ILLINOIS POLLUTION CONTROL BOARD
July 21, 1994

CITY OF GENEVA,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 94-58
	)	(Landfill Siting Review)
WASTE MANAGEMENT OF ILLINOIS, INC. and COUNTY BOARD, COUNTY OF KANE, STATE OF ILLINOIS,	)	
	)	
Respondents.	)	

LEE R. CUNNINGHAM AND MATTHEW MORAN OF GARDNER, CARTON & DOUGLAS APPEARED ON BEHALF THE PETITIONER;

DONALD J. MORAN OF PEDERSEN & HOUPT APPEARED ON BEHALF OF THE RESPONDENT, WASTE MANAGEMENT OF ILLINOIS, INC.; AND

TIMOTHY P. DWYER, OFFICE OF DAVID R. AKEMANN, KANE COUNTY STATE'S ATTORNEY APPEARED ON BEHALF OF THE RESPONDENT, KANE COUNTY BOARD.

OPINION AND ORDER OF THE BOARD (by C. A. Manning):

On February 9, 1994, pursuant to Section 40.1(b) of the Environmental Protection Act ("Act") (415 ILCS 5/40.1(b)), the City of Geneva ("City" or "Geneva") timely filed the instant petition for review of a landfill siting decision with the Pollution Control Board ("Board" or "IPCB"). The petition challenges the January 11, 1994 decision of the County of Kane ("County" or "Kane County") granting site location suitability approval for an expansion of the Settler's Hill Recycling and Disposal Facility. ("Settler's Hill Landfill" or "Settler's Hill".) (C-3319 to C-3324.)[1] Pursuant to Section 39.2 of the Act (415 ILCS 5/39.2), on January 11, 1994 the Kane County Board adopted Ordinance No. 94-19 which found that the landfill

[1]The transcripts from the hearings before Kane County will be cited as "9/21/93 Tr. at ____, 9/23/94 Tr. at ____ and 10/6/93 Tr. at ____." The record of decision below will be cited as "C-." At the Kane County hearings, the City of Geneva offered as an exhibit, the Solid Waste Management Plan for Kane County. It will be cited as "City Exh. #1, SWMP at ___". "Joint Exh. #1" refers to the stipulation of facts entered at the Pollution Control Board's April 26, 1994 hearing by Kane County and the City of Geneva and will be cited as PCB R.,. The transcripts from the Board's hearing will be cited as "PCB Tr. at ." The petitioner's brief will be cited as "City Br. at ____". Kane County's brief will be cited as "County Br. at ____" and Waste Management of Illinois' brief will be cited as "WMII Br. at ___".

applicant, Waste Management of Illinois, Inc. ("WMII"), had satisfied all of the relevant statutory criteria.[2] (C-3321.

In petitions for review of local landfill siting decisions, the Board derives its authority from Section 40.1 of the Environmental Protection Act. Pursuant to that section, the Board is to hold a public hearing "based exclusively on the record before the county board" The Board held such hearing on April 26, 1994 in Geneva, Illinois before Board Hearing Officer Todd Parkhurst. The parties presented only a stipulation of fact concerning Kane County's adherence to its own landfill siting ordinance. (See Joint Exh. #1.) Five members of the public offered public comment at the hearing. Among the commenters was Dr. Rodney B. Nelson.[3] Post-hearing briefs were submitted beginning May 26, with the last reply brief filed June 16, 1994.[4]

ISSUES PRESENTED FOR REVIEW

The issues presented to the Board for review by the City of Geneva can be summarized as follows:

A. Did Kane County's failure to strictly follow the procedural requirements of its own landfill siting ordinance divest it of jurisdiction to hear the application?;

[2]Kane County determined that the statutory criteria under Section 39.2(a) were all relevant except for the criteria regarding the disposal of hazardous waste and regulated recharge areas. The County found these criteria were inapplicable. (C-3321.)

[3]On February 1, 1994, Dr. Nelson filed his own petition for review, which was docketed as PCB 94-51, Rodney B. Nelson, III v. Kane County and Waste Management, an which also challenged the January 11, 1994 Kane County siting decision. The Board consolidated the two cases by order of February 17, 1994. However, on April 21, 1994, we granted WMII's motion to dismiss Dr. Nelson's petition for lack of standing. This action in effect bifurcated the cases. On April 25, 1994, Dr. Nelson filed a motion for reconsideration asking that we reverse our decision, and find standing. That motion is the subject of a separate order today, in docket PCB 94-51.

[4]On July 1, 1994, the City of Geneva filed a Motion to Complete the Record to include a legal brief filed by Geneva with Kane County on October 13, 1993 regarding the issue of concurrent jurisdiction. Geneva indicates the brief appears to have been omitted from the record of decision. The motion is hereby granted.

B. Did Kane County provide the participants with a fundamentally fair hearing on WMII's petition?;

C. Are any of Kane County's decisions on the three challenged statutory criteria against the manifest weight of the evidence? The criteria challenged are that:

1. The landfill expansion is necessary to accommodate the waste need of the area it is intended to serve ("need criterion") (Section 39.2(a)(1));

2. The landfill expansion is so designed, located and proposed to be operated that the public health, safety and welfare will be protected ("design criterion") (Section 39.2(a)(2));

3. The landfill expansion is consistent with the County's Solid Waste Management Plan, "SWMP criterion") (Section 39.2(a)(8))

D. Is Geneva entitled to "alternative relief" by adding a condition to the Kane County landfill siting decision requiring WMII to seek siting approval from Geneva?

FACTUAL AND LEGAL BACKGROUND

Kane County is a unit of local government vested with the statutory authority and responsibility to hold a public hearing for the purpose of considering and acting upon applications to approve the siting of "new" regional pollution control facilities under Sections 3.32, 39(c), and 39.2 of the Act. (415 ILCS 5/3.32, 39(c), and 39.2). "New" regional pollution control facilities, can include solid waste landfills, or the expansion of such landfills, as is the case here.

