ILLINOIS POLLUTION CONTROL BOARD
September 21, 2000

LAND AND LAKES COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 99-69
	)	(Pollution Control Facility Siting Appeal)
RANDOLPH COUNTY BOARD OF COMMISSIONERS,	)	
	)	
Respondent.	)	
	)	

ELIZABETH S. HARVEY, MCKENNA, STORER, ROWE, WHITE & FARRUG, APPEARED ON BEHALF OF PETITIONER;

STEPHEN HEDINGER APPEARED ON BEHALF OF PETITIONER;

JAMES W. KELLEY APPEARED ON BEHALF OF PETITIONER; and

RICHARD S. PORTER, HINSHAW & CULBERTSON, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On November 23, 1998, Land and Lakes Company (Land and Lakes) filed an appeal pursuant to Section 40.1 of the Environmental Protection Act (Act) (415 ILCS 5/40.1(1998)) of an October 19, 1998 decision by the Randolph County Board of Commissioners (Randolph County) denying siting of a pollution control facility. Randolph County denied the siting based on Land and Lakes' failing to meet two of the nine criteria listed in Section 39.2 of the Act (415 ILCS 5/39.2 (1998)). In this appeal Land and Lakes asserts that the proceedings before Randolph County were fundamentally unfair and that the decision by Randolph County was against the manifest weight of the evidence.

Hearings were held before Chief Hearing Officer John Knittle on May 9 and 10, 2000. The hearings were held in Chester, Randolph County, Illinois. Land and Lakes filed its brief on June 16, 2000, and a reply brief on July 28, 2000. Randolph County filed its brief on July 17, 2000. In addition to the briefs filed by the parties, an *amicus curiae* brief was filed on July 14, 2000, by Kenneth Bleyer and Dora Spinney. [1]

The Board affirms the Randolph County Board of Commissioners' denial of siting for a pollution control facility. Based on the record and as explained below, the Board finds that the proceedings were not fundamentally unfair and the decision to deny siting based on two statutory criteria was not against the manifest weight of the evidence.

PRELIMINARY MATTERS

As a preliminary matter the Board will address Land and Lakes' motion to strike filed on July 28, 2000. Randolph County filed a response to that motion along with alternative motions on August 10, 2000. On August 18,

[1] The transcript of the hearings will be cited as "Tr. at"; the petitioner's brief will be cited as "Pet. Br. at"; the reply brief will be cited as "Reply"; respondent's brief will be cited as "Resp. Br. at". The Randolph County record will be cited by referring to the county record table of contents number and, where appropriate, a page number "TOC # at #".

2000, Land and Lakes filed an objection. The Board denies the motion to strike and allows Randolph County's brief to exceed 50 pages.

STATUTORY BACKGROUND

Section 39.2(a) of the Act provides:

> The county board of the county or the governing body of the municipality . . . shall approve or disapprove the request for local siting approval for each pollution control facility which is subject to such review. An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if the proposed facility meets the following criteria:
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> * * *
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> ii. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;
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> * * *
>
> viii. if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan;
>
> * * *

415 ILCS 5/39.2(a) (1998).

Section 40.1(a) of the Act provides in pertinent part:

> If the county board or the governing body of the municipality . . . refuses to grant approval under Section 39.2 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the county board or the governing body of the municipality. * * * The county board or governing body of the municipality shall appear as respondent in such hearing, and such hearing shall be based exclusively on the record before the county board or the governing body of the municipality. * * * In making its orders and determinations under this Section, the Board shall include in its consideration the written decision and reasons for the decision of the county board or the governing body of the municipality, the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision. 415 ILCS 40.1(a) (1998).

FACTS

The pertinent facts of this case are described in the following section. First, the procedural history is presented. Next, there follows a summary of testimony at the Board's May 9 and 10, 2000 hearings. Lastly, there is a discussion of the facts relevant to the denial of siting based on Section 39.2(ii) and (viii) of the Act.

On April 28, 1998, Land and Lakes filed a siting application seeking approval to site a pollution control facility in Randolph County, pursuant to Section 39.2 of the Act (415 ILCS 5/39.2 (1998)). TOC 3. Under Randolph County's ordinance, the Randolph County Planning Commission (Planning Commission) coordinated receipt of evidence. Four members of the Planning Commission (Marvin Campbell, Mike Riebeling, Dorothy Rinne, and Tom Smith) conducted a public hearing on the siting application. Resp. Exh. 1. Those public hearings were held on July

28 and July 29, 1998, and written comments were accepted for a period of 30 days after the public hearing. TOC 2, 9, 10, and 11. The Planning Commission was charged with preparing a report and recommendation to be submitted to the Randolph County Board. Resp. Exh. 1.

On September 21, 1998, after the close of the public comment period, the Planning Commission filed its report titled "Proposed Findings, Conditions & Recommendations of the Randolph County Commission" (Report). TOC 8. The Report concluded with a recommendation that siting be denied. *Id.* The Planning Commission recommended denial because the Planning Commission found that the facility would not be located consistent with the Solid Waste Management Plan of Randolph County contrary to Section 39.2(viii) of the Act (415 ILCS 5/39.2(viii) (1998)). *Id.* On October 19, 1998, the Randolph County Board voted on the application and denied siting on the grounds that criterion ii (415 ILCS 5/39.2(a)(ii) (1998)) and criterion viii (415 ILCS 5/39.2(a)(viii) (1998)) were not met.

The Randolph County Board consists of three members. At the time of the vote on Land and Lakes' siting application, those members were: Clem Esker, Terry Moore, and Ronald Stork. Tr. at 68, 134, 147. Stork was Chairman of the Board. Tr. at 68. All three members of the Board received contacts concerning the siting application that were outside the record of the proceedings. Members of the Planning Commission also received comments that were outside the record. A summary of each person's testimony at the Board's hearing will follow.

Ron Stork

Stork testified that he received a number of phone calls regarding the siting application at both his home and his business. The calls occurred after the application was filed in April 1998 but before the County Board's decision in October 1998. Tr. at 73-74; 91-92; 96-98. Stork did not remember the exact number of calls he received. He testified at hearing to receiving five or six phone calls. Tr. at 73. However, in deposition, he testified that he received two or three dozen calls. Tr. at 97-98. Stork installed a "trap and trace" on his phone lines at home and at work. Stork did so because he was concerned about his family. Tr. at 97-100. Many callers did not identify themselves, but wanted to discuss the substance of the landfill siting application. Tr. at 73. Stork stated that he did not speak to the callers regarding the substance of the application. Tr. at 91. Stork specifically remembers a phone conversation with Kenneth Markley, during which Markley made substantive statements about the proposed landfill. Tr. at 94-97. Markley is, and was at the time, the vice president of a group known as FORCE. Tr. at 39, 40.

Stork testified that he received some written comments regarding the landfill which opposed the landfill. Tr. at 70, 72, 92. He took the comments he received to the county clerk's office to be placed in the record. Tr. at 70, 92.

Stork testified that he was approached in person about the siting process. Alan Corbin told Stork that people were opposed to the landfill, and stated that he did not think it would be good for Stork's business if the landfill were sited. Tr. at 103-104. Stork also received a phone call from Dave and Peggy Guebert. The Gueberts opposed the landfill. Tr. at 105. Stork stated that he did not discuss the merits of the application with these people. Tr. at 125.

Stork was invited to attend two meetings regarding the landfill siting. Stork was asked to speak at a meeting of the Randolph County Farm Bureau while the landfill application was pending. Tr. at 69. Stork accepted that invitation, and appeared at the Farm Bureau meeting to answer questions about the application. Tr. at 70-71. Additionally, Stork was asked to attend a meeting of FORCE, which he did not attend. Tr. at 71.

Stork received one phone call in which the caller stated that she had overheard conversations that Stork's construction equipment could be vandalized. Tr. at 78. Shortly after that phone call, Stork discovered four flat tires on his construction equipment in one day, which was unusual. Tr. at 101-102.

Stork also received a package in the mail, while the siting application was pending. Tr. at 75. The package was in a manila envelope, and it appeared to be full of garbage. "Stuff was leaking from the package." Tr. at 75-76.

Stork did not open the package, but turned it over to the Sparta Police Department. Tr. at 76. Stork believes that his receipt of this package of garbage was related to the landfill siting proceeding. Tr. at 77.

Additionally, Stork was the target of pranks, which he believes were related to the landfill siting process. Tr. at 82, 128. But Stork also indicated that "sometimes as an elected official there is little games that are played and you tend to forget them." Tr. at 82. Once Stork's wife was called at work by a local florist, asking where the florist should deliver the large number of flowers or plants supposedly ordered by her. However, Stork's wife had not ordered flowers. Tr. at 81-82. On another occasion, someone called the restaurant where the Sparta Chamber of Commerce holds its meetings. It was Stork's last meeting as president of the Chamber of Commerce, and the caller told the restaurant manager that Stork's wife was going to pick up the tab for the entire lunch. In fact, Stork's wife had not made the phone call, and had not intended to pay for lunch for the entire Chamber of Commerce. Tr. at 79, 81. On a third occasion, Stork's office received a phone call from a local furniture store, asking when Stork's wife would pick up the two chairs she had allegedly ordered for Stork's birthday. She had not ordered any chairs. Tr. at 79-80.

Stork first testified that the events did not affect his decision "in the end." Tr. at 105-106. Stork also testified in his earlier deposition that the phone calls, personal contacts, threats, and pranks cumulatively had an effect on his ability to make a decision on the landfill siting application. Tr. at 109. Stork indicated that pressure and "extenuating factors" makes decisionmaking more difficult, and does affect one's ability to make a decision. Tr. at 110. However, Stork also stated that his decision was based solely on the record. Tr. at 120-121. Stork stated that "if all the criteria had been met that would have been a difficult decision to make based on the overwhelming opposition to the landfill." Tr. at 128.

Terry Moore

Moore estimated that he received one call in favor of the landfill, and about four calls against the landfill at his home. Tr. at 134-136. He allowed one of the callers, who was opposed to the landfill siting, to express her opinion at more length than the other callers, since the caller was a friend of Moore's wife. Tr. at 134-135. However, he stated her comments were no different than those placed on the record. Tr. at 140-141.

