the Groundwater Impact Assessment or GIA. The GIA is a conservative analysis performed with computer modeling to demonstrate in accordance with Agency requirements, that even if the landfill does leak, groundwater

will not be impacted 100 feet from the waste boundary for at least 100 years after closure of the landfill approximately 28 years from now. Tr. 3/3 117-18, C7286B-87. Such a GIA is not required for local siting approval but is an Agency requirement for permitting purposes and was requested by the Petitioner so as to demonstrate to the Council the safety of the landfill's geological and hydrogeological location. Tr. 3/3 118, C7287B. Mr. Stanford used the computer program Migrate V9, the program most commonly used for Agency permit applications. Tr. 3/3 119-20, C7288-88B.

The GIA is required to use highly conservative assumptions. For example, the Agency requires not only the assumption that the landfill leaks, but that it had over 300 leaks. That is a very conservative assumption because Mr. Stanford does not believe the landfill will have any leaks. He is unaware of any such lined, Subtitle D landfill leaking anywhere in the United States, which the Dean of the University of Illinois Engineering School also recently confirmed to be the case. Tr. 3/3 120-21, C7288-88B.

Mr. Stanford also assumed that there would be one foot of leachate all across the landfill liner (Tr. 3/3 150 & 243, C7303 & C7349B) even though the liner is sloped so that such a build-up could not actually occur and even though the landfill has a leachate collection and removal system. Tr. 3/3 121, C7288B. Mr. Stanford further assumed that the leachate would retain its full strength for 128 years even though it would actually degrade into carbon dioxide and water, "which are both completely inert." Tr. 3/3 122-23, C7289-89B. In the real world, according to Mr. Stanford, if leachate actually took 200 hundred years to reach an aquifer, there would be by that time "almost nothing left of it." Tr. 3/3 253-54, C7354B-55. Mr. Stanford further ignored the beneficial effects of

retardation, which also occurs in the real world because contaminants do not actually move as quickly as the water. Tr. 3/3 122, C7289.

The GIA was further made conservative by treating several of the minor sand seams in the Tiskilwa – seams which actually appeared to be discontinuous -- as if they were actually continuous pathways for potential contaminant migration. Tr. 3/3 123, C7289B. In fact, in response to questions from the City's attorney, Mr. Stanford agreed that the published literature indicates that the Tiskilwa till is remarkably uniform with the sand lenses being discontinuous, which is consistent with Mr. Zinnen's reported observations at the Subject Site, including what he has seen in open excavations there. Tr. 3/3 246-47, C7351-51B.

Although when the landfill is constructed, it will significantly reduce the recharge to the Subject Site and consequently reduce the rates of lateral flow in the uppermost aquifer, Mr. Stanford's GIA assumed no such reduction in the rates of groundwater flow. Tr. 3/3 123-24, C7289B-90. Also, even though the lower dolomite is a aquitard, Mr. Stanford "modeled it much more like an aquifer and a fractured one at that." Tr. 3/3 124, C7290. Finally, because of the conservative method he used to estimate vertical dispersion coefficients, the exaggerated horizontal flow rate incorporated into the GIA computer model similarly exaggerated the vertical transport of contaminants. Tr. 3/3 124, C7290.

Despite all those highly conservative assumptions, Mr. Stanford determined through the GIA's initial or "baseline assessment" that there would be no groundwater impact on either the uppermost aquifer or the lower sandstone aquifer for more than 100 years after closure. Tr. 3/3 125, C7290B. Far exceeding the Illinois regulatory

requirement, the GIA showed that there would be no impact on the uppermost aquifer for more than 200 years and no impact on the Glenwood/St. Peter for more than 300 years. Tr. 3/3 125-26, C7290B-91. Because there will actually be both degradation of the leachate as well as real world retardation, Mr. Stanford opined that this landfill would never impact groundwater in the uppermost aquifer. Tr. 3/3 126, C7291. That means, according to Mr. Stanford, that "this landfill is well-designed and it's well-matched to the hydrogeologic conditions at the site." Tr. 3/3 126, C7291.

In addition to the baseline analysis, Mr. Stanford also performed a "sensitivity analysis," running the model 92 additional times. That confirmed that there would be no impact on groundwater quality anywhere within the uppermost aquifer or the sandstone aquifer for at least a hundred years following closure. It also confirmed that the sand deposits within the till together with the uppermost aquifer constitute the most appropriate focus for the groundwater monitoring program. Tr. 3/3 127-28, C7291B-92. On the basis of the GIA, Mr. Stanford developed that Groundwater Monitoring Program or GMP, a network of 51 monitoring wells encircling the Subject Site (as depicted in App. Ex. 74), which will be regularly sampled and analyzed to monitor for potential releases from the landfill. Tr. 3/3 128-29, C7292-92B. Mr. Stanford noted that groundwater flow direction is subject to the annual review and reporting and that adjustments to the plan may be necessary over time. Tr. 3/3 129-30, C7292B-93. Mr. Stanford's opinion is that the GMP, which will certainly be modified and expanded, will provide for the reliable protection of potential releases from the proposed Expansion. Tr. 3/3 131, C7293B.

Mr. Stanford summarized well his reasons for believing that the Subject Site is an excellent location for the proposed Expansion:

> The site geology and hydrogeology are the most favorable that I've ever seen for a facility like this. We have here among the deepest deposits of low permeability and clay till anywhere in the State of Illinois. The groundwater impact assessment including five separate conceptual models supported by 92 different sensitivity analyses indicates that the landfill will comply with all of the groundwater protection requirements. Moreover, because the GIA indicates no impacts anywhere in the uppermost aquifer let alone the underlying sandstone aquifer, the groundwater protection standard is not only met by the proposed facility, but far exceeds it. The hydrogeology of the site provides many opportunities for monitoring before potential impacts can reach the regional sandstone aquifer below. Finally, the sandstone aquifer below is separated from the base of the landfill by two aquitard units, confining units including the Tiskilwa Till and dolomite aquitard. The proposed Rochelle Municipal Landfill No. 2 expansion has been designed to take advantage of the existing hydrogeology and is therefore protective of the public health, safety and welfare. Tr. 3/3 132-33, C7294-94B.

Mr. Norris offered no opinion to rebut Mr. Stanford's opinion that the Expansion met Criterion (ii) and would protect the public health, safety and welfare. In addition, the CCOC's cross-examination of Mr. Zinnen and Mr. Stanford provided no impeachment of their positive opinions as to design and location.

Although the CCOC questioned groundwater impacts in the Unit 3 French drain along the uncertain Unit 1 waste boundary (Tr. 3/4 70-72, C7412B-13B), such impacts might be expected from such an obsolete, unlined area (which RWD essentially inherited from the City when it took over Rochelle's existing landfill -- Unit 1). The more salient point is that there is already a Subtitle D landfill at the Subject Site (Unit 2), which ***has*** been proven protective of the public health, safety and welfare as evidenced by both the Agency permit and the fact that Unit 2 is ***not*** impacting Unit 3, which is in close proximity. Tr. 3/4 70-73, C7412B-14. Obviously, the Agency has already concluded

that this engineering design and location meet the applicable state standards (as do the already approved Groundwater Impact Assessment and Groundwater Monitoring Program required for Unit 2's permit and operation), and the Application merely requested an Expansion. There was no evidence or suggestion that the Expansion will be any different than what the Agency has already permitted in this location or how the Expansion area is any different than the Unit 2 area.