Original 1982 Siting Approval

Settler's Hill Landfill was originally sited in 1982. (C-3356.) At that time, it was assumed by both Kane County and Geneva that, since 27 acres of the original 150 acre landfill site were located within the corporate limits of Geneva, both units of local government had concurrent statutory siting authority. Therefore, both Geneva and Kane County held public hearings pursuant to the Act. Both Geneva and Kane County approved the landfill in 1982.[5]

[5]Geneva granted siting approval on May 24, 1982 in, "An Ordinance Granting Site Approval to a Regional Pollution Control Facility Subject to Various Stipulations under the Illinois

As approved in 1982, the original landfill contained 150 acres with 101 acres for actual waste disposal at a maximum vertical height of 800 feet (C-3332 and C-3351.) Located within the Geneva city limits were 27 acres which included the landfill's access road, its entrance gate and its scales. (C-3351.) The remaining acreage of the landfill was located within unincorporated Kane County. (Id.)

The 1982 siting process also gave Geneva some operational responsibility for oversight of Settler's Hill. Those responsibilities, which continue today, include: monitoring the landfill operations (in addition to monitoring the initial construction and development), receiving documents relating to the waste stream, groundwater monitoring activities and reporting, all construction reporting and documentation, and monitoring the City of Geneva's Well No. 7. (10/6/93 Tr. at 47-49.)

1987 Siting Expansion Approval

In 1987 WMII applied to Kane County for an expansion of the original landfill. The application sought to expand Settler's Hill by an additional 141 acres and an additional landfill life of 9.96 years or until the year 2003. (C-28A.) Of these 141 acres, 78 were designated for actual waste disposal and the maximum vertical extension of the facility was increased to 900 feet. (C-3351.) None of the 141-acre area of expansion was located within Geneva limits (WMII Br. at 2) and no alterations were made to the City's jurisdiction of the access roads, or the gate, or any of the other responsibilities provided for in 1982. WMII did not file an application for siting approval with Geneva, and Geneva did not participate in the Kane County siting process. Geneva explained in its post-hearing brief that it did not participate in the 1986 expansion because it was able to reach a "mutually agreeable resolution regarding WMII's expansion re quest". (City Br. at 19.) At the Kane County hearing, Thomas Talsma, Geneva employee, testified that Geneva did not participate in the 1987 siting process because the Mayor of Geneva and the City Council relied upon a letter from Philip Elfstrom, then Chairman of the Kane County Board, to Mayor Richard Lewis that indicated the City "could be assured ... there would be no further expansion of the landfill beyond the subject limits and specification found in the 1987 petition." (10/6/93 Tr. at 95; see also Public Comment of Mayor William T. Ottilie, 10/6/93 Tr. at 113.)

At the hearing before Kane County, Geneva tried to introduce

Environmental Protection Act". Kane County and WMII were co-petitioners in the local siting hearing before the City of Geneva. (City Br. at 15; C-3328- C-3340.)

the actual letter as an exhibit for the purpose of explaining why the City did not assert jurisdiction in 1986. (10/6/93 Tr. at 22.) The hearing officer below sustained the objection of WMII and did not admit the letter. (10/6/93 Tr. at 27.) Geneva has asked that we review the hearing officer's determination and reverse his decision. (10/6/93 Tr. at 60.) We will not reverse the hearing officer's decision because the actual letters are not crucial to our determination. We believe the record, without the letter, contains sufficient information to explain the situation as it unfolded in 1986 and 1987. Furthermore the letter is ultimately not relevant to our decision because the exercise of siting authority is a statutory duty not subject to waiver by action or inaction of the local siting authority. (See our discussion infra at 26.).[6]

After holding public hearings pursuant to the Act, on February 10, 1987, Kane County passed Resolution No. 87-33 approving WMII's application. The decision was appealed to the Board and we affirmed. (See Valessares et al. v. Kane County and Geneva, (July 16, 1987) 79 PCB 106, PCB 87-36.)[7]

The Landfill Expansion At Issue

On May 28, 1993, WMII applied for the instant expansion of Settler's Hill Landfill, this time at the apparent urging of Kane County.[8] This expansion would extend the actual boundaries of

[6]On June 13, 1994, WMII filed a Motion to Strike Exhibits and to Declare Request Nos. 5 and 6 Admitted. Geneva answered two questions regarding concurrent jurisdiction by offering the "Phillip Elfstrom" letter in addition to several other documents regarding Geneva's failure to conduct a local siting hearing in 1987. We are granting the motion to strike, but are denying the motion to admit requests nos. 5 and 6. We do so for the same reasons we upheld the hearing officer's order excluding Geneva's correspondence.

[7]Valessares was a third-party appeal of Kane County's decision granting an expansion of Settler's Hill Landfill in 1986. The petitioners, none of whom were Geneva, challenged the fundamental fairness of the siting process and the decision's failure to satisfy the statutory criteria in Section 39.2(a) of the Act. Petitioners argued that the process was fundamentally unfair on the basis of alleged ex parte contacts between the county and WMII, and that conflicts of interest existed due to Kane County's financial interest in the expansion. As stated above, we affirmed Kane County's decision.

[8] In May of 1992, Kane County passed Resolution No. 92-102 providing that Settler's Hill should be expanded immediately. (C-3350.) Thereafter, the county sent a letter dated May 22, 1992 to WMII indicating its intention to "engage the services" of WMII

the site by seven acres from 291 to 298 acres, providing an additional 137 acres of waste capacity for an additional 8.96 years of life beyond the 1987 extension, or until the year 2012. (C-28A.) The expansion does not include any area within the corporate limits of the City of Geneva, but the expansion area is drawn up to Geneva's border. The only part of the Settler's Hill Landfill which is within Geneva's city limits is the original 27 acres which was the subject of the original 1982 siting hearing. Those 27 acres include the gate area, and according to WMII's application as approved by Kane County, WMII intends to continue its use of that gate and the original access roads for the landfill for ingress and egress into the entire landfill including the original area and the proposed expansion. (City Br. at 14.) As in 1987, an application for expansion was never filed with Geneva. However, unlike in 1987, the City affirmatively asserts its position that it is a proper siting authority concerning this expansion.