Moore was invited to attend a meeting of FORCE, as Stork had been. The invitation was extended by mail and he did not attend the meeting. Tr. at 138. Moore also received three or four letters about the landfill, which he threw away. Tr. at 136. Additionally, Moore received some campaign literature in the mail opposing the landfill siting application. Tr. at 137. Moore testified that he based his decision solely on the record and he did not "pay attention" to comments outside the hearing process. Tr. at 142. Moore indicated that when he received phone calls he would tell the callers that he would not discuss the landfill siting and would then end the conversation. Tr. at 135, 140.

Clem Esker

Esker was approached by one man who came to see Esker at his office regarding the proposed landfill. Tr. at 150. Esker testified that he informed the individual that he could not talk about the landfill siting. Tr. at 150. Esker stated that he did not have a substantive discussion with the individual. Tr. at 150. Additionally, Esker received a phone call at home regarding the siting application. Tr. at 150-151. Esker also testified that he did not take the phone call. Tr. at 151.

Marvin Campbell

Campbell testified that he received phone calls regarding the siting application at both home and work. He estimated that he received about 30 messages on his home answering machine. Tr. at 190. Campbell did not recall if the messages indicated opposition to the landfill application. Tr. at 189-190. Campbell received three to five calls at work. Tr. at 189-190. He indicated to the callers that he could not discuss the siting and they should testify at the hearing. Tr. at 190. Some of the callers were unhappy when he indicated that he would not discuss the siting application but he received no threats. Tr. at 190-191.

Campbell was also approached approximately eight to ten times in person regarding the landfill siting. On one occasion, a woman active in the opposition approached Campbell at McDonald's restaurant. Campbell found it obvious that the woman opposed the landfill. Tr. at 193. On another occasion, Campbell was approached at the airport, where Campbell works. Those people were against the siting of the landfill. Tr. at 193. Campbell testified that the atmosphere was intimidating to some people, but not to him. Tr. at 195. Campbell also testified that none of the calls or contacts affected his decision in any way. Tr. at 194.

Michael Riebeling

Riebeling also received phone calls regarding the landfill at home and at work. Riebeling received between six and eight phone calls at home, and six to eight phone calls at work. Tr. at 157. Of those callers who expressed an opinion, all opposed the landfill siting. Tr. at 158. Riebeling did not discuss the merits of the application with the callers. Tr. at 167-168. In fact, Riebeling stated that he would get the callers off the phone as quickly as possible and he would indicate that he could not discuss the application. Tr. at 167.

Additionally, Riebeling received one item in the mail. Inside the envelope (which did not have a return address) was a three-inch piece of paper with what appeared to be an official State of Illinois seal. Handwritten on that paper were the words "Oppose Landfill." The rest of the items in the envelope were copies of letters to the editor, or newspaper articles, all of which opposed the siting of the proposed landfill. Tr. at 158-160; Pet. Ex. 4. Riebeling told the other members of the Planning Commission about the letter, and may have shown them the letter. Tr. at 162, 165. Riebeling did not give the letter to the Randolph County Clerk for inclusion in the public record of the siting proceeding. Tr. at 162. Riebeling testified that the note did not affect his decision. Tr. at 167.

Dorothy Rinne

Rinne received contacts outside the record of the siting proceeding in that she received phone calls at home. Rinne was unsure of the number of calls she received, but indicated that it was less than ten calls. The callers opposed the landfill. Tr. at 175. Rinne indicated that she declined to talk about the landfill siting process with the callers. Tr. at 175.

Rinne also received fewer than ten letters in the mail regarding the landfill siting proceeding. Tr. at 175-176. She skimmed the letters, and after determining that the letters related to the landfill siting proceeding, she did not read the letters further. Tr. at 176, 181. Rinne threw the letters away, and did not give the letters to the county clerk to place in the record. Tr. at 176. Rinne did not give any weight to the phone conversations and did not consider the calls as evidence. Tr. at 177. In addition, Rinne indicated that the mailings did not influence her decision on the landfill siting. Tr. at 179-180.

Thomas Smith

Smith also received phone calls and a letter regarding the landfill siting proceeding. He received at least two phone calls at home and he informed the callers that any information the callers wanted to present had to be in writing and filed with the county clerk. Tr. at 205. Smith specifically remembers two callers who opposed the landfill. Tr. at 207. Additionally, Smith received a letter at his home, opposing the landfill siting. Tr. at 207-208. A copy of the letter that he received was also filed with the county clerk. Tr. at 208. Smith did not consider the two calls to be evidence in the siting hearing. Tr. at 222. Smith based his decision on the information provided at the public hearings and in the written comments. Tr. at 222.

Ex Parte Contacts at County Board Meeting

Representatives of the opposition group FORCE were given the opportunity to speak on the substance of the siting application at a regular meeting of the county board. Mr. Alan Weber, the president of FORCE, was allowed to address the county board at its regularly scheduled Board meeting on August 24, 1998. Tr. at 85-91, 229, 240. Weber stated that the public, and FORCE, were opposed to the proposed landfill. Tr. at 88-89. Additionally,

Kenneth Markley, the vice president of FORCE, was also allowed to speak at that August 24, 1998 county board meeting. Tr. at 36, 40, 89-91. Kenneth Markley also opposed the proposed landfill, and specifically discussed traffic and road issues. Tr. at 90. There were no Land and Lakes representatives present at the August 24, 1998 meeting. Tr. at 86.

Stork testified that as chairman of the county board, it was his policy "to allow anyone that wanted to show up at a County Board meeting to have an opportunity to speak of any issue that they choose to speak about." Tr. at 124. Moore also testified that since he began to serve on the county board in 1988 (Tr. at 134) it had been the "tradition" to let anyone speak at a county board meeting. Tr. at 144. County Board meetings were set on a quarterly basis, publicized by the County Clerk, and public meetings were open to anyone who wished to attend. Tr. at 124-125.

Section 39.2(ii) and (viii) of the Act

On October 19, 1998, Randolph County Board denied siting for a facility to be owned and operated by Land and Lakes. TOC 4 at 1-4. The Randolph County Board denied the request for siting because it found Land and Lakes failed to demonstrate that the facility would meet Section 39.2(ii) (criterion ii) and (viii) (criterion viii). TOC 4 at 2 and 4. The Randolph County Board's reasons for denial relate to the provisions of the Randolph County Solid Waste Management Plan (Randolph County Plan).

The Randolph County plan provides, in part:

> Environmental protection, especially in the context of protecting regional groundwater resources, is a primary consideration of local siting criteria. Recommended local criteria were developed to clarify what constituted acceptable potential sites for a landfill. The criteria are grouped into exclusionary and inclusionary criteria. Exclusionary criteria are used to screen individual parcels or areas. Parcels or areas which contained any of the exclusionary characteristics would not be considered in the site identification process. Areas or parcels which remain after the exclusionary criteria, would be screened against the inclusionary criteria to identify parcels for consideration for on-site investigations. Table 61 lists the exclusionary and inclusionary local siting criteria. Pet. Exh. 2, at 205; Resp. Br. at 15.

Among the "Exclusionary criteria" listed in table 61 is "exclude all areas with[in] 1 1/2 miles of municipal corporate limits." Pet. Exh. 2, at 207.

The Randolph County Plan was approved by the Illinois Environmental Protection Agency (Agency) as being consistent with the Illinois Environmental Protection Act. TOC 3, Vol 3, at 1. On February 27, 1995, after reviewing the Randolph County Plan, the transcript of the testimony given during the public hearing on the Randolph County Plan, and the responses and substantive questions received during the public review period on the Randolph County Plan, the Randolph County Board adopted the Randolph County Plan as its own (see Resolution attached to Randolph County Plan, Pet. Exh. 2).

On April 28, 1998, Land and Lakes filed its application for siting approval for a new disposal and recycling facility, which was to be located less than a mile from Sparta, Illinois. The hearing on the application was held on July 28 and 29, 1998. TOC 2 at 1-352.

Criterion ii

Land and Lakes presented evidence and testimony that the proposed facility is so designed, located, and proposed to be operated as to protect health, safety, and welfare. TOC 3, Vols. 3-10. Dr. Neil Williams, an expert in landfill design and construction, testified extensively on behalf of Land and Lakes on the design and operation of the proposed landfill. TOC 2 at 97-136. Dr. Williams concluded that the proposed facility satisfies criterion ii. TOC 2 at 136. Additionally, James Cowhey Jr. and Eileen Sheliga testified on the proposed design and operation of the facility. TOC 2 at 40-51; 311-350.

Randolph County retained Rhutasel and Associates, consulting engineers, to review and evaluate Land and Lake's application. TOC 2 at 52. Rhutasel and Associates issued a written report of its findings ("the Rhutasel Report") (Pet. Ex. 1), and Mr. Larry J. Rhutasel testified at hearing. TOC 2 at 51-74. Rhutasel testified that his firm "point[ed] out...a particular table – it was Table 61 – which is a list of exclusionary landfill site identification criteria." TOC 2 at 61. Rhutasel further testified that included in those criteria was the one and a half-mile exclusion. TOC 2 at 61-62. Finally Rhutasel testified to concerns about traffic. TOC 2 at 60-61. Specifically, the concerns were not about patterns, but the weight loads and width of roads. *Id.* The Rhutasel Report concluded that Land and Lakes had adequately addressed the protection of health, safety, and welfare. Pet. Ex. 1 at 5-6. Rhutasel testified that issues identified in the report were minor, and did not rise to any finding that criterion ii was not met. TOC 2 at 63-65.

Extensive testimony was provided on this issue at the public hearings by concerned citizens. See *e.g.*, TOC 2 at 91. Also numerous comments were filed discussing the issue of road safety. TOC 9.

The Planning Commission met on September 21, 1998, to make its recommendations on the application. The Planning Commission voted unanimously that Land and Lakes' application satisfies criterion ii. TOC 2, planning commission hearing, at 8-12.

Criterion viii

Randolph County is one of four counties which jointly adopted a solid waste management plan prepared on their behalf by the Southwestern Illinois Planning Commission (SIMAPC). (Pet. Ex. 2.) As part of its application, Land and Lakes submitted a letter from Darryl L. Thompson, Manager of General Planning for SIMAPC. Thompson stated that SIMAPC had reviewed Land and Lake's application for consistency with the solid waste management plan for Randolph County. Thompson concluded that "the location of a new landfill in Randolph County, that is acceptable to local governments is consistent with their Solid Waste Management Plan. . .." TOC 3 at Vol. 2, Crit. 8. Land and Lakes' application also analyzed the solid waste management plan, and noted that the Randolph County Plan identifies the need for source reduction and final waste disposal capacity, with a corresponding support of the development of landfills to meet final disposal needs. TOC 3 at Vol. 2, Crit. 8 at 1.