The CCOC suggested numerous generic objections to the design and location -- that the HDPE liner may deteriorate in the presence of 100% solutions of chemicals (far in excess of normal leachate) (Tr. 2/25 200-05 & 286-87, C7055B-58 & C7098B-99); that the design only meets so-called "minimum" standards (Tr. 2/25 82 & 197, C6996B & C7054); that parts of the facility may have an inward gradient (as if that were an undesirable feature, which is not true) (Tr. 2/25 195-97, C7053-54); that geotextile clogging of the leachate collection system could be a problem even though it is not (Tr. 2/25 209-12, C7060-61B); that animals might get into the final cover drain pipes even though the pipes are screened to prevent that (Tr. 2/25 214, C7062B); that leachate storage might be insufficient (Tr. 2/25 219-23, C7065-67) even though RWD proposed far more than required (Tr. 2/25 177, C7044B); that foundation soils might compress (Tr. 2/25 224-27, C7067B-69); that final cover might experience differential settlement and require repairs (Tr. 2/25 227-33, C7069-72); or that small amounts of hazardous waste might be disposed of by consumers (nail polish, paint, etc.) as they are in every landfill without material impact. Tr.2/25 204-06 & 241-43, C7057B-58B & C7076-77. Those are all facile "objections" that could be leveled at ***any*** state of the art sanitary landfill. None of these supposed cross-examination points impeached or rebutted the Petitioner's

well- supported expert opinions that the proposed Expansion was safe from all standpoints – design, location (including hydrogeology) and proposed operations.

Mr. Norris

Mr. Norris, a geologist with Geo-Hydro, Inc., of Colorado, was the only witness called by the CCOC. Tr. 3/4 36-37 & CCOC Ex. 10, C7395B-96. Although Mr. Norris testified to various "concerns" he had with the hydrogeology (Tr. 3/4 57, 78, 112, 158, 159 & 160, C7406, C7416B, C7456B-57B), ***he provided no opinion as to whether or not the Expansion was so located as to protect the public health, safety and welfare under Criterion (ii)***. Significantly, he agreed with Mr. Stanford that the Subject Site has been extensively characterized. Mr. Norris stated:

> this site has -- for a landfill site probably has more piezometers, more borings more evenly spaced across the site than any I believe I have reviewed. So the data available for characterization is probably as or ***more extensive here than of any other site I have seen.*** Tr. 3/4 143-44, C7449-49B (emphasis added).

The only definite opinions Mr. Norris did offer were that the Petitioner's GIA – an analysis not required for local siting approval (Tr. 3/3 118, C7287) – had not accurately modeled existing site conditions, that the GIA had not "accurately predicted ***postdevelopment*** conditions for monitoring purposes" (Tr. 3/4 66, C7410B (emphasis added)), that the Tiskilwa till did not offer the degree of protection promised by the applicant and that the Petitioner's GMP would not be able to monitor the potential escape of contaminants because "***until the impact of the physical presence of this proposed site is modelled*** you can't even begin that exercise because you are working with a flow system that even the applicant acknowledges will be subject to a recharge shadow effect." Tr. 3/4 113-14, C7434-34B (emphasis added). Mr. Norris also suggested that the GIA

shows that the site will not meet the performance criteria for ammonia (Tr. 3/4 55-56, C7405-05B), but his claim ignores basic chemistry. As explained by Mr. Stanford, the GIA predicts a concentration at a given point in time, which is not additive to background concentrations. Tr. 3/3 156, C7306. Mixing two solutions of 0.5 mg/l will only increase the volume, not the concentration.

In other words, Mr. Norris, who has himself never performed a GIA (Tr. 3/4 139-40, C7447-47B), has never submitted a GIA to the Agency and has never even used the Migrate V9 computer program (Tr. 3/4 209-10, C7482-82B),[9] is suggesting that Mr. Stanford's GIA is flawed because it supposedly did not consider what would happen to the flow rates once the landfill was actually constructed because of that "recharge shadow." Mr. Stanford, who ***is*** familiar with the program and ***has*** performed GIA's, directly disputed that, pointing out that after construction there will be less recharge and that "***both*** vertical and horizontal rates of groundwater flow will be slowing down." Tr. 3/3 123-24, C7289B-90 (emphasis added). Thus, whereas Mr. Norris suggests "you can't even begin" to design a GMP until the reduced post-construction recharge has been modelled, Mr. Stanford testified that GIA did conservatively model that impact by retaining the faster rates of flow (i.e., sooner groundwater impacts). Tr. 3/3 123-24, C7289B-90.

As far as the Tiskilwa till is concerned, Mr. Norris' basis for suggesting that it was not as impermeable as represented by the Petitioner was (1) the R-107 monitoring well, which is screened in a sand lens and located about 150-200 feet from the edge of Unit 1, has methane gas impacts, which supposedly could not occur if the Tiskilwa were

[9] Mr. Norris acknowledges that Mr. Stanford is correct in stating (Tr. 3/3 119, C7287B) that Migrate V9 is the most commonly used GIA program accepted by the Agency. Tr. 3/4 209, C7482

really as impermeable as the Application suggests (Tr. 3/4 74-78, C7414B-16B);[109] (2) the similar seasonal water table fluctuations in the till and the lower aquifers (as reflected by Mr. Norris' hydrographs, which are CCOC Ex. 11, Norris J-N) supposedly "requires virtually an instantaneous connection of flow between those two materials" (Tr. 3/4 82-83, C7418B-19); and (3) at certain select locations the vertical gradient is lower between the overlying tills and the uppermost aquifer, which Mr. Norris contends (erroneously) can only be explained by a change in the water flux or hydraulic conductivity. Tr. 3/4 94, C7424B.

Norris conceded that the R-107 gas impact is likely due to nothing more than that Unit 1 and that nearby well are connected by the granular or sand unit in which that well is screened. Tr. 3/4 194-96, C7474B-75B. Thus, as the Council's Hearing Officer recognized, that provides utterly no basis for suggesting that the Tiskilwa till is less permeable than set forth in the Application. Hearing Officer Report 26. Mr. Norris contends that there is direct hydraulic connection between the till and the uppermost aquifer which is "likely" the result of fractures in the till (Tr. 3/4 152-53, C7453B-54), but that obviously is not possible because, as Mr. Stanford pointed out, if the units were directly connected, there could not be – as there clearly are – three distinctly different water tables. Tr. 3/3 106, C7281. Thus, the Council's Hearing Officer agreed that Mr. Norris could not be correct on this point. Hearing Officer Report 27. Although dismissing Mr. Stanford's testimony that the fluctuations were likely due to atmospheric or weight pressure on confined aquifers or storativity effects (Tr. 3/3 252-53, C7354-

[10]The Application states that, according to the slug tests, the Tiskilwa till has a geometric mean hydraulic conductivity of 1.4×10^{-6} cm/sec, which is several orders of magnitude less permeable than the most permeable intra-till granular units having a hydraulic conductivity of 3.1×10^{-3} cm/sec. A2049.

54B), Mr. Norris did vaguely concede that "the idea that it can be related to differences in storativity is something that can be pursued." Tr. 3/4 82-83, C7418B-19.