Approximately six weeks prior to Waste Management's application, on April 13, 1993, Kane County adopted Ordinance No. 93-85, entitled "Ordinance Establishing Rules of Procedure for New Regional Pollution Control Facility Site Approval Applications in Unincorporated Areas of Kane County, Illinois". (C-3395 - C-3416.) The ordinance creates notice and procedural requirements additional to those set forth in the Act. While there is no dispute that both WMII and the Kane County followed all the statutory notice and procedural requirements pursuant to Section 39.2(b) of the Act, Kane County and Geneva stipulated that Kane County "did not strictly follow" its own procedural ordinance. Specifically, the ordinance requires that a landfill application be published within 60 days of its filing; it was published on the 63rd day. (Joint Exh. 1, pars. 1-3.) The ordinance also requires that Kane County publish two hearing notices informing the public that any evidence to be introduced at the county's local siting hearings must be submitted seven days prior; the notices were published but they failed to contain this information. (Id. at 4-6.) Finally, the ordinance required that at least once during the week prior to hearing, the county publish a "display ad"; instead, the county published simply two "legal notices". (Id. at pars. 7-9.)

Pursuant to the siting ordinance referenced above, Kane County selected a "Siting Hearing Committee" which was to be comprised of "professionals with expertise pertaining to the statutory criteria which the Kane County Board must consider in

to assist in the planning, design, siting and permitting of the expansion. (Id.)

its decision". [9] (C-3398; City Br. at 7.) The ordinance required the committee to "evaluate the application and testimony, assess potential problems and provide the County Board with reports as to specific criteria". (C-3398-99.)

Warren Kammerer, Chairman of the Kane County Board, appointed to the Committee all of the members of the Kane County Board itself, including himself, Mary Richards, (Public Health Committee Chair), Pat Sjurseth (Development Committee Chair), Michael McCoy, (Transportation Committee Chair), and Walter Treiber, Jr. (Public Safety Committee Chair). The Siting Hearing Committee also consisted of the following consultants: Gerald Salzman, Barton and Aschman, Inc., Wayne Breda, President of American Environmental Sciences and Technology, Inc., ("AESTI") Francis Lorenz, Lorenz and Associates, George Wight, Sr., President, Wight Consulting Engineers, Inc. and Dr. Nolan Aughenbaugh, Consulting Engineer, Oxford, MS. (C-3422.) The consultants all submitted reports or comments, the relevant portions of which are discussed under the statutory criteria to which they relate.

Pursuant to both the Act and its ordinance, Kane County held timely public hearings on the siting application on September 21, September 23, and October 6, 1993. The hearing officer opened a 30-day public comment period on October 6, 1993, which closed on November 5, 1993. The Kane County Clerk received several hundred public comments on the proposed expansion. (C-3451 to C-3830.) Also during the public comment period, Geneva and WMII filed legal arguments addressing the issue of Geneva's claimed status as a local siting authority concurrent with the County and its corresponding request that a condition be included in the Kane County decision requiring WMII to apply for siting approval from the City of Geneva. (C-2678 to C-2686, C-2777 to C-30001.) The evidence presented at the County's hearing which is relevant to our decision on review is summarized below.

1. The Need Criterion

The need criterion requires the applicant show that the landfill extension is needed to accommodate the waste needs of the area it is intended to service. In this case, the Settler's Hill Landfill expansion is intended to service all of Kane County and portions of the following surrounding counties: a small, eastern portion of DeKalb County, the southern edge of McHenry

[9] At a minimum the committee had to consist of a hydrogeologist, an engineer, a real estate expert, a traffic planner and a public health and safety professional. (C-3398.)

County, the southwest tip of Lake County, a small portion of Cook, the western edge of DuPage,the northwest portion Will and the northern edge of Kendall County. (9/21/93 Tr. at 59.)

At hearing, WMII offered the testimony of its employee, Will Flower, in support of the need criterion. He testified that he performed an "independent analysis" of the written report and supporting data of Rolf C. Campbell & Associates which was presented as part of the application submittal (9/21/93 Tr. at 57.) He concluded that the facility is necessary to accommodate the waste needs of the service area in order to "dispose of solid waste that will not be reduced or recycled". (9/21/93 Tr. at 57 and 62.)

He testified that the waste total for 1992 was 1.2 million gate yards; the total from April 1992 to March 1993 was 1.6 million gate yards and the projected total for calendar year 1993 was estimated at 1.2 million gate yards. He estimated that, after 1993, the facility will receive an additional 200,000 gate yards, totalling 1.4 million gate yards per year until the facility closes in 2012. He considered any possible population decreases, and the anticipated increase in the county recycling goal[10]. However, in light of the closure of Woodland Recycling and Disposal Facility in 1997 he testified there would be an increased "need". Woodland Recycling and Disposal Facility located in Elgin Township (C-31A) is scheduled to close in 1997, causing 1.4 million gate yards of waste each year to be diverted to Settler's Hill. (9/21/93 Tr. at 62.) Additionally, the closure of two nearby DuPage County landfills were also calculated by Mr. Flower into the need appraisal. Both Greene Valley Landfill (which currently receives approximately 10 million gate yards per year) and Mallard Lake Landfill are scheduled to close in the year 2000.