ISSUES

Land and Lakes raised three issues in its petition for review. The first issue is whether the combination of *ex parte* contacts and an atmosphere of fear and intimidation resulted in a fundamentally unfair proceeding. The second and third issues both deal with whether Randolph County's decision on the criteria (ii and viii) is against the manifest weight of the evidence. The Board will first address the fundamental fairness of the proceedings and then discuss the criteria.

FUNDAMENTAL FAIRNESS

In this section the Board will address the issue of whether the proceedings were fundamentally unfair. The Board will begin by summarizing the arguments of Land and Lakes, and follow with a discussion of Randolph County's arguments. Then, the Board will discuss Land and Lakes' response to Randolph County's arguments. The Board will then address the positions of the *amicus curiae*. Finally, in this section the Board will analyze the arguments and render its decision on the fundamental fairness of the proceeding.

Land and Lakes' Arguments

Generally, Land and Lakes maintains that an "*ex parte* contact" is one that takes place without notice and outside the record between a person in a decisionmaking role and parties before that person. Pet. Br. at 16. Land and Lakes cites to Residents Against a Polluted Environment v. County of LaSalle (RAPE v. LaSalle County) (September 19, 1996), PCB 96-243 to support its definition of *ex parte* contact. Land and Lakes also maintains that contact between a local decision maker and constituents outside the presence of the applicant in which a position in

opposition to the siting is taken is an improper *ex parte* contact. Pet. Br. at 16. Land and Lakes relies on Waste Management of Illinois, Inc. v. Pollution Control Board, (Waste Management v. PCB) 175 Ill. App. 3d 1023, 530 N.E.2d 682,697 (2d Dist. 1988) to support its argument that such contacts are improper. Further, Land and Lakes argues that there must be a showing that the complaining party suffered prejudice from the *ex parte* contacts before the local decision can be reversed. Pet. Br. at 16, citing Waste Management v. IPCB, 530 N.E.2d at 698 and RAPE v. LaSalle County. Land and Lakes points to the five-part inquiry enunciated in E & E Hauling, Inc. v. Pollution Control Board, (E & E Hauling v. PCB) 116 Ill. App. 3d 586, 451 N.E.2d 555, 571 (2d Dist. 1983) as the standard for determining for whether a county board's decision is tainted.

E & E Hauling v. PCB quotes PATCO v. Federal Labor Relations Authority, 685 F.2d 547 (D. C. Cir. 1982) and states, in part that in deciding if a proceeding is tainted:

> a number of considerations may be relevant: the gravity of the *ex parte* communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communication were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceeding would serve a useful purpose. E & E Hauling v. PCB, 451 N.E.2d 555, 571.

The Board will address the specifics of this inquiry in more detail below.

Land and Lakes specifically argues:

1. The repeated contacts between the Randolph County Board and Planning Commission members and opponents of the siting were improper *ex parte* contacts;

2. The discussion of the substance of Land and Lakes' application by representatives of the objectors group was an improper *ex parte* contact;

3. Land and Lakes was prejudiced by the extensive *ex parte* contacts in this case;

4. The cumulative effect of the *ex parte* contact and the threats and intimidation made it impossible for Land and Lakes to receive a fair hearing; and

5. The Randolph County Board should be reversed not remanded.

Each of these arguments is discussed in turn.

Land and Lakes asserts that the repeated contacts between the Randolph County Board and Planning Commission members and opponents of the siting were improper *ex parte* contacts

Land and Lakes notes that at deposition all three members of the Randolph County Board and all four members of the Planning Commission testified that they received *ex parte* contacts. Pet. Br. at 19-20. Land and Lakes points to the fact that the contacts included phone calls, as few as one received by Esker and as many as three dozen received by Stork. Pet. Br. at 20. Also, several of the local officials were contacted in person and some received items in the mail. *Id.* The "vast majority" of the comments were in opposition, argues Land and Lakes. *Id.* Land and Lakes asserts that this "pattern of contacts" between opponents to siting and the Randolph County Board and Planning Commission members took place outside the presence of Land and Lakes. Pet. Br. at 20. Land and Lakes argues that applying the definitions articulated in Waste Management Inc. v. PCB and RAPE v. LaSalle County, the contacts were improper *ex parte* contacts. *Id.*

Land and Lakes asserts that the discussion of the substance of Land and Lakes' application by representatives of the objectors' group was an improper *ex parte* contact

Land and Lakes argues that the courts and the Board have previously held that allowing substantive presentations regarding a landfill siting at a county board meeting, without prior notice to Land and Lakes, is an improper *ex parte* contact. Pet. Br. at 21. In support of its position Land and Lakes cites to E & E Hauling v. PCB and City of Rockford v. Winnebago County Board (November 19, 1987), (Rockford v. Winnebago) PCB 87-92, aff'd 186 Ill. App. 3d 303, 542 N.E.2d 423 (2d Dist. 1989). In E & E Hauling v. PCB, the applicant had several contacts with the county board at finance committee meetings held after the close of the public hearings. Pet. Br. at 21. The court stated that the lack of notice to the public that the landfill would be discussed sufficed to characterize those meetings as *ex parte*. E & E Hauling v. PCB, 451 N.E.2d at 671. In Rockford v. Winnebago County, the Board found that improper *ex parte* contacts occurred when members of the public were allowed to address the county board just prior to the county board's vote on a siting application. Pet. Br. at 21-22.

Land and Lakes asserts that the facts in this case regarding FORCE's presentation to the County Board on August 24, 1998, are almost identical to those in the above two cases. Pet. Br. at 22. Land and Lakes maintains that FORCE was given an opportunity to substantively address the Randolph County Board in opposition to the siting, without notice to the public or Land and Lakes. *Id.*

Land and Lakes argues it was prejudiced by the extensive *ex parte* contacts in this case

Land and Lakes argues that it was prejudiced by the extensive *ex parte* contacts between opponents of the landfill siting and the Randolph County Board and the Planning Commission. Pet. Br. at 23. Land and Lakes further argues that the prejudice was exacerbated because of the threats and intimidation directed at Stork. *Id.* To support its assertion, Land and Lakes points to Stork's testimony that the pressure and "extenuating factors" made decisionmaking more difficult, and Stork's admission that "if all the criteria had been met that would have been a difficult decision. . . ." (Tr. at 110, 128. Pet. Br. at 25. Land and Lakes also points to Stork's deposition testimony wherein he stated that "all of the events cumulatively did have an affect" on his ability to make a decision. Pet. Br. at 25, citing Tr. at 109.

Land and Lakes asserts that, applying the factors enunciated in E & E Hauling v. PCB, the *ex parte* contacts irrevocably tainted Randolph County Board's decision denying siting approval. Pet. Br. at 24. The first inquiry is the gravity of the *ex parte* contacts. E & E Hauling v. PCB, 451 N.E.2d 555, 571. Land and Lakes argues that there was a pattern of *ex parte* contacts, from phone calls to personal approaches and mailings. Further, FORCE and two individuals were given an opportunity to address the Randolph County Board on the substance of the application at the August 24, 1998 Randolph County Board meeting after the close of the hearings without notice to either the public or Land and Lakes. Pet. Br. at 24. Finally, Land and Lakes contends that Stork, the chairman of the Randolph County Board, was subjected to threats and intimidation. *Id.* Thus, Land and Lakes argues there was a pattern of *ex parte* contacts, which tainted the proceeding. *Id.*

The second inquiry is whether the *ex parte* contacts influenced or may have influenced the ultimate decision. E & E Hauling v. PCB, 451 N.E.2d 555, 571. Land and Lakes argues that Stork admitted, in his deposition testimony, that the cumulative effect of the *ex parte* contacts had an impact on his decision. Pet. Br. at 25, citing Tr. at 109.

The third inquiry is whether the party making the contacts benefited from the ultimate decision. E & E Hauling v. PCB, 451 N.E.2d 555, 571. Land and Lakes argues that it is undisputed that a vast majority of the contacts came from opponents to the siting, and the ultimate decision was to deny siting. Clearly, the persons making the contacts benefited from the Randolph County Board's decision. Pet. Br. at 25.

The fourth inquiry is whether the content of the improper communications was unknown to opposing parties, who therefore had no opportunity to respond. E & E Hauling v. PCB, 451 N.E.2d 555, 571. Land and Lakes argues that it did not know of the contacts until after the decision and therefore could not respond to the content of the contacts. Pet. Br. at 26. Land and Lakes' inability to respond was exacerbated by the "undefined nature of FORCE, an opposition group." Pet. Br. at 26. FORCE never formally appeared as a group in the hearings on the siting. Pet. Br. at 26. Therefore, Land and Lakes argues it is difficult to respond to improper contacts by an "undefined and shadowy opposition group." *Id.*

The fifth inquiry is whether vacating the decision and remanding for a new proceeding would serve a useful purpose. E & E Hauling v. PCB, 451 N.E.2d 555, 571. Land and Lakes argues that it was clearly prejudiced by the extensive and threatening *ex parte* contacts in this case. Pet. Br. at 26. Land and Lakes asserts that the Randolph County Board's decision was irrevocably tainted by "these illegal and prohibited contacts." *Id.* However, Land and Lakes argues that this case should not be remanded but reversed because no fair decision could be made on remand. Pet. Br. at 26-27.

Land and Lakes asserts that the cumulative effect of the *ex parte* contact and the threats and intimidation made it impossible for Land and Lakes to receive a fair hearing

Land and Lakes argues that while the *ex parte* contacts alone are sufficient to find the proceeding fundamentally unfair, the cumulative effect of the contacts along with the threats and intimidating tactics directed at Stork, made it impossible for Land and Lakes to receive a fair hearing on the application. Pet. Br. at 27. Land and Lakes maintains that the opponents of the siting "engaged in a pervasive pattern of improper contacts" and threats against Stork. *Id.*

Land and Lakes asserts that the Randolph County Board decision should be reversed not remanded

Land and Lakes concedes that the usual remedy for a fundamentally unfair proceeding is to remand the proceeding to the local decision maker. Pet. Br. at 28. However, Land and Lakes argues that in this case such a remedy would not cure the prejudice suffered by the applicant. *Id.* Land and Lakes opines that remand would punish the applicant while producing the same result of *ex parte* contacts and attempts at intimidation and fear. *Id.* Therefore, Land and Lakes asserts that the Board should reverse the Randolph County Board's decision and grant siting approval by operation of law. Pet. Br. at 28-29.