Mr. Norris' contention that lower vertical gradients at a very few of the monitoring well nests suggests "that the characteristics of the Tiskilwa till are dramatically different than the interpretations of the applicant"(Tr. 3/4 93, C7424) is an unsubstantiated hypothesis. There are a number of different reasons that the vertical gradient in select locations could be lower than the site wide average that have nothing to do with the hydraulic conductivity of the till. Mr. Norris concedes that a lower gradient may have nothing to do with the hydraulic conductivity and that his entire analysis in this regard might be based on "erroneous data." (Tr. 3/4 94-95, C7424B-25). Mr. Norris only implies that the lower vertical gradient, in a very few instances amongst an enormous amount of data, suggests a higher hydraulic conductivity in the Tiskilwa till than presented in the Application. He offers no evidence to verify his hypothesis. In fact, Mr. Norris' statements that the Tiskilwa till is so porous as to allow instantaneous flow throughout the unit (Tr. 3/4 82-83, C7418B-19) would mean that the Tiskilwa till would form an aquifer, which, as the Council's Hearing Officer noted, ignores the voluminous amounts of data contained in the Application and transcripts of this proceeding that unquestionably prove otherwise. Hearing Officer Report 26. In fact, the Tiskilwa till at the site is not considered a Potable Resource Groundwater by the state (impaired due to low conductivity) (A2065), the average hydraulic conductivity of the lower till is 1.4 E-06 cm/sec (A2184) and, as pointed out by the City (Tr. 3/3 246, C7351), the Illinois Geological Survey has noted that the Tiskilwa till is "remarkably uniform . . . any sand lenses would be discontinuous." It is typical of Mr. Norris' testimony that he picks out

an extraneous piece of data from a much larger and comprehensive data set to conjure up a hypothesis that contradicts the overwhelming weight of the evidence.

Mr. Norris' testimony must be considered in the context of the "puffing" of his supposed qualifications, his complete lack of experience in actually performing any of the work he is so quick to criticize and his obvious bias. Mr. Norris, who lists in his resume the degree "Ph. D., Hydrogeology, all but dissertation completed, 1992" has apparently been working on that degree for 33 years (although he only counts back to 1987). Tr. 3/4 136-37, C7445B-46. He was only licensed as a geologist in the past couple years. Mr. Norris claims in his resume that he was the "Project Manager and Hydrogeologist for a geologic and hydrogeologic assessment of a proposed regional landfill in Will County, Illinois," that he "documented numerous errors in the application" and that the "Application was approved with some 56 modifications." CCOC Ex. 10, Landfill Services. Although one might assume Mr. Norris was the siting authority's hydrogeologist responsible for imposing those numerous modifications, he fails to mention in the resume that the siting authority actually rejected his testimony, stating, among other things, in their Final Report:

> Due to the lack of concrete evidence and analysis backing Mr. Norris's claims the county does not support his view that the interpretation of the hydrogeologic investigation for the proposed site was performed incorrectly. Tr. 3/4 150, C7452B .

Mr. Norris has never designed a landfill. Tr. 3/4 138, C7446B. He has never operated a landfill. Tr. 3/4 138, C7446B. Mr. Norris has never performed a hydrogeological study for the development of a landfill. Tr. 3/4 138-39, C7446B-47. He has never performed a GIA, although Mr. Norris considers "virtually everything I do as a hydrogeologist a groundwater impact assessment" (Tr. 3/4 139-40, C7447-47B – using

the term "groundwater impact assessment" somewhat more loosely than the Agency. See 35 Ill. Admin. Code Section 811.317 (regulations governing procedures for performing a Groundwater Impact Assessment). He has never conducted a site characterization for proposed development of a landfill. Tr. 3/4 140, C7447B. Mr. Norris has never conducted field permeability for the purpose of conducting a hydrogeological evaluation of a proposed solid waste landfill. Tr. 3/4 144, C7449B. He has never prepared a siting application to develop a solid waste landfill. Tr. 3/4 144, C7449B. He has never prepared an application to the Agency for a permit to develop a solid waste landfill. Tr. 3/4 144-45, C7449B-50.

Mr. Norris also exhibits his bias by giving nearly identical testimony every time he testifies. He has testified in approximately 12 Illinois siting applications, always except one time – Wayne County – representing opponents of the siting and nearly always contending that the proposed groundwater monitoring was inadequate. Interestingly, at Wayne County, the single instance he ***did not*** represent an objector, Mr. Norris found the groundwater monitoring program to be adequate because the landfill was right on the banks of a stream, and any "leaks from that landfill would immediately show up as seeps in springs around the flanks of the property." Tr. 3/4 121-23, C7438-38B. Other than that siting, Mr. Norris has never seen an adequate groundwater monitoring program. It has been his common complaint against any siting application in which he has been involved. Thus, Mr. Norris found the groundwater monitoring program to be inadequate at the following sites:

- Fulton County (Tr. 3/4 119-20, C7437-37B)
- Marion County (Tr. 3/4 124, C7439B)
- Kankakee County (Tr. 3/4 124, C7439B)
- McHenry County (Tr. 2/4 130-31, C7442B-43)

- LaSalle County (Tr. 3/4 131-32, C7443-43B)
- East Peoria (Tr. 3/4 132-33, C7443B-44)
- Will County (Tr. 3/4 133-34, C7444-44B)
- Coles County (Tr. 3/4 134, C7444B)
- Ogle County (RWD's 2000 Application) (Tr. 3/4 134, C7444B)

Also, in each of the six cases in which Mr. Norris has testified for the CCOC's counsel, Mr. Mueller, in opposition to a siting application, he has found the groundwater monitoring program to be inadequate. Tr. 3/4 131-32, C7443-43B. Notably, in each of those cases Mr. Norris also testified that the siting criteria were not met, something he did not do in this case, ***never offering any opinion as to whether or not this Application meets Criterion (ii)***. Tr. 3/4 131, C7443. Thus, the opinions of Mr. Zinnen, Mr. Stanford and Mr. Gelderloos stand uncontradicted.

Ultimately, Mr. Norris is equivocal about nearly everything, expressing "concerns" rather than a definitive opinion as to whether or not the Expansion will actually impact the public health, safety or welfare. A perfect example is how he treats the potential impact on the Creston municipal wells, which are screened in the St. Peter sandstone about a mile east of the Subject Site. Despite uncontradicted evidence that groundwater in that aquifer is flowing from east to west and that the Creston wells are uphill from the Subject Site (Tr. 3/3 103-04, C7279A-80 & App. Ex. 69) and his own recognition that under such circumstances no landfill leak could ever reach the Creston wells because they would be "upgradient" (Tr. 3/4 156-57, C7455B-56), Mr. Norris nevertheless was willing to calculate a travel time of 169 years for a contaminant to leave the bottom of the landfill and reach those wells. Tr. 3/4 182-83, C7468B-69. He did that based on some data he thought he had looked at the time of the 2000 Application in connection with this same landfill even though he knew there was a problem with that

data (Tr. 3/4 179-81, C7467-68) and even though he did not know one way or the other whether those wells were actually up gradient or down gradient. Tr. 3/4 159, C7457 ("I do not have the data to say that the pumping levels in the Creston wells are below the site heads on-site). Similarly, Mr. Norris has never actually run the Migrate V9 program to see whether or not the Petitioner's GIA model would fail. Tr. 3/4 214, C7484B. Despite the cavalier and ambiguous claim he makes in CCOC Ex. 11, Norris D, that the "calculation failed," Mr. Norris admitted under questioning by the City Staff's counsel that he has no basis for knowing one way or the other whether the GIA model would fail. Tr. 3/4 214, C7484B ("I don't believe I testified that it would fail"). He apparently just wanted to leave that impression but be free to back away from it when pressed. Mr. Norris is the classic moving-target witness, never being definitive, forever expressing "concerns" and always, as he did in this case, criticizing the groundwater monitoring program.