2. The Design Criterion

The design criterion requires that the landfill extension be so designed, located and proposed to be operated in a manner that will protect the public health, safety and welfare of the public. In support of this criteria, Joan Underwood and Paul Wintheiser, both employees of RUST Environment & Infrastructure, each prepared a written report regarding his or her opinion of the landfill expansion's effect on the public health, safety and the environment. (Underwood Test. and Wintheiser Test., 9/21/93 Tr. at 66 and 88.) Ms. Underwood prepared a report giving her evaluation of the geology and the hydrogeologic conditions at the site and Mr. Wintheiser, prepared a report on the site design.

[10]Kane County's Solid Waste Management Plan provides for an increase in recycling from 29.7% in 1993 to 47.3% in 1998.

At hearing, Ms. Underwood testified on the geology of the site and her methodology for determining the geology. (Id.) She concluded that from a hydrogeologic and geologic standpoint, the landfill is sited to be protective of the health, safety and welfare of the public. (Id. at 72-73.) Her reasoning is based on: (1) her opinion that the "geology can be defined at the site" and that the geology is "consistent across the site"; (2) "the existence of this low permeability fine grain formation in the upper subsurface"; and (3) that the expansion is a "monitorable site" with a groundwater monitoring system proposed for the facility. According to the testimony of Ms. Underwood, the monitoring system is designed based on the shape of the water table map. It provides a series of monitoring wells that surround the site in a downgradient direction spaced approximately 200 feet apart, and additional wells located upgradient.

Mr. Wintheiser also offered his opinion that the expansion's design is protective of the public health, safety and welfare (Wintheiser Test. 9/21/93 Tr. at 89) and offered an explanation of the design's four major protective features: a liner system located at the top and bottom of the landfill, a leachate collection system, a surface water management system and a gas management system. (9/21/93 Tr. at 76 and 89-91.) The liner system consists of a composite liner system at the top of the landfill and a base liner system at the bottom. The base liner system prevents liquids that accumulate within the landfill from leaking out through the landfill. At the bottom is 36 inches of compacted soil. Over the top of that layer is a high density polyethylene membrane and above the membrane is a synthetic textile which creates a cushion layer between the leachate collection system and the base line system. (Wintheiser Test., 6/21/94 Tr. at 77.) Two cover systems are proposed for this site. The first is a cover of two feet of compacted soil overlain with a high density polyethylene geomembrane and is similar to the composite base liner system. On top of the geomembrane is a drainage layer, and then two and one-half feet of protective cover soil and then, six inches of top soil. Vegetation is then established to limit erosion. (Id. at 79.) It is intended that precipitation is handled through the surface water management system. (See Tr. at 85-87.) The second type of cover system is three feet of compacted soil overlain by two and one-half feet of protective soil and six inches of top soil, and vegetation. (Id. at 81.) The gas management system consists of wells drilled vertically into the waste mass. The wells are connected by a series of buried pipe with a connected blower which creates a vacuum to extract the landfill gas. (Wintheiser Test. 9/21/93 Tr. at 87.) The gas, which is methane and carbon dioxide and is generated by natural decomposition, is then burned, rather than vented into the atmosphere. (Id. at 87-88.)

Coupled with the liner system is a construction design that prevents leakage from the landfill. (Id. at 78.) The floor of

the landfill is sloped to low spots generally outside the landfill to shed water. The water is expected to drain out of the waste mass, into the leachate collection system which is a 12-inch granular drainage layer (Id. at 81) and within that layer, a perimeter piping system included to increase the factor of safety in the design (Id. at 82), and stop at the barrier liner system. By sloping the liner system, the leachate travels through the leachate collection system to the low spots. also known as sumps. (Id.) A larger-diameter pipe provides access to the sump to monitor the liquid level at the base of the landfill. A pump can be installed via the pipe to remove the liquid. (Id. at 82.) Currently, the liquid is pumped up risers from the sumps into tank trucks and hauled off-site for proper disposal. The proposed system for the expansion includes a perimeter piping system around the expansion area which are directly connected to the sumps. According to Wintheiser, this provides for continuous operation, rather than intermittent operation which takes place when tank trucks are used. (Id. at 83.) There will be no liquid build-up in the sumps, although the regulations allow for 12 inches of liquid on the base of the landfill. (Id.)

From WMII, Mr. Dale Hoekstra, division president and general manager of Settler's Hill, testified regarding the daily operation of the landfill in relation to the design criterion. (Hoekstra Test. 9/21/93 Tr. at 94.) He offered extensive testimony describing the control mechanisms for receiving waste into the landfill, the ticketing systems, the landfill's day-to-day operations, the wet-weather and windy day operations, litter control, police and fire protection measures, the site's spill prevention control, odor and vermin control, and load checking. (Id. at 94-100.) Mr. Hoekstra also testified that Settler's Hill has only been cited with a violation of the Environmental Protection Act on one occasion in 1984 for lack of daily cover in a small area of the facility. (Id. at 100.) He also testified that the facility did receive a compliance inquiry letter in 1990 regarding its composting operations. However, no complaint was filed, and composting has since been discontinued. (Id. at 101.)

3. The SWMP Criterion

Counties may enact Solid Waste Management Plans as long as the plans follow the planning requirements of the Local Solid Waste Disposal Act and the Solid Waste Planning and Recycling Act. Kane County adopted such a plan in November of 1992. ("SWMP") (City Br. at 2, citing, City Exh.#1, SWMP at 1.) Kane County's 20 year plan is a product of two years drafting and "substantial public participation." (9/21/93 Tr. at 36.)

Criterion 8 of Section 39.2 authorizes the county to take its SWMP into account when considering any proposed landfill or landfill expansions. Specifically, such landfill decisions must be consistent with the SWMP. (Section 39.2(a)(8) of Act.)