Randolph County's Arguments

Randolph County sets forth numerous arguments in support of its contention that the Randolph County Board's decision should be affirmed. First, Randolph County maintains that Land and Lakes was given ample opportunity to present its case and the decision by the Randolph County Board was based on the record. Second, Randolph County asserts that Land and Lakes has not shown that the process was irrevocably tainted using the E & E Hauling v. PCB test. Third, Randolph County asserts that the communications were not *ex parte* communications. Fourth, Randolph County argues that a majority of the county board had few to no contacts so the process was not tainted. Fifth, Randolph County argues that any communications with the Planning Commission are irrelevant as the Planning Commission was not the decisionmaker. Sixth, Randolph County maintains that the appropriate redress has been had and neither reversal nor remand are appropriate.

Randolph County maintains that Land and Lakes was given ample opportunity to presents its case and the decision of the Randolph County Board was based on the record of the preceding

Randolph County points out that the application filed by Land and Lakes was 10 to 12 volumes of material and the hearings held on that application included 670 pages of testimony. Resp. Br. at 21. After the hearings were held, the Planning Commission made its recommendation to the county board. *Id.* Land and Lakes was allowed to present testimony at the hearing. Resp. Br. at 22. Randolph County asserts that the testimony of the county board members was that their decision was "not influenced or affected by any unsolicited communications." Resp. Br. at 24. Therefore, Randolph County asserts that the Planning Commission members and the Randolph County Board made their decisions solely on the record and not on the public opposition. *Id.*

Randolph County argues that in Rockford v. Winnebago the court enunciated a test to be used to determine if prejudice occurred to the applicant. Resp. Br. at 20-21. Randolph County points to the following quote from that case:

> However, the existence of strong public opposition does not invalidate the [county] board's decision where the applicant was given an ample opportunity to present its case and where the

> applicant has not demonstrated that the [county] board's denial was based upon the public opposition rather than the record. Rockford v. Winnebago, 186 Ill. App. 3d, 542 N. E. 2d 423, 431.

Randolph County maintains that it is clear that Land and Lakes was given ample opportunity to present its case and the decision by the Randolph County Board was based on the record not public opposition. Resp. Br. at 24. Therefore, based on the Rockford v. Winnebago case, Randolph County asserts that the Randolph County Board's decision should be affirmed. Resp. Br. at 24.

Randolph County maintains that the proceedings before the Randolph County Board were not irrevocably tainted and Land and Lakes was not prejudiced

Randolph County argues that using the factors enunciated in E & E Hauling v. PCB, the record indicates that Land and Lakes has failed to prove that the proceedings before the Randolph County Board were irrevocably tainted. Resp. Br. at 24. As indicated above, the first inquiry from E & E Hauling v. PCB is gravity of the communications. Randolph County relies on Gallatin National Company v. Fulton County (Gallatin v. Fulton) (June 15, 1992), PCB 91-256 to support its position. In that case the Board held that the contacts were about non-substantive matters, there was no discussion of the merits of the case, and the participants were not influenced in any way in making their recommendation. Gallatin National Company v. Fulton County (June 15, 1992), PCB 91-256. Randolph County asserts that because the testimony indicates that the contacts in this case were also non-substantive, the contacts were not "grave" under E&E Hauling v. PCB. Resp. Br. at 26-27.

Randolph County argues that the second inquiry from E&E Hauling v. PCB, whether the communications influenced the ultimate decision, has also not been substantiated by Land and Lakes. Resp. Br. at 27. Randolph County contends that the testimony of the county board members indicates that all three members made their decision based on the record and that the contacts did not influence their decision. *Id.* Specifically, Randolph County cites to Moore's testimony that no call, mailing, or contact he received impacted his decision. Resp. Br. at. 27, citing Tr. at 141-142. Randolph County also cites Esker's testimony that his decision was based solely upon the record. Resp. Br. at 27, citing Tr. at 152. Finally, Randolph County points to Stork's testimony that the phone calls, mailings, package and pranks did not impact his ability to make an objective decision in the end. Resp. Br. at 28, citing Tr. at 105-106.

Randolph County argues that because the contacts were not by a "party" to the proceeding, the third inquiry of E&E Hauling v. PCB (whether the party making the contacts benefited from the ultimate decision) is not met. Resp. Br. at 29. Randolph County reasons that because the general public made the contacts, no party to the hearing benefited by the contacts.

The fourth inquiry, whether the content of the communication was unknown and thus there was no opportunity for response, also must fail according to Randolph County. Resp. Br. at 30. Randolph County states that Land and Lakes was given an opportunity to address *ex parte* communications at a county board meeting on October 19, 1998. *Id.* Further, Land and Lakes was given the opportunity to speak because Land and Lakes filed an objection to statements made at county board meetings about the landfill when Land and Lakes was not present. *Id.* Therefore, Randolph County maintains Land and Lakes was given an opportunity to respond. Resp. Br. at 31.

The last inquiry enunciated in E&E Hauling v. PCB is whether remand will serve a useful purpose. Randolph County points out that Land and Lakes is not seeking a remand, but rather a declaration that siting is granted and vacating the Randolph County Board decision. Randolph County maintains that first, Land and Lakes has not demonstrated, based on the factors of E&E Hauling v. PCB, that the Randolph County Board decision should be vacated. Second, Randolph County asserts that Land and Lakes failed to identify "the heretofore unknown body of law, which . . . would operate to totally avoid the requirements of Section 39.2 [of the Act] merely on the basis of public opposition to a landfill." Resp. Br. at 31-32.

Randolph County argues that the cases cited by Land and Lakes to support Land and Lakes' request that the Board overturn the Randolph County Board's decision are not applicable to this case. Resp. Br. at 32-33. Randolph County asserts that in this case the decisionmakers did not act in an affirmative manner, but rather merely

answered their phones. Resp. Br. at 33. Also in the cases cited by Land and Lakes, the Board overturned siting approvals, not siting denials. Thus, the Board maintained the *status quo*, whereas in this case the Board would be allowing the construction of a landfill site, which arguably violates Section 39.2 of the Act. *Id.*

Randolph County maintains that the communications with the public were not *ex parte* communications

Randolph County asserts that the communications which took place between the public and the Randolph County Board were not *ex parte* contacts because an *ex parte* contact "is one which take place without notice and outside the record between one in the decision-making role and 'a party before it'." Resp. Br. at 37, citing Town of Ottawa v. Pollution Control Board, 129 Ill. App. 3d 121, 126, 472 N.E.2d 150, 154 (3d Dist. 1984) (Ottawa v. PCB). Randolph County argues that because the communications were not from a party to the decision maker, the comments were not *ex parte*.

Randolph County concedes that Waste Management v. PCB does not completely agree with Ottawa v. PCB. Resp. Br. at 38. Randolph County does, however, maintain that the Waste Management v. PCB court's rationale that communications from the public may be *ex parte* contact is not a well-reasoned analysis. Resp. Br. at 38. Randolph County asserts that if the Waste Management v. PCB court's rationale were correct, anytime a judge received a comment from the public on a pending case the proceeding would be tainted. *Id.* In fact, Randolph County points out, the Supreme Court Rules distinguish between *ex parte* communications (a communication of the judge with one party) as opposed to "other communications made to the judge outside the presence of the parties concerning a pending matter." Resp. Br. at 38, citing Illinois Supreme Court Rule 63A(4)(1999).

Randolph County argues that it would be a "ridiculous burden" upon siting proceedings if a county board member were required to be disqualified because of "unsolicited contacts" from members of the public. Resp. Br. at 38. Randolph County maintains that such a ruling would provoke members of the public to make contacts to taint a process, so that to protect against this, governing authorities would need to be made up of anonymous members. Resp. Br. at 38-39. Therefore, Randolph County asserts the only contacts which should be held to affect the fundamental fairness in a siting hearing are substantive contacts of the decision maker with a party outside the presence of another party which result in actual prejudice. Resp. Br. at 39.

Randolph County maintains that a majority of the Randolph County Board had few to no contacts outside the hearing

Randolph County argues that the testimony of Esker and Moore indicates that these individuals had "next to no contact" with anyone regarding siting outside the hearing process. Resp. Br. at 36. Randolph County also asserts that Stork testified that the calls did not influence his decision. *Id.* However, even if Stork's vote had been tainted, the vote against the landfill was unanimous. *Id.* Thus, Randolph County observes, Land and Lakes would not have been granted siting approval. Resp. Br. at 37. Randolph County cites to three Board cases to support this argument. Those cases are Waste Management of Illinois v. Lake County Board (April 6, 1989), PCB 88-190, National Company v. Fulton County Board (June 15, 1992), PCB 91-256, and St. Charles v. Kane County Board (March 21, 1084), PCB 83-228, 83-229, and 83-230 (consl). In those cases the Board found that even if a county board member were tainted that did not mean the entire decisionmaking process was tainted. Resp. Br. at 36-37.

Randolph County maintains that the contacts with members of the Planning Commission by the public were irrelevant

Randolph County argues that there were few contacts by the public with the Planning Commission and that these contacts were irrelevant. Resp. Br. at 39. While the Planning Commission drafted a report with recommendations to the Randolph County Board, the Planning Commission did not have the decision making authority. Resp. Br. at 39. Randolph County cites Gallatin National Company v. Fulton County (June 15, 1992), PCB 91-256 in which the Board affirmed the county board decision in part because the alleged improper communications involved a committee which merely advised the county board.