(c) Operation

With respect to the plan of operations, the Petitioner called two witnesses, one being Mr. Zinnen, who testified to the operating plan he has prepared for the Expansion, and the other being Mr. Gelderloos, who testified to day-to-day operations. That testimony was relevant to both Criterion (ii) as well as Criterion (v). Significantly, the Council concluded that the Petitioner had met Criterion (v), and it is thus highly unlikely their negative decision on Criterion (ii) had anything to do with operations.

Mr. Zinnen

The landfill operating plan is set forth in writing and in substantial detail in the application (A1045-97) and deals with litter control, odor control, dust control, mud

tracking, vector control, noise control, CQA plan, hours of operation, waste placement procedures, daily cover, load checking procedures, landfill gas monitoring procedures and groundwater monitoring procedures. App. Ex. 113 & Tr. 2/25 178-79, C7045-45B. Closure and post-closure plans are also proposed for the Expansion. App. Ex. 114. A1065-73 & Tr. 2/25 180-82, C7046-47. Based on Mr. Zinnen's involvement in the design, the plans he has prepared for the Expansion and the investigations he has conducted, his opinion is that the facility is so designed, located and proposed to be operated that its siting will protect the public health, safety and welfare. Tr. 2/25 183, C7047B. That testimony was not impeached or rebutted.

Mr. Gelderloos

Mr. Gelderloos also testified to day-to-day operations, both with respect to how the Expansion is proposed to be operated so that the public health, safety and welfare will be protected under Criterion (ii) and so as to minimize the danger to the surrounding area from fires, spills and other operational accidents under Criterion 5. Tr. 2/26 32-33, C7141B-42. There was no rebuttal testimony or impeachment, and the Council found compliance with Criterion (v), indicating their apparent satisfaction with the operations element of Criterion (ii).

Significantly, both the Hearing Officer and the City Staff also concluded that the Petitioner had demonstrated compliance with Criterion (ii). See Hearing Officer Report 30; City Staff Report 50. The only issue on which there was real dispute in the testimony had to do with the hydrogeology aspect of the location element, and, as the Hearing Officer stated:

> The real issue involves the testimony of two hydrogeologists and the hydrogeologic suitability of the site. Steven Stanford testified for the

applicant. . . . Charles Norris testified on behalf of CCOC. Hearing Officer Report 21-22

The Hearing Officer went on to state that because Norris appeared "to be advocating from the witness stand" and because of his "frequently testifying for Mr. Mueller [the CCOC attorney] in opposition to Pollution Control Facilities, frequently offering opinions based on the same or similar grounds" "Mr. Norris' credibility is suspect." Hearing Officer Report 22.

The Hearing Officer agreed that the City Staff had "prepared an excellent list (with which I agree) and encapsulating its weighing of the [Stanford/Norris] testimony" (Hearing Officer Report 22-24) as follows:

1. Both Mr. Stanford and Mr. Norris agree that the site is the most throughly investigated site either has encountered for the purposes of a landfill siting application.
2. Mr. Stanford conducted a Groundwater Impact Assessment and is contained within Applicant's Exhibit #1.
3. A Groundwater Impact Assessment is not a requirement of the Rochelle Siting Ordinance for an application of local siting approval.
4. A Groundwater Impact Assessment is generally considered the most rigorous performance standard in regards to groundwater protection for facilities of this nature.
5. The City determined the Groundwater Impact Assessment contained within Applicant's Exhibit #1 was conducted in a manner which is consistent in methodology with that which has historically been acceptable to the Illinois Environmental Protection Agency for such an assessment.
6. Mr. Stanford testified that the results of the Groundwater Impact Assessment indicate that groundwater will be protected well in excess of the minimum IEPA standards.
7. Mr. Stanford testified that he has previously conducted Groundwater Impact Assessments for submittal and review by the IEPA for developments such as the one proposed in this case.
8. Mr. Norris testified he has never conducted a Groundwater Impact Assessments for submittal and review by the IEPA for developments such as the one propose in this case. Further, Mr. Norris testified he has never utilized the software which was utilized in the development this assessment.

9. Results of tritium and carbon dating analysis of groundwater obtained from the Creston municipal water well, summarized by Mr. Keith Hackley, Ph.D. of the Illinois State Geologic Survey, tend to support the claims of the applicant as to the rate of local groundwater recharge.
10. The exhumation and relocation of disposal Unit #1 would afford area groundwater the same degree of protection as demonstrated within the Groundwater Impact Assessment.

The City Staff, represented by the same lawyers now representing the Council, recommended that the City find that there had been compliance with Criterion (ii) and recommended the imposition of some special conditions. The Council's determination, arrived at apparently without any consultation with the City Staff or conferring with one another, is against the manifest weight of the evidence and evinces a complete disregard of the evidence and a capitulation to political pressure from the CCOC special interest group. The Council's decision as to Criterion (ii) is against the manifest weight of the evidence and should be reversed.

CRITERION (iii). COMPATIBILITY AND PROPERTY VALUE

The Petitioner presented two witnesses as to Criterion (iii),[11] Mr. J. Christopher Lannert, a landscape architect and urban planner who owns The Lannert Group, who testified to compatibility with the surrounding area (Tr. 2/24 64, C6713), and Peter J. Poletti (Tr. 2/24 120, C6769), a real estate appraiser who owns Poletti Associates, Inc., a real estate appraisal and consulting firm, who testified to the effect on property values. Mr. Lannert and Mr. Poletti were the only witnesses to testify regarding Criterion (iii), and their testimony was unrebutted.

[11] Criterion (iii) requires that the Applicant demonstrate that "***the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of surrounding property.***" 415 ILCS 5/39.2(a)(iii).

Criterion (iii) requires only that the applicant establish the facility be located to minimize, not eliminate, the effect on surrounding property values. File v. D&L Landfill, Inc., 219 Ill. App.3d 897, 907-08, 579 N.E.2d 1228, 1236, 162 Ill.Dec. 414, 422 (5th Dist. 1991). The law requires only that the location minimize incompatibility and effect on property values, not guarantee that no fluctuation will result. Clutts v. Beasley, 185 Ill. App.3d 543, 547, 541 N.E.2d 844, 846, 133 Ill.Dec. 633, 635 (5th Dist. 1989). Criterion (iii) does not require proof that the applicant can assure an odor-free facility or roads utterly devoid of stray papers. E & E Hauling, 116 Ill.App.3d at 614, 451 N.E.2d at 576, 71 Ill.Dec. at 608. Few applicants could gain approval under a standard so strict. Id. This criterion only requires an applicant to demonstrate more than minimal efforts to reduce the facility's incompatibility. File, 219 Ill.App. 3d at 907-08, 579 N.E.2d at 1236, 162 Ill.Dec. at 422. An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. T.O.TA.L. v. City of Salem, PCB 96-79, *21 (1996); Waste Management, Inc. v. Pollution Control Board, 123 Ill.App.3d 1075, 1090, 463 N.E.2d 969, 980, 79 Ill.Dec. 415, 426 (2d Dist. 1984). Criterion (iii) calls for the facility to be located so as to "minimize" incompatibility but does not allow rejection simply because there might be some reduction in value. A.R.F. Landfill, Inc. v. Lake County, PCB 87-51, *20 (1987).