Al Maiden, a planning and zoning consultant from Rolf C. Campbell and Associates, retained by WMII, testified that WMII's application is "consistent" with Kane County's SWMP. He testified that he believed the plan was intended to be "general" (9/21/93 Tr. at 22-23) and that its overall goal is to manage the solid waste produced within the county, primarily through the use of facilities located therein. (Id. at 38.) He indicated that the County's SWMP calls for the immediate expansion of Settler's Hill in Recommendation 7.1 (Id.; see also City Exhibit #1, SWMP at 42.) Maiden also explained that the plan itself is somewhat internally inconsistent. One portion of the plan calls for the expansion to provide additional life of five years, and another calls for the landfill to be open until 2010. (Id. Tr. at 23 and 37-38; City Exhibit #1, SWMP at 42 and Table 10.1.) Maiden explained that the plan also requires that in addition to expansion of Settler's Hill, the County must explore new solid waste management solutions. Specifically the County must initiate a new landfill site selection process with a goal of developing a landfill by 2010. (Id. Tr. at 37-38; see also City Exh. #1, SWMP at 60.) WMII and Kane County indicate in their post-hearing briefs that consistent with the SWMP, the County has assembled an advisory committee to study and investigate the future site of a landfill in Kane County, other than Settler's Hill. (WMII Br. at 16.)

ANALYSIS

As previously stated, the Illinois siting law, sometimes known as SB-172, provides for local approval for the siting of all regional pollution control facilities, and expansions thereof, in the State of Illinois. Codified at Sections 3.32, 39(c), 39.2 and 40.1 of the Act, the siting law provides that before a permit to develop or construct a "new regional pollution control facility" can be issued by the state permitting authority, the Illinois Environmental Protection Agency ("Agency"), a County board or municipal government must first approve the siting request for each new regional pollution control facility. (Section 39(c).) These local decisions may be appealed to the Board. Our authority to review the landfill site location decisions of local governments is found in Section 40.1 of the Act. The Board's scope of review encompasses three principal areas: (1) jurisdiction, (2) fundamental fairness of the local government's site approval procedures, and (3) the nine statutory criteria for site location suitability.

Given these responsibilities, we examine each issue raised by Geneva.

A. Did Kane County's failure to strictly follow the procedural requirements of its own landfill siting ordinance divest it of jurisdiction to hear the application?

Section 39.2 of the Act places strict notice and procedural requirements on the local siting authority considering a siting application. These requirements have been held to be jurisdictional by the state appellate courts in Illinois so that where there has been a deviation from the statutory notice provisions, the local government siting authority has been held to be without jurisdiction and their decision has been overturned. (See e.g. Browning-Ferris Industries of Illinois, Inc. v. IPCB, 162 Ill. App. 3d 801, 516 N.E.2d 804, 807 (5th Dist. 1987).) In the instant case, all of the statutory procedural requirements, both those that apply to the applicant and those that apply to Kane County, have been met.

While all of the statutory procedural requirements were strictly followed, the County did not strictly follow its own procedural ordinance concerning landfill sitings. (See discussion of the facts, supra at 6.) While Section 39.2(g) states that the statutory siting procedures provided for in the Act "shall be the exclusive siting procedures," the courts and this Board have held that the unit of local government may develop its own siting procedures so long as those procedures are consistent with the Act and supplement, rather than supplant, those requirements. (See Waste Management of Illinois v. PCB, (2nd Dist. 1988) 175 Ill. App. 3d 1023, 530 N.E.2d 682, 692-693.)

On review of the local government's decision, Section 40.1 of the Act requires that the Board consider the fundamental fairness of the procedures used by the local siting authority in reaching its decision. Various IPCB decisions have therefore analyzed local government siting procedures to determine whether those procedures comport with the standards of fundamental fairness. (See Citizens for Controlled Landfills, et. al. v. Laidlaw Waste Systems, Inc. et al., PCB 91-89 and PCB 91-90 (September 26, 1991); Gallatin National Company v. The Fulton County Board et al., PCB 91-256 (June 15, 1992); Daly v. Village of Robbins, PCB 93-52 and PCB 93-54 (July 1, 1992).)

In this case, Geneva does not specifically argue that the County's violation of its own procedures denied it a fundamentally fair hearing.[11] Instead, Geneva argues that since those procedures were set forth in an ordinance, the County's failure to strictly follow its own ordinance divests it of jurisdiction in this proceeding. Relying on zoning ordinance caselaw, Geneva is essentially asking that we raise the County's ordinance requirements to the same jurisdictional level as the

[11]Indeed, since it failed to raise this issue at the proceeding below (before the County Board), appellate caselaw would suggest it is foreclosed for doing so now. (See A.R.F. Landfill v. Pollution Control Board, 528 N.E.2d at 396.

notice requirements found in the Act itself. (City Br. at 3-5 citing, Ad-Ex, Inc. v. City of Chicago, 207 Ill. App. 3d 163, 565 N.E.2d 669, 152 Ill. Dec. 136 (1st Dist. 1990).) We decline to do so.

Zoning is, for the most part, a predominantly local issue which is not procedurally governed by state law. The Act, on the other hand, provides a statutory scheme to standardize the process of local government landfill siting issues. Section 39.2(g) specificially states that "local zoning or other local land use requirements shall not be applicable" and states that the Act alone establishes "the exclusive siting procedures and rules and appeal procedures".

As stated above, specific procedural requirements are set forth in the Act which must be met before jurisdiction is properly had by the local government entity making the landfill siting decision. Kane County met these statutory requirements and is required to meet no others in order to vest it with jurisdiction to have heard and decided WMII's application pursuant to the Act.

The County's failure to follow its own procedural ordinance does not divest it of jurisdiction as a siting authority in this case. However the procedures employed by Kane County are reviewable pursuant to the Section 40.1 mandate that the process used by the County in making its decision comport with standards of fundamental fairness. We analyze that issue below.

B. Did Kane County conduct the local siting process on Waste Management's application for expansion of Settler's Hill Landfill in a manner fundamentally fair to the participants?