Further, Randolph County asserts that there is no evidence that the Planning Commission members discussed any "nonparty" communication they received outside the hearing process with the Randolph County Board. Resp. Br. at 40. Also, Randolph County maintains there is no evidence that any such communication was used by the Planning Commission in its deliberations on its recommendation to the Randolph County Board. *Id.* Also, Randolph County maintains that unlike the RAPE v. LaSalle County case the evidence in this case is clear that any communication with the Planning Commission did not affect the recommendation to the Randolph County Board. Resp. Br. at 40. Therefore, the contacts were irrelevant. *Id.*

Randolph County maintains that the appropriate redress has already occurred

Randolph County argues that there is no reason to remand this matter to the Randolph County Board as the communications have been placed on the record through the discovery process before the Board. Resp. Br. at 40. Randolph County asserts that the applicant "does not have a right to remove the decision making authority" from the Randolph County Board; rather the applicant only has the "right to have those contacts disclosed" in order to determine if there was prejudice to the decision. Resp. Br. at 40. Randolph County maintains that there is no evidence of prejudice and the Randolph County Board's decision should be affirmed. *Id.*

Land and Lakes' Reply

In its reply, Land and Lakes responded to several of the points made in the Randolph County brief. However, the Board will only discuss two of those responses as only those two responses present arguments not already discussed. First, Land and Lakes maintains that Randolph County's reliance on Gallatin v. Fulton is misplaced. Reply at 8. Land and Lakes asserts that in Gallatin v. Fulton the Board found no fundamental unfairness when the applicant's attorney discussed non-substantive matters with the hearing officer and members of the hearing committee. *Id.* Land and Lakes asserts that the committee members in Gallatin v. Fulton could not remember if or when the *ex parte* contacts occurred. *Id.* It was under these circumstances that the Board found no prejudice resulted. *Id.*

Land and Lakes argues that the facts in this proceeding are more analogous to those in Concerned Citizens of Williamson County v. Bill Kibler Development (CCWC v. Kibler) (January 19, 1995), PCB 94-262. Reply at 9. In CCWC v. Kibler, the applicant attended a meeting of the county board and discussed technical matters. Reply at 9. Although members of the public were present, they were unable to participate in the meeting. *Id.* Land and Lakes argues that the prejudice to Land and Lakes is even more severe than to the objectors in CCWC v. Kibler because all the contacts took place outside the presence of Land and Lakes. *Id.*

Secondly, Land and Lakes also disputes the argument made by Randolph County that a majority of the Randolph County Board had little to no contacts outside the hearing. Land and Lakes argues that the cases cited by Randolph County to support its position are cases which involve many more county board members than Randolph County. Land and Lakes states that Randolph County "cites no authority for its proposition that disqualifying one-third of the decisionmakers (one of just three members) on the grounds of *ex parte* contacts is allowable." Reply at 13. Land and Lakes maintains that the Board has previously decided not to apply such a simplistic mathematical formula and in support of its position cites to Rockford v. Winnebago where the Board remanded a case to the county board after disqualifying four of the 26 members. Reply at 14.

Amicus Curiae

The *amicus* brief filed in this case urges the Board not to "adopt the decision" in Waste Management v. PCB. *Amicus* at 5. The brief asks that the Board not find contacts by the non-parties in this case to be *ex parte* contacts with the Randolph County Board. If the Board does find that the contacts are *ex parte*, then the brief argues that the contacts do not meet the test in E & E Hauling v. PCB. *Amicus* 9-14.

Discussion

The first step in our discussion is to determine whether the contacts that occurred in this proceeding were *ex parte* contacts. If the answer is yes, then the Board must decide if Land and Lakes was prejudiced by those contacts. If the contacts are not *ex parte* then the Board need not examine the issue of prejudice. After careful consideration of the facts in this case, the Board finds that the contacts were *ex parte* contacts for the following reasons.

Both parties rely on Waste Management v. PCB to argue their positions. The Board is convinced that Waste Management v. PCB supports a finding that the contacts were *ex parte* contacts. The court affirmed the Board's decision in that case where the Board referred to telephone calls to the board members as *ex parte* contacts. See Waste Management of Illinois v. Lake County Board (December 17, 1987), PCB 87-75, slip op at 22-23. Thus, the Board's decision was consistent with the holding of the court.

Further, in Waste Management v. PCB the court stated:

> A court will not reverse an agency's decision because of *ex parte* contacts with members of that agency absent a showing that prejudice to the complaining party resulted from these contacts. E & E Hauling v. PCB 451 N.E.3d 555, 571. Here the record does not indicate that Waste Management suffered any prejudice as a result of contacts between citizens of Lake County and LCB [Lake County Board] members. The various telephone calls, letters, and personal contacts were merely expressions of public sentiment to county board members on the issue of Waste Management's landfill application. Moreover, existence of strong public opposition does not render a hearing fundamentally unfair where, as here, the hearing committee provides a full and complete opportunity for the applicant to offer evidence and supports its application. Waste Management of Illinois v. Pollution Control Board 160 Ill. App. 3d 434, 513 N.E.2d 592, 112 Ill. Dec. 178 (1987). Further, *ex parte* communications from the public to their elected 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. Thus, although personal *ex parte* communications to county board members in their adjudicative role are improper, there must be a showing that the complaining party suffered prejudice from these contacts. Waste Management v. PCB 530 N.E.2d 682, 697-698, citing E & E Hauling v. PCB 451 N.E.3d 555, 571.

The court in Waste Management v. PCB (citing E & E Hauling v. PCB) clearly found contacts between nonparties with board members could be *ex parte* communications. This position was reiterated by the court in Fairview Area Citizens Taskforce v. Illinois Pollution Control Board (FACT v. PCB), 198 Ill. App. 3d 541, 555 N.E.2d 1178 (3rd Dist. 1990) and by the Board in at least two cases, Citizens Opposed to Additional Landfills and Harvey Pitt v. Greater Egypt Regional Environmental Complex (COAL v. GERE) (December 5, 1996), PCB 97-29 and Residents Against a Polluted Environment v. County of LaSalle and Landcomp Corporation (September 19, 1996), PCB 96-243. Thus, it is well established that contact by nonparties, outside the public hearing, with a board member concerning a pollution control facility siting proceeding is an *ex parte* contact.

Having determined that the contacts were *ex parte* contacts, the Board must now decide if the contacts prejudiced Land and Lakes. First, the Board agrees with Randolph County that the contacts with members of the Planning Commission were irrelevant. All four members of the Planning Commission testified that the limited contacts did not affect their decision and the recommendation they made to the Randolph County Board. The Planning Commission members testified that their recommendations were based solely on the record before them. The Planning Commission was only in the position of making recommendations to the Randolph County Board; it was not in a position to make the ultimate decision. And although the Board has found in some prior cases that contacts with an individual or group making recommendations to the decision making body can be improper contacts which prejudice the proceeding (see RAPE v. LaSalle), the Board finds that the contacts in the instant case do not rise to that level and are more analogous to those in Gallatin v. Fulton.

Next, the Board will examine the factors from E & E Hauling v. PCB to determine if the *ex parte* contacts tainted the Randolph County decisionmakers' process so that the proceeding was fundamentally unfair. The Board will first look to the contacts with Randolph County Board members Esker and Moore. Again, the testimony indicates that there were very few contacts and that the contacts did not affect their decision. Also, the Randolph

County Board members did not discuss the *ex parte* contacts they received with the other board members. Thus, the contacts were minor and "are perhaps inevitable given a county board member's perceived legislative position." Waste Management v. PCB 530 N.E.2d 682, 697-698, citing E & E Hauling v. PCB 451 N.E.3d 555, 571. The contacts did not affect the agency's ultimate decision and as the identity of the contacts is not clear and some of the contacts supported the landfill, the Board cannot find that there was a benefit in the ultimate decision. See E & E Hauling v. PCB. Therefore, because Esker and Moore based their decisions on the hearing record, the contacts with Esker and Moore did not prejudice Land and Lakes. See Waste Management v. PCB.

The Board now looks to the testimony of Randolph County Board Chairman Stork. While the Board is initially dismayed at the number and type of *ex parte* contacts directed at Stork, the Board must also take into account the context that as chairman of the Board, citizens would inevitably direct more comments to Stork as the perceived leader of an elected body of representation. Stork's testimony is ambiguous as to the effect the contacts had on his ability to make a decision. However Stork states that his vote to deny siting was based on the evidence before the Randolph County Board. Therefore, the Board finds that although the contacts with Stork were improper *ex parte* contacts, the existence of the contacts did not prejudice Land and Lakes. See Waste Management v. PCB.

Finally with regard to *ex parte* contacts, the Board examines the contacts at the county board meeting. Again the Board finds that the contact did not prejudice Land and Lakes. The Board notes that this circumstance is unlike CCWC v. Kibler. In CCWC v. Kibler, the county board asked specific substantive questions of the applicant while refusing to allow opponents to speak and relied on those answers to make the decision. In this case, the county board had a long tradition of allowing anyone to speak at county board meetings. The county board members all indicate that they gave no weight to the statements made. Thus, the Randolph County Board members did not rely on the information presented at the county board meeting to make a decision and Land and Lakes was not prejudiced. Citizen statements at the regularly scheduled county board meetings "were merely expressions of public sentiment to county board members" and did not "render hearing fundamentally unfair." Waste Management v. PCB 530 N.E.2d 682, 697-698, citing E & E Hauling v. PCB 451 N.E.3d 555, 571.

The Board also notes that the "existence of strong public opposition does not render a hearing fundamentally unfair where, as here, the hearing committee provides a full and complete opportunity for the applicant to offer evidence and supports its application." Waste Management of Illinois v. Pollution Control Board 160 Ill. App. 3d 434, 513 N.E.2d 592, 112 Ill. Dec. 178 (1987), Land and Lakes was given a full and complete opportunity to offer and support its application. Public hearings were held before the Planning Commission where witnesses for Land and Lakes testified in support of the multi-volume application. Opposition to the application was also heard at that hearing. After the close of the public hearing, a thirty-day comment period was held. Thus, Land and Lakes was aware of the opposition and had the opportunity to respond.

In summary, the Board finds that the proceedings before the Randolph County Board were not fundamentally unfair. The Board does find that the contacts were *ex parte* contacts; however under the inquiry enunciated in E & E Hauling v. PCB and reiterated in Waste Management v. PCB, the applicant was not prejudiced.

CRITERIA ii and viii

Having determined that the proceedings were not fundamentally unfair, the Board next must examine if the Randolph County Board's decision to deny siting based on Section 39.2(ii) and (viii) of the Act was against the manifest weight of the evidence. As indicated above, criterion ii is that the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected. Criterion viii is that the facility is to be located consistent with the planning requirements of the solid waste management plan.