(a) Compatibility

Mr. Lannert testified as to the compatibility of the Expansion with the character of the surrounding area, which is the first part of Criterion (iii). As set forth in his resume (App. Ex. 20), Mr. Lannert is a registered landscape architect in the State of Illinois and has practiced in the field of land planning, landscape architecture and community

consulting since graduating from Michigan State University with a Bachelor of Science in landscape architecture/urban planning in 1970. Tr. 2/24 65-66, C6714-15. The three primary areas of practice of The Lannert Group are landscape architecture, community consulting and land planning. Tr. 2/24 67-68, C6716-17. Since first being retained by Waste Management in connection with the Settler's Hill landfill in 1978, Mr. Lannert has testified in over 25 solid waste landfill siting applications and in connection with the siting of a dozen transfer stations. Tr. 2/24 68, C6717. All of those involved minimizing incompatibility with the character of the surrounding area under Criterion (iii). Tr. 2/24 68-69, C6717-18.

In addition to being a registered landscape architect in the State of Illinois, Mr. Lannert is also a member of the American Planning Association, the Urban Land Institute and the American Society of Landscape Architects. He has served as a board member and is President of the Landscape Architecture Foundation, and he is presently one of four board members on the Illinois Department of Professional Regulation Board regulating conduct of landscape architects. Tr. 2/24 68-69, C6717-18. Mr. Lannert's written report is contained in the Application. A5058-102.

Mr. Lannert's methodology involved an evaluation of the Expansion with specific attention to land use and zoning within approximately one mile of the Subject Site. He consulted aerial photographs, the Creston Zoning Ordinance, the Ogle County Amendatory Zoning Ordinance and Comprehensive Plan, the Ogle County Atlas and Plat Book, the Ogle County Solid Waste Management Plan, the Ogle County Pollution Control Facility Siting Ordinance, the City of Rochelle Municipal Code and the City of Rochelle Comprehensive Plan including the Zoning Ordinance and related documents.

A5064 and Tr. 2/24 70-71, C6719-20. The Lannert Group also conducted a field survey with numerous follow up field investigations of the Subject Site and its environs throughout May and June of 1997 with additional site visits during the January, February and August of 1999 as well as June and July of 2001 to update portions of the report. A5065.

Utilizing an aerial photograph, which had been prepared to show existing land use and zoning (App. Ex. 3), Mr. Lannert testified that the Subject Site, approximately 319 acres in size, has an underlying zoning of I-2 General Industry. Most of the property surrounding the site is used for farm fields and is zoned agricultural. Tr. 2/24 72, C6721. The Subject Site is situated south and adjacent to the right-of-way of the Union Pacific Railroad, east of Mulford Road and north of Creston Road. Immediately to the west of the Subject Site is a large finger of industrial property within the corporate limits of Rochelle, and across the railroad tracks to the north is a large tract of A-1 Agricultural District property which is subject to an annexation agreement with the Village. Tr. 2/24 72, C6721. Approximately 80 percent of the land within a one mile radius of the Subject Site is either used or zoned for agricultural purposes. Tr. 2/24 73, C6722. Another 14 or 15 percent is used or zoned for industrial purposes, and for that reason Mr. Lannert concludes that the character of the surrounding area is compatible with the proposed Expansion.

Mr. Lannert's report contains twelve Off Site Area Views in order to demonstrate the character of the surrounding area from various vantage points around the Subject Site. Tr. 2/24 74, C6723 & A5089-90. In order to confirm his opinion that the Expansion would be compatible with the surrounding area, Mr. Lannert also prepared a series of

Computer Landform Models which are essentially before and after photographs showing, with the use of computer modeling, what the Subject Site will look like once the landfill is finished. Although all of those views appeared in the report, several of them were specifically displayed during the hearing. App. Exs. 8-15.

As those Computer Landform Models confirmed, although the finished Expansion will range in height from 70 to 130 feet over grade, when viewed from half a mile or a mile away, it adequately blends into the surrounding, undulating land and fence rows. Tr. 2/24 78, C6727. According to Mr. Lannert, the Expansion "nestles into the horizon very nicely." Tr. 2/24 79, C6728.

The Lannert Group also prepared a landscaping plan for this facility, which calls for the top to be planted with wild flower drifts, a relocated entry, berms along the easterly and southerly boundaries and plantings including overstory trees, evergreen trees, ornamental trees as well as shrubbery material. Tr. 2/24 81-82, C6730-31. Mr. Lannert noted that the 30 to 40 foot landscape berm along Creston Road is quite unique in that it is entirely separate from the landfill itself and is designed to screen the Village of Creston from the landfill. Tr. 2/24 82-83, C6731-32. The construction of that berm goes well beyond the typical efforts to screen a landfill. Tr. 2/24 83, C6732.

Mr. Lannert's opinion is that the proposed Expansion is compatible with the character of the surrounding area, and the bases for his opinion are that 80 percent of the surrounding land use is either agricultural or open space, the nearest residential unit is over 725 feet from the waste boundary and over 520 feet from the Subject Site boundary, that the existing railroad to the north and the surrounding roadways to the east, south and west provide adequate setback and buffer for the Expansion and that the Subject Site is

located in an I-2 General Industry zoning district which specifically provides for landfills as a special use and that the facility, as shown on the landscape plan, is properly screened and buffered from the surrounding area by berms and plantings. There was no rebuttal testimony.

(b) Property Value

Mr. Poletti testified regarding the second leg of Criterion (iii), which is whether the Expansion is located so as to minimize any effect on the value of surrounding property. As set forth in his resume (App. Ex. 21), Mr. Poletti is an appraiser and a member of the Appraisal Institute, awarded the MAI designation by that organization. He is a Certified General Appraiser in the States of Illinois, Missouri, Iowa, Tennessee, Kentucky and Indiana, and since 1977 he has been the Township Assessor of Collinsville Township in Madison County, Illinois.

Mr. Poletti holds a Bachelor of Science from the University of Illinois, a Masters Degree in Geography from Southern Illinois University in Edwardsville and a Ph. D. in American Studies from St. Louis University. Mr. Poletti has appraised various types of property, primarily industrial and commercial, and has been involved in Criterion (iii) evaluations as well as landfill evaluations, quarry evaluations and the valuations of numerous other types of commercial and industrial developments as well as single family residences. Mr. Poletti has taught for the Appraisal Institute as well as for the Illinois Assessment Institute. Tr. 2/24 120-21, C6769-70.

Mr. Poletti has worked on approximately 25 different landfills, including siting proceedings, usually representing applicants but sometimes representing siting

authorities. About 10 percent of his business or professional time is devoted to solid waste facility siting proceedings.

Mr. Poletti's methodology involves looking at the surrounding area and the site, having personal contact or meetings with local people as well as representatives of the Petitioner, examining transfers of property within the general area and reviewing the literature as well as previous studies he has done. Tr. 2/24 124-25, C6773-74. His local contacts in this case involved realtors, the Ogle County Supervisor of Assessments, the Dement Township Assessor and the Rochelle Assessor. Tr. 2/24 124-25, C6673-74.