The Environmental Protection Act requires that we review the procedures employed below by the local siting authority to determine whether they were "fundamentally fair." (415 ILCS 5/40.1(a).) Our consideration of "fundamental fairness" is guided by parameters set forth by the second district in Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 530 N.E.2d 682 (1988):

> Administrative proceedings are governed by the fundamental principles and requirements of due process of law. Due process is a flexible concept and requires such procedural protections as the particular situation demands. In an administrative hearing, due process is satisfied by procedures that are suitable for the nature of the determination to be made and that conform to the fundamental principles of justice. Furthermore, not all accepted requirements of due process in the trial of a case are necessary at an administrative hearing. *** Due process requirements

> are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. (Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 1036-37, 530 N.E.2d 682(2d Dist. 1988)(Daly v. Village of Robbins (July 1, 1993), ___PCB ___,PCB 93-53 and 93-54 (cons.))

Rather than attacking individual procedures, Geneva challenges the fundamental fairness of the landfill siting process based on the "totality of circumstances". Geneva argues that, taken as a whole, Kane County was "unduly influenced" by economic considerations in its decision to approve the landfill expansion. (City Br. at 6.) The "bias" which allegedly tainted the process was the County's need to renegotiate its operating contract for management of the landfill with WMII. Geneva believes, after reviewing an unofficial transcription of the August 10, 1993 closed meeting, the Kane County Board Members' were primarily concerned with obtaining a new operating agreement to avoid a large penalty clause and to insure an increased revenue stream. (City Br. at 5-7)

Geneva is arguing that the "bias" here is more overt than that which was presented to the Illinois Supreme Court in another important landfill siting case under the Illinois siting law, E&E Hauling, Inc. v. Pollution Control Board, (1985) 107 Ill. 2d 33, 481 N.E.2d 664, 89 Ill. Dec 821 (1985). In that case, the Illinois Supreme Court expressly stated that public officials should be considered to act without bias. Specifically, the Court found there was no "conflict" where the local siting authority, who was also the site owner, received revenue from the operation of the landfill. (E&E Hauling 481 N.E.2d at 668.) Geneva argues that Kane County's specific inclusion of an "operating contract" condition[12] in its decision evidences that Kane County's consideration of economic factors is of greater concern than was the E&E Hauling situation. (See City Br. at 6.)

WMII and Kane County respond to Geneva's allegation of bias by asserting that a unit of local government's consideration of

[12]The "operating contract" condition provides: No IEPA permit shall be applied for by the County and WMII as co-applicants for the expansion site until such time that a new and separate contract is entered into between Kane County and WMII; such contract must be valid and enforceable and approved by the Kane County Board. Any new agreement between WMII and Kane County for the operation of Settler's Hill Landfill shall include, at a minimum, a reasonable and appropriate host community fee for the City of Geneva, elimination of the "put or pay" clause and shall not preclude this agreement from being effective prior to January 11, 1994.

economics is appropriate. (WMII Br. at 8, citing, E&E Hauling, 481 N.E.2d at 667-668 and Fairview Area Citizens Taskforce v. IPCB, 198 Ill. App.3d 541, 555 N.E.2d 1178, 1182 (3rd Dist. 1990); see generally County Br. at 5-8.) Kane County contends it is its duty to "protect its citizens in a fiscally responsible manner and adopt solid waste policies which benefit the entire county". (County Br. at 8.)

We are not persuaded that the local siting process was fundamentally unfair. We are convinced that the County had the clear authority under Illinois law to consider its own fiscal health. (Fairview Area Citizens Taskforce, 555 N.E.2d at 1182.) The fact that Kane County may have considered economics resulting in the "operating contract" condition, does not render the whole process fundamentally unfair. The County Board's interest in the fiscal well-being of the County in relation to the operating contract appears to be of the same type of consideration important to the Illinois Supreme Court when it ruled that no bias existed in E&E Hauling. The Court stated that:

> The Board should not be disqualified as a decisionmaker simply because revenues were to be received by the county. County boards and other governmental agencies routinely make decisions that affect their revenues. They are public service bodies that must be deemed to have made decisions for the welfare of their governmental units and their constituents. Their members are subject to public disapproval; elected members can be turned out of office and appointed members replaced. Public officials should be considered to act without bias. (E&E Hauling, 481 N.E.2d at 667-668 (emphasis added.)

Because it is appropriate for the county board to take into account the fiscal considerations of the county, we find that the inclusion of the "operating contract" condition or any requisite "renegotiation" does not so taint the siting process as to render it fundamentally unfair. Nothing in the county record (or outside the county record[13]) demonstrates that Kane County's consideration of economics or its concern with renegotiating the operating contract agreement with WMII curbed due process rights of any of the participants, including Geneva.

[13]When we review issues of fundamental fairness, the Illinois Supreme Court has affirmed that the Board may look beyond the actual county record and accept evidence concerning fundamental fairness at the PCB hearing to avoid an unjust or absurd result. (E&E Hauling, Inc. v. PCB, 116 Ill.App.3d 587, 594, 451 N.E.2d 555 (2d Dist. 1983), aff'd in part 107 Ill.2d 33, 481 N.E.2d 664 (1985).

Therefore, we now turn to each of the three statutory criteria challenged by Geneva.

C. Are Kane County's decisions on the three challenged statutory criteria against the manifest weight of the evidence?

When reviewing challenges to a unit of local government's determination that the statutory criteria have been satisfied, the Board must apply the "manifest weight of the evidence" standard of review. (Waste Management of Illinois, Inc. v. Pollution Control Board (1987), 160 Ill.App.3d 434 [112 Ill.Dec. 178], 513 N.E.2d 592; See also City of Rockford v. Pollution Control Board (1984), 125 Ill.App.3d 384 [80 Ill.Dec. 650], 465 N.E.2d 996.) A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. (Harris v.Day, 115 Ill.App.3d 762, 451 N.E.2d 262). The province of the hearing body is to weigh the evidence, resolve conflicts in testimony, and assess the credibility of the witnesses. Merely because we could reach a different conclusion, is not sufficient to warrant reversal. (City of Rockford v. IPCB and Frink's Industrial Waste, 125 Ill.App.3d 384, 465 N.E.2d 996 (2d Dist. 1984); Waste Management of Illinois, Inc. v. IPCB, 22 Ill.App.3d 639, 461 N.E.2d 542 (3d Dist. 1984); Steinberg v. Petta, 139 Ill.App.3d 503, 487 N.E.2d 1064 (1st Dist. 1985); Willowbrook Motel v. PCB, 135 Ill.App.3d 343, 481 N.E.2d 1032 (1st Dist. 1985).