The Board's standard for reviewing a local decision has long been established. The courts have stated that the Board must determine if the local decision was against the manifest weight of the evidence. McLean County Disposal, Inc. v. County of McLean, 207 Ill. App. 3d 352, 566 N.E.2d 26, 29 (4th Dist. (1991); E & E Hauling v. PCB 452 N.E.2d at 572. A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable form a review of the evidence. File v. D &L Landfill, Inc. 219 Ill. App. 3d 897, 579 N.E.2d

1228, 1231 (5th Dist. 1991); Turlek v. Pollution Control Board, 274 Ill. App. 3d 244, 653 N.E.2d 1288, 1292 (1st Dist. (1995)). Simply because the Board could reach a different conclusion is not sufficient to warrant reversal of a local decision. City of Geneva v. Waste Management (July 21, 1994), PCB 94-58.

In this section the Board will begin by summarizing the arguments of Land and Lakes. Then a discussion of Randolph County's arguments follows. The Board will then discuss Land and Lakes' response to Randolph County's arguments. Finally, in this section the Board will analyze the arguments and render its decision on whether the Randolph County Board's decision was against the manifest weight of the evidence.

Land and Lakes' Arguments

Land and Lakes argues that the findings by the Randolph County Board that the application did not demonstrate that the Randolph County Plan was designed to protect the health, safety and welfare (criterion ii) and that the facility was consistent with the solid waste management plan (criterion viii) is against the manifest weight of the evidence. Land and Lakes sets forth three arguments with regard to criterion ii. First, Land and Lakes maintains that the Randolph County Board improperly found that the criterion was not met because of an alleged inconsistency in the solid waste management plan. Pet. Br. at 30. Second, Randolph County Board's use of traffic concerns as a basis for denial of criterion ii is inconsistent with the decision on criterion vi,[2] which deals explicitly with traffic patterns. Pet. Br. at 33. Third, Land and Lakes argues that the use of traffic concerns in Randolph County Board's denial of criterion ii is an illegal "conditional denial". Pet. Br. at 36.

On the denial of criterion viii, Land and Lakes also puts forth three arguments. The first is that the "exclusionary" factors relied upon by the Randolph County Board are not a part of the solid waste management plan. Pet. Br. at 39. Secondly, the "exclusionary" factors are merely recommendations. Pet. Br. at 41. Finally, Land and Lakes argues that the setback clause violates the Act; exceeds the authority of Randolph County under the Solid Waste Planning Act; and is bad policy.

Land and Lakes maintains that the Randolph County Board improperly found that criterion ii was not met because of an alleged inconsistency in the solid waste management plan

Land and Lakes points out that the Randolph County Board indicated that the provision in the solid waste management plan prohibiting landfills within one and a half-miles of a municipality was intended to protect the health, safety and welfare of Randolph County residents. And based on that, as well as other reasons discussed below, Randolph County Board determined that criterion ii was not met.

Land and Lakes argues that the Randolph County Board erroneously used its interpretation of the facility's consistency with the solid waste management plan to deny compliance with criterion ii. Pet. Br. at 30. Land and Lakes reasons that criterion viii is the proper criterion under which to consider consistency with the solid waste management plan. *Id.* Land and Lakes states: "[t]o allow a decisionmaker to deny an application under more than one criteria, for the same reason, would render the separate criteria meaningless." Pet. Br. at 31. If a proposed facility is not consistent with the solid waste management plan the proper criterion for denial is criterion viii. *Id.*

Land and Lakes also asserts that no person presented any testimony or comment on the purpose of the one and a half-mile setback. Pet. Br. at 32. Land and Lakes, however, presented evidence that the facility complies with all federal and state location standards. TOC 3 at Vol. 3, Part IV. There was no challenge to Land and Lakes' evidence on the location standards and no comment was made. Pet. Br. at 32.

Land and Lakes also argues that Randolph County Board's expert, Rhutasel, testified to the existence of the setback but only as it relates to criterion viii. Pet. Br. at 32. Land and Lakes argues that there is no evidence that the one and a half-mile setback is related to the public health, safety, and welfare. *Id.*

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[2] Section 39.2(vi) of the Act (criteria vi) provides that "the traffic patterns to and from the facility are so designed as to minimize the impact on existing traffic flows."

Land and Lakes maintains that the Randolph County Board's use of traffic concerns as a basis for denial of criterion ii is inconsistent with the decision on criterion vi which deals explicitly with traffic patterns

Land and Lakes indicated that a second reason for denying siting based on criterion ii, was Randolph County Board's concerns about traffic patterns. Land and Lakes argues that the decision on criterion ii directly conflicts with Randolph County Board's decision that the application met the requirements of criterion vi. Pet. Br. at 34. Land and Lakes argues criterion vi is the proper place to direct concerns about traffic patterns. *Id.* Land and Lakes also argues that the denial based on criterion ii is "particularly objectionable" because it is based on issue over which Randolph County has control, not Land and Lakes. Pet. Br. at 35.

Land and Lakes maintains that the use of traffic concerns in Randolph County Board's denial of criterion ii is an illegal "conditional denial"

Land and Lakes argues that the Randolph County Board's decision is internally inconsistent and in effect is a "conditional denial". Pet. Br. at 36. Land and Lakes argues that the Randolph County Board found that criterion ii was not met and then states:

> any effort to cure this lack of compliance, would at a minimum, require the Applicant to comply with any and all recommendations made by the Randolph count Highway Department concerning permanent road upgrades, permanent road improvements. . .. In addition, the Applicant, would at a minimum, need to implement and comply with all ongoing road maintenance equipment which would be prescribed by the Randolph County Highway Department. Pet. Br. at 36, citing Exh. C at 4.

Land and Lakes argues that the above language constitutes a "conditional denial" of the type which the Board found to be inappropriate in Land and Lakes Company v. Village of Romeoville (December 6, 1991), PCB 91-7. In that case the Board stated:

> Sections 39.2(a) and (e) of the Act, however, do not contemplate the imposition of conditions upon a denial. Rather, any applicant who seeks site approval of a proposed regional pollution control facility has the right to expect the county board or municipal governing body to issue definitive approval (which allows for the addition of conditions that are reasonably related to the criteria) or denial of its siting application. To hold other wise would be unfair to the applicant. Land and Lakes Company v. Village of Romeoville (December 6, 1991), PCB 91-7

Land and Lakes maintains that the "exclusionary" factors relied upon by the Randolph County Board, in finding that criterion viii was not met, is not a part of the solid waste management plan

In determining that the application had not demonstrated compliance with criterion viii, the Randolph County Board adopted the finding of the Planning Commission. Pet. Br. at 39. The Planning Commission found that the solid waste management plan "excludes sites within 1.5 miles of municipal limits" and that the facility's proposed siting within one mile of Sparta meant that the application did not meet criterion viii. TOC 8 at 6.

Land and Lakes contends that the solid waste management plan does not exclude facilities located within one and a half-miles of a municipality. Pet. Br. at 40. Specifically, Land and Lakes argues that only a part of the document entitled "Solid Waste Management Plan for Bond, Clinton, Randolph, and Washington Counties in Illinois" is an actual "solid waste management plan". *Id.* The part of the documents Land and Lakes considers the "solid waste management plan" is chapter 12. Land and Lakes asserts that the rest of the document's chapters "provide extensive background on solid waste management issues, including landfills, but are not part of the 'county solid waste management plan'." *Id.*

The provision in the Randolph County Plan where the setback is located is not in chapter 12, according to Land and Lakes. And, Land and Lakes asserts nowhere in chapter 12 is there a mention of location criteria. Therefore, Land and Lakes concludes it is clear that the setbacks are not a part of the Plan. Pet. Br. at 40.

Land and Lakes maintains that the "exclusionary" factors relied upon by the Randolph County Board, in finding that criterion viii was not met, are merely recommendations

Land and Lakes argues that, even if the setback is a part of the Plan, the text of the Randolph County Plan refers to the location factors as "recommended local criteria". Pet. Br. at 41. Further, Land and Lakes argues that Darryl Thompson Manager of General Planning for SIMAPC, the entity that drafted the document, opined that the location of a new landfill in Randolph County that is acceptable to local government is consistent with their Solid Waste Management Plan. Pet. Br. at 41. Therefore, Land and Lakes asserts that Thompson "was of the opinion that the proposed landfill is consistent with the solid waste management plan." *Id.*

Land and Lakes asserts that there is no evidence in the record that contradicts Thompson's opinion. Pet. Br. at 43. Further, the report prepared for Randolph County by Rhutasel and Associates, consulting engineers (Rhutasel Report), only stated that the setback warranted further consideration. *Id.* The Rhutasel Report went on to conclude that "there was no reason to disagree with the conclusions" of Land and Lakes and Thompson, according to Land and Lakes. *Id.* Thus, Land and Lakes maintains the decision by the Randolph County Board that criterion viii is not met was against the manifest weight of the evidence. *Id.*

Land and Lakes maintains that the setback clause violates the Act; exceeds the authority of Randolph County under the Solid Waste Planning Act; and is bad policy

Land and Lakes points out that Section 39.2 of the Act establishes a unified, statewide, siting process. Pet. Br. at 43-44. The Board has adopted regulations for landfills which include location standards and setbacks. Pet. Br. at 44. The Board did not include a setback for municipalities. *Id.* Land and Lakes argues that allowing counties to begin adding additional siting location criteria, outside those in Section 39.2 of the Act would violate the unified statewide plan envisioned by the legislature. *Id.* Land and Lakes further argues that the setback is an attempt to incorporate "zoning powers" in the Plan. Pet. Br. at 44-45. Thus, Land and Lakes reasons since zoning is specifically exempt from consideration in Section 39.2 siting proceedings, the inclusion of the setback violates the Act.

Land and Lakes also argues that a county board has the authority to adopt a solid waste management plan under the Solid Waste Planning and Recycling Act. 415 ILCS 15/1 *et. seq.* (1998). However, that authority does not allow a county board to "add location criteria" to the criteria already adopted by the legislature, argues Land and Lakes. Pet. Br. at 45.