Mr. Poletti compared the sale prices of properties within a target area in relatively close proximity to the landfill with the sale prices in a control area "that is considered to be a zone where property values would not be affected." Tr. 2/24 128, C6777. In making the comparison between the control area, including Rochelle, which Mr. Poletti felt would not be affected by the landfill, and the target area, including Creston, which Mr. Poletti felt was close enough to the Subject Site to potentially be affected, Mr. Poletti looked at two factors, appreciation rates and prices per square foot. Tr. 2/24 129-31, C6778-80. He did that because he wanted to know both how fast prices were changing within the target area versus the control area as well as the price per square foot to see if there was already an impact between the target area and the control area. Tr. 2/24 130-31, C6779-80.

With respect to appreciation rates, Mr. Poletti found 27 resales within the control area and four resales within the target area. App. Ex. 29. The target area appreciation rate was 7.2 percent per year, whereas the control area was only 4.2 percent per year. App. Ex. 30. Although Mr. Poletti expected that the rates would become more

comparable over time, that study generally showed that there is "really no difference in appreciation rates for the control area versus the target area." Tr. 2/24 132, C6781.

In order to compare prices per square foot, Mr. Poletti attempted to compare similar properties. Tr. 2/24 133-34, C6782-83. Therefore, he removed sales involving related parties or other non-market situations, only considered houses constructed since the mid-1950s, excluded sales on tracts larger than five acres, excluded homes with large outbuildings and excluded bi-level or tri-level homes. All of that was done to ensure that the square footage comparison was comparing comparable properties. Within the target area Mr. Poletti identified 10 sales, whereas the control area had 80 sales. The average price per square foot in the target area was $78.52, while the control area price per square foot was $78.97. Tr. 2/24 136, C6785 & App. Ex. 33. Mr. Poletti's conclusion, after performing a statistical analysis, was that "there was no difference in sales price between properties within the target area . . . [and] those within the control area." Tr. 2/24 137, C6786.

Even after Mr. Poletti had modified his analysis to eliminate two outlying sales, he still concluded there was no statistically significant difference in sales price per square foot between properties in the target area and properties in the control area. App. Ex. 34.

Both of those studies dealt with residential properties because he was unable to find any sales of farm land or larger residential tracts in the target area. However, from similar studies he had performed in Coles County, Livingston County, Roxanna, and Clinton, Illinois and West St. Louis County, Missouri, Mr. Poletti concluded that neither farmland nor larger residential tracts have any apparent differences in value as a result of

being located near a landfill versus being located some distance away. Tr. 2/24 138-39, C6787-88 & A5141-72.

Mr. Poletti also noted certain anecdotal evidence of no such difference, mostly involving properties in close proximity to the Expansion that have sold in recent years. For example, a house and two lots on Creston Road facing the landfill sold for $143,000, and the house subsequently sold for $111.25 per square foot in July 1999. Another house near the landfill sold in March 2000 for $139,700 or $72.01 per square foot, which was 94% of its asking price. Tr. 2/24 141, C6790. The Rich's house very near the landfill sold in August of 2001 for $256,000 or $102.40 per square foot.

Mr. Poletti's opinion is that the proposed Expansion is so located to minimize any impacts on property values in the surrounding areas.

Both the City Staff and the Hearing Officer recommended that the Council find that the Petitioner had met Criterion (iii) establishing both a minimization of incompatibility with the surrounding area and a minimization of the effect on the value of surrounding properties. City Staff Report 62; Hearing Officer Report 36 & 38. The Council's decision to the contrary evinces a disregard of the evidence and undoubtedly results from the fact that the Council members never conferred with the City Staff or with each other and instead relied upon *ex parte* political pressure by the CCOC to make their decision.

CRITERION (vi). TRAFFIC PATTERNS

The sixth Criterion[12] is whether traffic patterns to or from the Expansion are so designed as to minimize impact on existing traffic flows. The issue is not whether there

[12] Criterion (vi) requires that the Applicant demonstrate that "***the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows.***" 415 ILCS 5/39.2(a)(vi).

will be any negative impact but whether any impact on traffic flow has been minimized. Fairview Area Task Force v. Illinois Pollution Control Board, 198 Ill.App.3d 541, 554, 555 N.E.2d 1178, 1187,144 Ill.Dec. 659, 668 (3rd Dist 1990). RWD called one witness, traffic and transportation engineer Michael A. Werthmann, to testify regarding Criterion (vi), and he was the only witness to testify regarding traffic. Mr. Werthmann's report included in the Application (A5498-636) was supplemented by his written responses to traffic questions raised by hearing participant, Susan Kivikko. App. Ex. 124. There was no rebuttal testimony.

Mr. Werthmann was qualified as a traffic engineer and expert. He has practiced in that profession for the last 13 years since graduating in 1989 with a Bachelor of Science in Civil Engineering from Michigan State University. He is presently a partner and principal in the firm of Kenig, Lindgren, O'Hara, Aboona, Inc., and he is a registered professional engineer in the State of Illinois. Tr. 2/24 182-83, C6831-32. Mr. Werthmann has worked on Criterion (vi) traffic studies for approximately 10 to 12 landfills and 10 to 12 waste transfer stations. Tr. 2/24 183, C6832. Although he was first retained by RWD to prepare the traffic study for this Application, he was initially involved with the Rochelle Landfill because he was hired by the City in connection with RWD's 2000 application to review the traffic report on behalf of the City. Tr. 2/24 92-94, C6741-43. In order to prepare the traffic study for this Application, Mr. Werthmann collected and reviewed a great deal of information and data, contacting a number of people. He reviewed the prior application, the new Application, the Rochelle Zoning Ordinance and other information regarding the existing landfill. Tr. 2/24 184, C6833. He also spoke to officials with the Illinois Department of Transportation, the Ogle

County Highway Department, the Dement Township Road District, various representatives and officials of the City, the City Manager, the City Director of Public Works as well as interested citizens and the Citizens Advisory Committee appointed by the Council to review the landfill. Tr. 2/24 184-85, C6833-34.

Mr. Werthmann initially conducted a field investigation, driving the roadways and understanding the operating characteristics of the roadway system, visiting the Subject Site approximately 10 to 11 times. Tr. 2/24 185, C6834. He also investigated historical traffic counts, accident data, proposed roadway improvements and proposed developments in the area, and he spoke to officials to see if there were any particular concerns regarding the landfill or how the existing roadway system was operating. Tr. 2/24 186, C6835. Finally, Mr. Werthmann collected data, including weekday morning and evening peak period traffic counts at a number of intersections, 24 hour classification counts on Illinois 38, a gap study at the intersection of Illinois 38 and Mulford Road and a survey of train activity along the Union Pacific Railroad to the north of the Subject Site. Tr. 2/24 186, C6835.

Mr. Werthmann testified that the landfill is located south of the Union Pacific Railroad and east of Mulford Road and north of Creston Road. The major roadways that will serve as access to the Expansion include I-88, I-39, Illinois 38, Mulford Road and Creston Road. I-39 is a north-south limited access freeway with a full access interchange with I-88 and Illinois 38. I-39 provides two lanes in each direction and is under the jurisdiction of IDOT and has a weight limit of 80,000 pounds. Tr. 2/24 187, C6836.