1. Was Kane County's finding that the landfill expansion is necessary to accommodate the waste needs of the area it is intended to serve against the manifest weight of the evidence?

Section 39.2(a)(1) provides that local siting approval shall only be granted if "the facility is necessary to accommodate the waste needs of the area it is intended to serve". In order to meet this statutory provision, an applicant for siting approval need not show absolute necessity. (Clutts v. Beasley (5th Dist. 1989), 541 N.E.2d 844, 846; A.R.F. Landfill v. Pollution Control Board (2d Dist. 1988), 528 N.E.2d 390, 396; WMII v. Pollution Control Board (3d Dist. 1984), 461 N.E.2d 542,546.) The Third District has construed "necessary" as connoting a "degree of requirement or essentially." (WMII v. Pollution Control Board, 461 N.E.2d at 546.) The Second District has adopted this construction of "necessary," with the additional requirement that the applicant demonstrate both an urgent need for and the reasonable convenience of, the new facility. (Waste Management v. Pollution Control Board, (2d Dist. 1988), 530 N.E.2d 682, 689; A.R.F. Landfill v. Pollution Control Board, 528 N.E.2d at 396; WMII v. Pollution Control Board,(2d Dist. 1984), 463 N.E.2d 969, 976.) The First District has stated that these differing terms merely evince the use of different phraseology rather than

advancing substantively different definitions of need. (Industrial Fuels & Resources/Illinois, Inc. v. Pollution Control Board, (1st Dist. 1992), 227 Ill. App.3d 533, 592 N.E.2d 148, 156.)

In Ordinance No. 94-19 on January 11, 1994, Kane County found that the facility is necessary to accommodate the waste needs of the area it is intended to serve, subject to the following condition:

> Waste Management will be limited to accepting waste permitted by the Illinois Environmental Protection Agency. (C-3321.)

Geneva asserts that Kane County erred in concluding that the facility is necessary to accommodate the waste needs of the intended service area. In so doing, Geneva relies on a report by the American Environmental Sciences and Technology, Inc. ("AESTI")(C-2940), an independent consultant hired by the County to review the siting application. The AESTI report disputes the reasoning in the needs analysis performed by Rolf C. Campbell and Associates, Inc. (C-25), submitted by WMII as part of its siting application. However, the AESTI report reaches the same conclusion after performing its own analysis using different assumptions. Geneva agrees with the AESTI report in disputing the accuracy of WMII's assumptions, but disagrees with AESTI's conclusion that there is a need for the facility, arguing that AESTI's reasoning is flawed as well.

As a preliminary matter, WMII asserts that the AESTI report, as well as four other expert reports, were improperly included in the record, since they were submitted as public comments and were not submitted under oath or subject to cross-examination. WMII asserts that they should have been subject to the limitations on expert testimony contained in Kane County Ordinance 93-85, which establishes procedural rules governing Regional Pollution Control Facility sitings. Section III, paragraph C of this ordinance provides that preliminary reports prepared by experts or consultants retained by the County summarizing and analyzing the petition must be filed with the Clerk no later than seven days in advance of the date set for hearing. (C-3395.) WMII asserts that it was improper for the reports to have been submitted during the public comment period following the hearing before the Kane County Board. WMII made this objection in a public comment submitted on November 8, 1993 (C-2988 - 3001), and renewed it in its post-hearing brief.

We find that it was not improper for Kane County to accept the contested reports as public comments. As public comments, the reports are not entitled to the same weight as expert testimony submitted under oath and subject to cross-examination, but are instead entitled to the lesser weight given to all public

comments. (Industrial Fuels and Resources v. City Council of the City of Harvey (September 27, 1990) ___PCB___, PCB 90-53, slip op. at 5.) We believe that the members of the Kane County Board could make this distinction and give the reports appropriate consideration.

WMII's Needs Assessment

WMII submitted the Campbell Report as part of its siting application in order to demonstrate that there is a need for the proposed expansion. The Campbell Report concludes that there is insufficient disposal capacity to meet the waste disposal needs of the service area beyond the year 2003, and that it is therefore necessary to develop additional waste disposal capacity in the service area. (R. at C39.) The report concludes that the proposed expansion of the Settler's Hill facility will meet the disposal needs of Kane County until 2012. Furthermore, Will Flower of Waste Management testified and was subject to cross-examination at the September 21 and 23, 1993 hearings concerning the need for the proposed expansion as demonstrated in the Campbell report. (9/21/93 Tr. at 57-62.)

In reaching its conclusions, the Campbell report analyzes the population, waste generation, recycling and disposal trends, and the existing permitted landfill capacity in the service area. It relies upon information contained in the Solid Waste Management Plan of Kane County and surrounding counties, including DuPage, Lake, McHenry, Will and parts of Cook County; the Agency reports "Available Disposal Capacity for Solid Waste in Illinois (Annual Reports 1-6)"; and current capacities and projected future capacities of landfills in the service area. Id.