Finally, Land and Lakes suggests that the setback is bad policy because it would not allow a municipality to own and operate a facility within the municipality boundaries. Pet. Br. at 46.

Randolph County Arguments

Randolph County argues that the decision by the Randolph County Board is supported by the record. Specifically, on criterion ii, Randolph County sets forth four arguments: first, that the one and a half-mile exclusion is related to criterion ii; second that the condition of the surrounding roads is related to criterion ii; third, Randolph County may use the same facts to find a failure to meet two separate criteria; and, fourth, that the Randolph County Board did not issue a conditional denial. On criterion viii, Randolph County enunciates five arguments. Randolph County argues that the plain language of the Randolph County Plan and the testimony of Randolph County's experts supports the decision on criterion viii. Next, Randolph County argues that a determination on the consistency of the Randolph County Plan does not require expert testimony. Third, Randolph County argues that it is beyond the Board's authority to determine the propriety of the solid waste management plan. Fourth, Randolph County asserts the one and a half-mile exclusion does not violate the Act. And fifth, Randolph County maintains the one and a half-mile exclusion is a part of the Act. The Board will summarize each of those arguments.

Randolph County asserts that the one and a half-mile exclusion is related to the public's health, safety, and welfare

Randolph County asserts that it was free to consider the proximity of the landfill in its assessment of whether the landfill was located to promote health, safety, and welfare. Resp. Br. at 52. Randolph County

maintains that it is "consistent with conventional logic and reason" that the closer a landfill is to population the more likely it will affect health, safety, and welfare. *Id.* Randolph County believes that the solid waste management plan reflects this logic because the exclusionary factors are listed because of environmental protection particularly of groundwater is a primary concern. *Id.* Further, because the application included one of the exclusionary factors identified by the Plan, it is evidence of the potential negative impact to the health, safety, and welfare. *Id.*

Randolph County asserts that the condition of the surrounding roads is related to the public's health, safety, and welfare

Randolph County maintains that the Randolph County Board found that criterion ii was not met because of the "excessive wear and tear" on the roads, not because of traffic patterns. Resp. Br. at 53. Rhutasel made these distinctions in the testimony. *Id.* Randolph County asserts that it was not against the manifest weight of the evidence to follow this distinction and find that criterion ii was not met. Resp. Br. at 54.

Randolph County asserts that the Randolph County Board may use the same facts to find failure to meet two separate criteria

Randolph County first asserts that Land and Lakes does not point to any authority for its argument that the Randolph County Board cannot use the same facts to find that two criteria are not met. Resp. Br. at 54. Next, Randolph County argues that the criteria of Section 39.2 overlap and criterion ii is so broad that it is likely that any failure to meet one of the Section 39.2 criteria would also be a failure to meet criterion ii. *Id.* Randolph County also argues that this is not a case of first impression. Randolph County cites to Industrial Fuels and Resources/Illinois v. Harvey (September 27, 1990), PCB 90-53, in support of this proposition. Randolph County maintains that Harvey used the same reasons to deny siting on two separate criteria in that instance. Resp. Br. at 55.

Randolph County asserts that the Randolph County Board did not issue a conditional denial

Randolph County contends that the denial of siting under criterion ii was not a "conditional denial" because siting was "flatly" denied under criterion ii. Resp. Br. at 55. Randolph County asserts that there is no indication that the Randolph County Board would reverse its decision if the applicant met the "recommendations" made by the Randolph County Board. Resp. Br. at 56. Therefore, the denial was not conditional.

Randolph County also asserts that the Randolph County Board noted in its decision that "notwithstanding Land and Lakes' failure to demonstrate compliance" with criterion ii, the Randolph County Board "feels compelled to make certain additional Findings" concerning criterion ii. *Id.* Among those additional findings was that the routes preferred by Land and Lakes were not Class I roads and thus would put high weight and stress demands on the roads. Resp. Br. at 55-56.

Randolph County asserts that the plain language of the Randolph County Plan and the testimony of the experts supported Randolph County Board's decision on criterion viii

Randolph County argues that the plain language of the solid waste management plan supports the decision that Land and Lakes' application was inconsistent with the Plan. Resp. Br. at 43. Randolph County asserts that, regardless of whether the language in the Randolph County Plan is a recommendation or a required exclusion, it is within the authority of the siting authority to follow the Randolph County Plan and exclude siting. Resp. Br. at 43. Randolph County maintains that all solid waste management plans are "to some extent" recommendations since it is within the county's purview to determine consistency. Second, Randolph County argues that the Randolph County Plan states that "parcels or areas of which contained any of the exclusionary characteristics would not be considered in the site identification process." Resp. Br. at 43, citing Exh. 6 at 207. The exclusionary characteristics include the one and a half-mile restriction and the Randolph County Plan could not be any clearer that such proposals should be excluded, argues Randolph County. *Id.*

Randolph County further states that the testimony of Rhutasel was that the one and a half-mile restriction was an exclusionary provision. Resp. Br. at 44. Randolph County maintains it was not necessary for Rhutasel to

give Randolph County Board the ultimate legal conclusion that the application was inconsistent with Plan, the Randolph County Board alone is the one who must make that determination. Resp. Br. at 44. The Planning Commission also made that determination. *Id.*

Randolph County also points out that Land and Lakes relies on a letter from Thompson, who did not testify at hearing. Resp. Br. at 45. The Planning Commission found the letter to be "equivocal" and the letter does not even mention the one and a half-mile exclusion. Resp. Br. at 45. Therefore, Randolph County asserts it was appropriate for the Planning Commission and the Randolph County Board to hesitate to rely on Thompson's conclusions. *Id.*

Randolph County asserts that a determination of the consistency with the Randolph County Plan does not require expert testimony

Randolph County argues that it does not take an expert to determine what is intended by the plain language of a solid waste management plan, or to tell the Randolph County Board that one mile is less than one and a half-miles. Resp. Br. at 46. Randolph County states that generally expert opinions need only be used when the subject matter is beyond the "ken or understanding of the average person." Resp. Br. at 46, citing Hernandes v. Power Construction 73 Ill. 2d 90, 382 Ill.App. 3d 1201,1205 (1978). Thus even without the testimony of Rhutasel, the Randolph County Board could determine that the application was inconsistent with the Plan. Resp. Br. at 46.

To further substantiate the argument that additional expert testimony was not required, Randolph County asserts that both Stork and Moore served on the executive committee of SIMPAC, which authored the Plan. Resp. Br. at 47. Therefore, Randolph County argues, it was not against the manifest weight of the evidence to find the application inconsistent with the Plan. Resp. Br. at 47.

Randolph County asserts that it is beyond the Board's authority under Section 40.1(a) to determine the propriety of Randolph County's solid waste management Plan

Randolph County argues that the Board's Section 40.1 of the Act allows the Board to review a local decision made under Section 39.2 of the Act. Thus, Randolph County asserts the Board may review only the substance of a Section 39.2 hearing and there is no authorization to review the Randolph County Plan itself. Resp. Br. at 48.

Randolph County asserts that the one and a half-mile exclusion does not violate the Act

Randolph County first asserts that the exclusion does not violate the Act because the Randolph County Plan was reviewed by the Illinois Environmental Protection Agency pursuant to Section 4(b) of the Solid Waste Planning and Recycling Act (415 ILCS 15/4(b)) to insure consistency with the Act. Resp. Br. at 48. Randolph County argues that it is "ludicrous" for Land and Lakes to argue the Randolph County Plan violates the Act when "the agency responsive for enforcing the Act has already configured the Plan's consistency with the Act." Resp. Br. at 48.

Randolph County asserts that the one and a half-mile exclusion is a part of the solid waste management plan

Randolph County asserts that the plain language of the Randolph County Plan makes clear that the entire document is the solid waste management plan. Resp. Br. at 50.

Land and Lakes' Reply

Land and Lakes, in its reply, makes some new arguments in response to Randolph County and reasserts its position on others. The Board will summarize briefly the new arguments, and where necessary, the reassertion.

Land and Lakes argues that Randolph County has "filled" its response "with misstatements of fact and unsupported declarations." Reply at 19. Land and Lakes asserts that Randolph County has mischaracterized the conclusions of Rhutasel. *Id.* Land and Lakes argues that Rhutasel simply identified the existence of the setback and found no "reason to disagree" with the conclusion of Land and Lakes. *Id.* Further, Land and Lakes argues that there is no evidence that Stork and Moore were members of SIMPAC when the solid waste management plan was

adopted. *Id.* Land and Lakes maintains that Randolph County relies on the letterhead from Thompson's letter for support that Stork and Moore served on the SIMPAC at the time the Randolph County Plan was authored. *Id.* Land and Lakes points out the Randolph County Plan was authored in 1996 and the Thompson letter was written in 1998. Reply at 19; citing TOC 3 at Vol. 2.

Land and Lakes also contends that Randolph County makes several "bald statements of what it asserts to be the law" without supporting citations to the law. Reply at 20. Specifically Land and Lakes points to Randolph County's assertion that a local government is free to legislate environmental standards more stringent than those of the Act. Reply at 20. Land and Lakes argues that this assertion misses the distinction between "environmental standards" and the siting process. *Id.* Land and Lakes sites to Section 39.2(g) of the Act as support for its argument.

Land and Lakes also responds to Randolph County by reasserting that the setback or "exclusionary" factor is not part of the plan. Reply at 17. Land and Lakes argues that the plain language of the document indicates that the Randolph County Plan is in chapter 12. Land and Lakes also reasserts that it is improper to use the same facts to deny siting for two separate criteria. Reply at 22. Land and Lakes goes on to point out that the case cited by Randolph County to support its position on this issue was a case wherein the Board was reversed. Industrial Fuels v. PCB, 227 Ill. App. 3d 533, 592 N.E.2d 148, 159 (1st Dist. 1992).

Finally, Land and Lakes argues that the Board does have the authority to review Randolph County's decision on consistency with the Plan. Reply at 18. Land and Lakes argues that the Board is reviewing the interpretation of the Randolph County Plan used by Randolph County, not the Randolph County Plan itself. *Id.*

Discussion

As stated above, the Board reviews the decision of the Randolph County Board to determine if the decision is against the manifest weight of the evidence. The Board is not in a position to reweigh the evidence, but must determine if the decision is against the manifest weight of the evidence. Fairview Area Citizens Taskforce v. PCB, 198 Ill.App. 3d 541, 555 N.E.2d 1178 (3rd Dist. 1990). Therefore, the Board must decide if the evidence in the record supports the decision by Randolph County Board that Land and Lakes failed to meet criteria ii and viii. Based on a review of the record and for the following reasons, the Board finds that the record supports the Randolph County Board's findings on both criteria ii and viii.