Illinois 38 is a major east-west arterial road which, west of I-39 is a four-lane divided road with a posted speed limited of 45 mph that is reduced as it approaches Hwy

251. It has separate left hand turn lanes at most intersections. It is also under the jurisdiction of IDOT and also has a weight limit of 80,000 pounds. Tr. 2/24 187, C6836.

East of I-39, Illinois 38 is a two-lane road with a posted speed limit of 55 mph that is reduced to 45 mph through the Village of Creston. It is also under the jurisdiction of IDOT and also has a weight limit of 80,000 pounds. Tr. 2/24 187-88, C6836-37.

Mulford Road is a two-lane, north-south local road with an at-grade crossing with the Union Pacific Railroad and an intersection with Illinois 38 as well as Creston Road. Mulford Road is under stop sign control and has a weight limit of 73,280 pounds and is under the jurisdiction of Dement Township with the exception that the portion south of the railroad tracks is under the jurisdiction of the City. Tr. 2/24 188, C6837. Creston Road is a east-west local road under the jurisdiction of the City of Rochelle and has a posted weight limit of 73,280 pounds. Tr. 2/24 188, C6837.

IDOT has plans to improve the Mulford/38 intersection, including widening the intersection by separate left turn and right turn lanes on both approaches of Illinois 38 servicing Mulford Road. In addition all four radii at the intersection will be widened in order to accommodate truck traffic. Tr. 2/24 188-89, C6837-38. IDOT's intersection design (App. Ex. 38) represents, according to Mr. Werthmann, a significant improvement to the operation of the intersection both from an efficiency and safety standpoint. Tr. 2/24 189, C6838. IDOT plans to complete that project in 2003.

As part of the intersection design project, IDOT performed a sight distance analysis along Illinois 38 and Mulford Road and concluded that there is adequate sight distance along Illinois 38 so that vehicles can enter and exit out of Mulford Road safely and efficiently from and onto Illinois 38. Tr. 2/24 189-90, C6838-39 & App. Ex. 39.

Mr. Werthmann also testified that in connection with the Expansion the Petitioner has proposed to improve Mulford Road from 38 to the new site access drive, widening the road and upgrading the road to accommodate 80,000 pound truck traffic. In addition, at the Mulford/38 intersection RWD will widen the south approach and provide a northbound to eastbound right turn lane. Tr. 2/24 190, C6839.

In order to assess the traffic impact, Mr. Werthmann conducted a traffic study, performing peak hour traffic counts on the roadway system around the Subject Site. The theory is that if the Expansion can accommodate the peak hour of traffic, it can accommodate it at any other time of the day. Tr. 2/24 191, C6840. The traffic counts were conducted for morning and evening peak hours at four intersections within the vicinity of the Subject Site, including Illinois 38 and Mulford Road, Illinois 38 and the I-39 northbound ramp, Illinois 38 and the I-39 southbound ramp and Mulford Road and the existing access drive. Tr. 2/24 192, C6841. Although peak counts are normally only conducted from 6 a.m. to 9 a.m. and from 3 p.m. to 6 p.m., those counts were extended because of concerns expressed by various representatives of the community, and the counts for this Expansion were actually conducted from 6 a.m. to 10 a.m. and from 2 p.m. to 6 p.m. Tr. 2/24 192, C6841.

The counts at Mulford and 38 were conducted on four occasions even though Mr. Werthmann normally only conducts such counts on one occasion. At the I-39 ramps the counts were conducted on three occasions. Tr. 2/24 192, C6841. Also, because of concerns about student traffic to and from Northern Illinois University and Kishwaukee College, all but one of these counts were conducted when both schools were in session and students were commuting. Tr. 2/24 192-93, C6841-42. In order to perform the most

conservative analysis, each of the traffic counts conducted for each particular movement was based on the highest traffic count of all counts. Because issues were raised regarding Kishwaukee College, counts were also conducted at Malta Road and Illinois 38 because Malta Road serves as a main access to Kishwaukee College. Mr. Werthmann determined that approximately three quarters of the traffic generated by the college is generated from the east towards DeKalb, and only about 25 to 30 percent is generated towards Rochelle. Tr. 2/24 193-94, C6842-43.

A 24-hour classification count on Illinois 38 just west of Mulford Road was conducted showing that Illinois 38 carries 7,400 vehicles a day. Tr. 2/24 194, C6843. Mr. Werthmann testified that the Union Pacific Railroad indicates that the railroad track to the north of the Subject Site has approximately 53 to 55 trains a day or about 2 to 3 trains per hour. Tr. 2/24 194, C6843. A survey was conducted of train traffic while the landfill was open from 7 a.m. to 3:30 p.m. for three different weeks. That also determined that about 2 or 3 trains per hour pass the Subject Site on average, and Mulford Road is only closed for approximately 3 to 4 minutes when a train passes. Tr. 2/24 194-95, C6843-44. Accident data for the area was collected from the Illinois Department of Transportation as well as the Ogle County Sheriff's Department, from 1993 to 2002, and it indicated that none of the roadways or intersections are experiencing any high accident patterns. Tr. 2/24 195-96, C6844-45.

Mr. Werthmann testified that the data available for this traffic study was more than adequate and more than typical for what is normally done for a siting application. Tr. 2/24 196, C6845. Mr. Werthmann's opinion is that the existing roadway system is

currently operating well and efficiently, and that volumes on the roadway system are relatively low, particularly considering the capacity of the existing roadway system.

If the Expansion is permitted, it is anticipated that traffic will increase from the two basic markets the Expansion is expected to serve. The first is a local market typically transported to the landfill by single unit packer trucks. The second market would be the transfer station market that will be brought to the landfill in transfer trailers. Tr. 2/24 197-98, C6846-47. As far as local waste is concerned, Mr. Werthmann's study projected that approximately 80 percent of it will travel to and from the site along Illinois 38, and about 20 percent will travel from the north on Mulford Road from the south on Mulford Road and on Creston Road. Tr. 2/24 198, C6847. Transfer trailers will travel to the facility by the regional roadway systems, including I-88 and I-39. A majority of that traffic will exit at the Illinois 38 interchange, travel east to Mulford Road and then south to the landfill. Likewise, on the return trip it will come north on Mulford Road and then west on Illinois 38 to I-39. Tr. 2/24 198, C6847.

Although the Expansion is projected to process an average of 2,500 tpd of waste, to provide a conservative analysis, Mr. Werthmann looked at a "max day" of 3,500 tpd, which is approximately 40 percent more than the anticipated average. Tr. 2/24 199, C6848. At 2,500 tpd the landfill would generate approximately 171 inbound truck trips and 171 outbound truck trips. Using a max day of 3,500 tpd, there would be approximately 221 inbound trips and 221 outbound trips. During the peak hour the landfill would generate 19 to 25 inbound trips and 19 to 25 outbound trips in the morning peak hour and about 10 to 15 inbound and 10 to 15 outbound trips in the evening peak

hour, depending whether it is based on a figure of 2,500 or 3,500 tpd. Tr. 2/24 199-200, C6848-49.

If the landfill were designed as a subdivision of single family residences on one acre lots, those approximately 300 homes would generate approximately 3,000 trips a day compared to the 350 to 440 trips the Expansion might generate. In essence, during the peak hour such a subdivision would generate approximately 300 trips in one hour, which is similar to what is being projected for the Expansion for the entire day. Tr. 2/24 200-01, C6849-50.