One general argument which Land and Lakes makes concerning the Randolph County Board's decision on the two criteria is that Randolph County's expert, Rhutasel, found that Land and Lakes had satisfied the two criteria. The Board is not persuaded that the recommendations of Randolph County's expert are binding on the decisionmaker. See McLean County Disposal Company, Inc. v. County of McLean (November 15, 1989), PCB 89-108, aff'd. McLean County Disposal, Inc. v. County of McLean, 207 Ill. App. 3d 352, 566 N.E.2d 26, 29 (4th Dist. (1991)). The Board will now continue its discussion by focusing first on criterion ii and then on criterion viii.

Criterion ii

The Board finds that the decision to deny siting based on criterion ii is not inconsistent with the Randolph County Board's decision on criterion vi. Randolph County's findings on criterion ii indicate that there were concerns raised during the course of the siting hearing on the matter of roads. Resp. Exh. 4 at 3. More specifically, the findings indicated that most of the roads suggested by Land and Lakes as preferred transport routes are not classified as Class I Illinois Department of Transportation "80,000 pound" roads. However, a significant number of vehicles transporting waste to the facility would be over 80,000 pounds in weight. *Id.*

The Randolph County Board found that if the roads are not upgraded or restricted the roads would be subject to excessive wear and deterioration. *Id.* This could cause increasingly narrow pathways of travel. Resp. Exh. 4 at 4. This finding was based in part on the testimony of Rhutasel at the county hearing. He stated that: "[o]ur concerns are not related to the traffic patterns, but related to the capability of the existing roads to handle the -- I guess the weight of the loads that would be placed on them, and the actual width of the roadways and the impact

that the trucks carrying the refuse to the landfill would have on them." TOC 2 at 60-61. Thus, Randolph County's expert expressed concerns about the roads, which were not related to traffic patterns.

In addition, testimony was provided by Craig Holan[3] at the public hearing on the issue of road safety. Holan testified that he disagreed with the conclusions made by Land and Lakes' experts on the issue of traffic. TOC 2 at 91-92. Holan specifically noted the narrow widths of the roadways and steep embankments. TOC 2 at 96. He also indicated that there were "sight distance problems" with some of the intersections. TOC at 97.

In contrast, the testimony of Land and Lakes' expert Norman Roden indicates that the report prepared and submitted as a part of the application did not look at the structural conditions of the roads. TOC 2 at 191. Roden stated that:

> We made an inspection of the site and the area and then prepared some traffic surveys which included traffic volume counts, surveys of time and distance, relative times of distances via alternative routes from various points to the potential landfill site and then performed a capacity analyses for a couple of key intersections within that area. TOC 2 at 191.

Randolph County also received a number of comments which indicated a concern with the condition of the roads. Some of the comments presented include that there would be a "break down of roads", that there would be "danger from truck traffic", and the presence of the landfill would not "allow for safe travel." TOC 9 at C2, C3, C21, C24, C26, C27, C35, C54, C55, and C56.

The transcript from the county board meeting where the Randolph County Board made its decision clearly indicates that each of the members shared the concerns of their expert about roads. All three members indicated that they were concerned about the ability of the roads to handle the trucks weighing over 80,000 pounds. Resp. Exh. 3 at 16-17. In fact Chairman Stork states: "I think simply the hills - - if you've traveled the road, there's hills and narrow (sic), and the amount of truck traffic on there would not be conducive to the residences there." Resp. Exh. 3 at 17. In contrast on criterion vi, the members expressed concerns on the maintenance of the roads but the members felt that the actual traffic plan was sufficient. Resp. Exh. 3 at 24-26. Chairman Stork stated: " I think that most of it is immaterial how they get to the Holloway Road, but I do feel like they have minimized it." Resp. Exh. 3 at 25. Thus, the Randolph County Board did not adopt inconsistent findings on the criteria ii and vi, but rather distinguished between the two.

The Board disagrees with Land and Lakes' contention that this is a conditional denial. The language quoted by Land and Lakes is only a part of the entire finding on criterion ii. Randolph County found that the record did not support a finding that criterion ii had been met; then Randolph County went on to make additional findings. Resp. Exh. 4 at 3. These additional findings involved the concerns about traffic on the county roads and the language quoted by Land and Lakes. The Board's reading of that language is that the Randolph County Board was only explaining what lengths would be necessary to demonstrate compliance with criterion ii, not a conditional denial. The Board has reviewed its decision in Land and Lakes Company v. Village of Romeoville (December 6, 1991), PCB 91-7 and the Board is not convinced that the two cases are factually similar. Therefore, the Board finds that this is not a conditional denial.

The Board does agree with Land and Lakes that the Randolph County Board improperly found that criterion ii was not met because of the lack of a one and a half-mile setback. The only indication that this issue was raised before Randolph County that the Board can find in the record is in letters from persons opposing the landfill. *e.g.*, TOC 9 at C15, C27. Further, Randolph County has not pointed to any evidence in the record. Therefore, the Board agrees that denial of siting approval under criterion ii based on the one and a half-mile setback was inappropriate. However, as the Board agrees with the use of the traffic concerns as a denial reason, the Board upholds Randolph County's decision on criterion ii.

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[3] Holan has about eight years of post-graduate school work doing traffic impact studies and transportation planning. TOC 2 at 90.

Criterion viii

The Board is not persuaded by Land and Lakes argument that the one and a half-mile setback or "exclusionary" factor is not a part of the Plan. If the Board were to agree that only "Chapter 12" was the Plan, then the solid waste management plan would not include a discussion on "Solid Waste Needs Review" (chapter 2) or a discussion on "Recycling" (chapter 4). Further, the Solid Waste Planning and Recycling Act (415 ILCS 15/1 *et seq.*), which required the adoption of solid waste management plans, sets forth the minimum requirements for a plan. Those requirements include a review of solid waste needs and a recycling program. See 415 ILCS 15/4 and 15/6 (1998). Thus, the Solid Waste Planning and Recycling Act supports an interpretation that the Randolph County Plan adopted by Randolph County is the entirety of the document.

Next, Land and Lakes argues that the one and a half-mile setback is not an exclusionary factor. Again, the Board must disagree. The plain language of the Randolph County Plan indicates that: "exclusionary criteria are used to screen individual parcels or areas. Parcels or areas which contained any of the exclusionary characteristics would not be considered in the site identification process. Areas or parcels which remain after the exclusionary criteria, would be screened against the inclusionary criteria to identify parcels for consideration for on-site investigations." The language is clear that exclusionary criteria are designed to eliminate sites. The exclusionary criteria include the one and a half-mile setback. Therefore, the Randolph County Plan clearly excludes facilities within one and a half-miles of a municipality. The application submitted by Land and Lakes placed the pollution control facility within one mile of Sparta. Therefore, the record indicates that the application was not consistent with the plan and criterion viii has not been met.

Land and Lakes also argues that the setback clause violates the Act, is beyond Randolph County's authority, and is bad policy. Randolph County argues in response that the Board does not have the authority to review the provisions of the solid waste management plan. The Solid Waste Planning and Recycling Act requires that solid waste management plans be prepared and submitted to the Agency for review. 415 ILCS 15/4 (1998). The Agency is charged with reviewing the plan "to ensure consistency with the requirements of this Act." 415 ILCS 15/4 (1998). However, there is no mention that a review for consistency with the Environmental Protection Act has been performed, either by the Agency or the Board.

Section 40.1 of the Act grants the Board the authority to review a local decision on siting of a pollution control facility. Specifically, Section 40.1 of the Act states, in part:

> no new or additional evidence in support of or in opposition to any finding, order, determination or decision of the county board . . . shall be heard by the Board. In making its orders and determinations under this Section, the Board shall include in its consideration the written decision and reasons for the decision of the county board . . . , the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used . . . Section 40. 1 of the Act.

Thus, the Board may only review the county board's decision under Section 39.2 of the Act. And under Section 39.2 (viii) of the Act, the issue is whether the application is consistent with the solid waste management plan. Therefore, the Board may only look to the record and determine if the finding that the application is inconsistent with the Randolph County Plan was against the manifest weight of the evidence.

As discussed above, the language of the Randolph County Plan is clear that the one and a half-mile setback is exclusionary. As the language of the Randolph County Plan is clear, the Randolph County Board's decision that the application for a facility within one mile of Sparta was inconsistent with the Plan, is not against the manifest weight of the evidence. The Board therefore, upholds the decision by Randolph County on criterion viii.

CONCLUSION

The Board finds that the members of the Randolph County Board were subject to numerous contacts outside the record of the proceeding. These contacts were *ex parte* contacts. However, these contacts did not affect

the ultimate decision and did not prejudice Land and Lakes. Therefore pursuant to Waste Management v. PCB and E & E Hauling v. PCB the proceedings were not tainted by the contacts and were not fundamentally unfair.

The Board also finds that the Randolph County Board's decision to deny siting based on failure to satisfy Section 39.2 (ii) and (viii) if the Act is not against the manifest weight of the evidence. The record contains evidence that there are concerns for public safety due to road configuration as well as wear and tear on county roads. The record also indicates that the solid waste management plan contains an exclusionary clause against siting a facility within one and a half-miles of a municipality. Land and Lakes' application would site its pollution control facility within one and a half-miles of the municipality of Sparta. Therefore, the decision is not against the manifest weight of the evidence.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter

ORDER

For the reasons presented in the Board' opinion, the Board affirms the October 19, 1998 decision by the Randolph County Board of Commissioners denying siting of a pollution control facility for Land and Lakes Company.

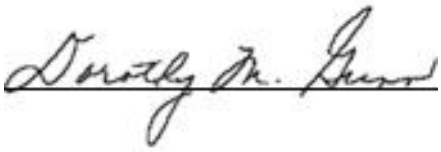
IT IS SO ORDERED.

Board Members E.Z. Kezelis and S.T. Lawton, Jr. dissented.

Chairman C.A. Manning concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of September 2000 by a vote of 5-2.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board