The study, taking into account traffic by employees and maintenance, also considered ambient future growth in the area. Thus, Mr. Werthmann looked at traffic patterns in 2005, which is the projected opening of the landfill at full capacity, then 10 years after the traffic study was conducted, which is 2012, and then 20 years out, which is 2022. Ambient growth was conservatively estimated at 3 percent a year even though IDOT only used a 1.75 percent increase when they conducted their recent intersection design study. Tr. 2/24 202, C6851.

For each such year or "assignment," Mr. Werthmann analyzed the traffic to determine whether the existing roadway system had sufficient capacity to safely and efficiently accommodate the traffic generated by the landfill and the future growth of the area. That investigation revealed that all of these intersections and roadway sections have sufficient capacity with one exception. Tr. 2/24 203, C6852. If the 2022 traffic volumes are ever realized, the intersection of the southbound ramps of I-39 and Illinois 38 is projected to operate at an unacceptable level of service during the evening peak hours. In other words, traffic on those ramps will have to wait longer than what is considered

acceptable, and at that point a traffic signal might be required at the ramps. Tr. 2/24 204, C6853. Mr. Werthmann stressed that the need for such a traffic signal would not be generated by the landfill but rather would be generated by the other growth in the area and the existing traffic because the 2022 traffic volumes at that intersection indicate that the landfill will only account for one percent of that traffic.

Mr. Werthmann also conducted a gap study at the intersection of 38 and Mulford Road, and he also confirmed that the IDOT sight distance analysis was correct. That means that there is more than sufficient sight distance at Mulford Road looking both east and west along Illinois 38 for traffic turning into and out of Mulford Road. Tr. 2/24 205-06, C6854-55. The sight distance analysis was also done conservatively based on a 62 mph speed even though the posted speed is 55 mph.

The gap study was done to determine the number and length of gaps within the traffic stream to ensure that there are adequate gaps for traffic that would be entering the traffic stream from a side road or cross street such as Mulford. Tr. 2/24 206-07, C6855-56. The gap study was actually conducted twice, once in July of 2001 and again in September of 2002 and was based on the Institute of Transportation Engineers Traffic Engineering Handbook. Tr. 2/24 206-07, C6855-56. That gap study indicated that there are more than sufficient gaps to accommodate the traffic that will be turning into and out of Mulford Road from and to Illinois 38.

Mr. Werthmann also testified that the Petitioner made extensive efforts to obtain approval from IDOT to install a traffic light, at RWD's expense, at the intersection of Mulford and Illinois 38. App. Ex. 40. Mr. Werthmann stated that it was his opinion that a traffic signal is not required at that intersection, and IDOT came to the same conclusion

and would not agree to the installation of a light at that intersection even though the Petitioner was willing to pay for it. Tr. 2/24 207-08, C6856-57.

Mr. Werthmann explained that the improvements to the site access are another major advantage of the present Application over the application filed by RWD in 2000. Whereas the existing access drive is almost immediately south of the railroad tracks, the new access drive has been relocated further south and will be approximately 1,650 feet from the railroad tracks. Tr. 2/24 209, C6858. In addition, the scale house of the facility, which is presently located very close to the entrance, will be relocated over 2,000 feet from Mulford Road, which provides additional stacking for vehicles waiting to access the scales. Tr. 2/24 209-210, C6858-59. In addition, because the entire 2,000 feet of access drive will be paved, that provides ample runoff distance to eliminate mud and debris from truck tires before they exit the landfill. Tr. 2/24 210, C6859.

Based on his traffic investigation, Mr. Werthmann's opinion is that the traffic to and from the facility have been designed to minimize the impact on existing traffic flows. Tr. 2/24 211-12, C6860-61.

Again, both the City Staff and the Hearing Officer recommended that the Council find that the Petitioner had proven compliance with Criterion (vi), both suggesting the imposition of certain conditions such as:

> The facility should not accept more than an annual daily average of 2,500 tons of waste per day with a maximum of 3,500 tons on any given operating day (absent special written consent given by the City to exceed these levels on a limited basis to address emergency or exigent circumstances). Hearing Officer Report 45.

See also City Staff Report 77. The Council's decision on the traffic criterion is against the manifest weight of the evidence and should be reversed.

CRITERION (ix). REGULATED RECHARGE AREA

There was no controversy regarding the fact that the Petitioner complies with Criterion (ix),[13] but the Council concluded that criterion had not been met. Mr. Zinnen testified without contradiction or challenge that the only regulated recharge area designated in Illinois is near Peoria and that therefore the Expansion meets Criterion (ix). Tr. 2/25 143, C7027B .

The Council's finding that the Petitioner had failed to prove compliance with Criterion (ix) is probably the best evidence that the Council completely disregarded the record, paid no attention to the City Staff's Report and entirely disregarded the Hearing Officer's excellent report. As the City Staff set forth in its report:

> Mr. Daniel L. Zinnen, of Weaver Boos stated in his direct testimony that the proposed facility will not be located within a regulated recharge area, as the only regulated recharge area located within the state of Illinois is located near Peoria (Tr. 2/25 at 143, C7027B). Applicant's Exhibit #1 at 1392 also identifies a letter from the Illinois Environmental Protection Agency dated August 29, 2001, which in effect supports the witnesses' claim. No other witness provided testimony on this criteria.
>
> Based upon our review of the record established in this matter, and further weighting the Closing Arguments and Findings of Fact produced by both the Applicant and Concerned Citizen's, the City believes the Applicant has satisfied this Criterion. City Staff Report 83.

Obviously, the Hearing Officer made the same finding because it was undisputed that Criterion (ix) "does not apply to the proposed facility." Hearing Officer Report 51.

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[13] Criterion (ix) requires that the Applicant demonstrate that ***"if the facility will be located within a regulated recharge area, any applicable requirements specified by the Board for such areas have been met."*** 415 ILCS 5/39.2(a)(ix).

Although the Council purported to reconsider and revised this obviously incorrect finding, that reconsideration is a nullity as set forth in the fundamental fairness section of this brief. The Council's final decision of April 24, 2003, that the Petitioner had failed to prove compliance with Criterion (ix) should be reversed.

IV. Conclusion

The Petitioner respectfully requests that the Board reverse the denial of siting or, alternatively, remand for a new hearing because of Council's denial of fundamental fairness.

ROCHELLE WASTE DISPOSAL, L.L.C., Petitioner

BY: McGREEVY, JOHNSON & WILLIAMS, P.C.
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ATTORNEY'S CERTIFICATE OF SERVICE

The undersigned, being first duly sworn on oath, depose and say that I am an attorney and served the foregoing instrument upon the within named:

Brad Halloran
Illinois Pollution Control Board
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Richard Porter, Esq.
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by sealing a true and correct copy of the same in an envelope, addressed as shown above, with sufficient United States postage and by depositing said envelope, so sealed and stamped, in the United States Mail at Rockford, Illinois, at or about the hour of 5 o'clock p.m., on the 16th day of January, 2004, and by emailing a true and correct courtesy copy of same to Richard Porter to the email address set forth above, at or about the hour of 9 o'clock a.m. ~~p.m.~~, on the 16th day of January, 2004.

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