The AESTI Report

The AESTI report criticizes several of the assumptions made in the Campbell report, including its failure to: 1) clearly and consistently define "gate yard"; 2) explain its assumptions concerning population of the service area; 3) consider the impact of the closing of the Woodland landfill; and consider the impact on the service area of activities in adjacent counties. AESTI also disputes the Campbell report's waste stream projections for the service area of the proposed expansion. AESTI then reexamines the data using different assumptions, but ultimately concludes that there is a need for the proposed expansion in order to avoid the "unacceptable risk that adequate disposal capacity will not exist around the year 2000." (See AESTI report at 2-4, C-2956.)

Geneva agrees with the AESTI report's critique of the Campbell report, but criticizes the AESTI report for concluding that the expansion is necessary, since AESTI report indicates that Settler's Hill Landfill would not exhaust its existing

capacity until sometime between 2000 and 2007, while a new landfill could potentially be sited by 2000. The City argues that this indicates that a new facility could be sited prior to the point at which existing capacity would be exhausted, and that therefore there is no need for the proposed expansion.

We find that Kane County was justified in finding that there was a demonstrated need for the proposed facility. The County could have credited the Campbell report and the testimony of Will Flower, both of which indicate that there was a need for the facility. Furthermore, even if the County credited the AESTI report, which was not subject to cross-examination, that report also concludes that there was a need for the facility. It was not necessary for the County to find that there was an absolute need for the facility. It would be sufficient if the County agreed that the expansion was necessary to avoid an unacceptable risk that adequate disposal capacity will not be available. Furthermore, there is no requirement that the County favor the siting of a new facility over expansion of the Settler's Hill facility in meeting the projected need.

We find that the County's conclusion that the proposed expansion is necessary in order to meet the waste disposal needs of the intended service area was supported by ample evidence in the record, and was therefore not against the manifest weight of the evidence.

2. Was Kane County's finding that the landfill expansion is so designed, located and proposed to be operated so that the public health, safety and welfare will be protected against the manifest weight of the evidence?

The design criterion of Section 39.2 of the Act requires the applicant to demonstrate and the local siting authority to find that "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected. (415 ILCS 5/39.2(a)(2).)" In its siting approval, Kane County found that the facility was designed so as to protect the public health, safety, and welfare.

Geneva disputes this finding, asserting that the application inadequately characterizes the hydrogeological conditions of the site, and that the application failed to address the impact of the proposed expansion on airport safety as required by 40 C.F.R. 258.10(a) and 35 Ill. Adm. Code 811.302(e). Geneva relies on two reports, a report by Dr. Nolan Aughenbaugh (C-2969), and the AESTI report (C-2940), in asserting that the County erred in finding that the proposed expansion satisfied criterion 2. These reports were submitted into the record before the County Board as public comments; they were not submitted under oath or subject to cross-examination.

As preliminary matter, WMII asserts that these reports were improperly included in the record, in that they should have been subject to the limitations on expert testimony contained in Kane County Ordinance 93-85, which establishes procedural rules governing Regional Pollution Control Facility sitings. Section III, paragraph C of this ordinance provides that preliminary reports prepared by experts or consultants retained by the County summarizing and analyzing the petition shall be filed with the Clerk no later than seven days in advance of the date set for hearing. (C-3395.) WMII asserts that it was improper for these reports to have been submitted during the public comment period following the hearing before the Kane County Board. WMII made this objection in a public comment submitted on November 8, 1993 (C-2988 - C-3001), and renewed it in its post-hearing brief.

For the reasons stated on page 19 above, we again find that it was not improper for Kane County to accept the contested reports as public comments.

Hydrogeology

Geneva relies on the report of Dr. Aughenbaugh in raising the following issues concerning the hydrogeology of the site. First, there was a lack of "essential information" regarding the closed Midway Landfill. Second, the applicant failed to address the proximity of the St. Charles Aquifer. Third, the application ignores data contained in the application's boring logs which show that silt and gravel are located four to five feet below the bottom of the landfill's liner. Geneva also relies on the AESTI Report in asserting that WMII's hydrogeological interpretation was deficient, also asserting that there may have been leakage from the existing landfill.

WMII included in its application a complete hydrogeological assessment of the proposed site performed by RUST Environment and Infrastructure (RUST). (See Siting Application Criteria 2.) At hearing, Joan Underwood of RUST testified that, from a hydrogeologic and geologic standpoint, the facility is sited so as to be protective of the public health safety and welfare. (September 21, 1993 Tr. at 72-73.) Additionally, Paul Wintheiser of RUST testified that the landfill expansion is designed so as to protect the public health, safety, and welfare. Both witnesses provided detailed explanations for their opinions in their testimony on September 21 and 23, 1993. Furthermore, WMII responded to the issues raised in the Aughenbaugh and AESTI reports in its public comment filed on November 8, 1993. (R. at C2984.) This filing details where the deficiencies alleged in the two reports were addressed, whether in the record or at hearing.

We find that the County Board was justified in crediting the information contained in the siting application and the testimony

offered by WMII's expert witnesses, while refusing to credit the objections raised by the conflicting reports. The decisionmaking authority rests solely with the local government. A local government's consultant report is not binding on the decisionmaker. (McLean County Disposal Company, Inc. v. The County of McLean, PCB 89-108, 105 PCB 203, 207 (November 15, 1989).) The County may well have afforded lesser weight to the reports disputing the accuracy of WMII's hydrogeological classification because they were submitted as public comments not subject to cross-examination, and because WMII responded to the criticisms on the record. Therefore, we find that Kane County's decision finding that the site would be designed and constructed so as to protect the public health, safety and welfare from threats posed by groundwater contamination was not against the manifest weight of the evidence.

Airport Safety

Geneva asserts that WMII improperly failed to address the impact of the proposed expansion on airport safety, as required by 40 CFR 258.10(a) and 35 Ill. Adm. Code 814.302(c) relying again on the AESTI report. Geneva argues that this assessment is necessary because of the proximity of the landfill site to the DuPage County Regional Airport. Geneva claims that without making such a demonstration, the County could not have found that the site was so designed, located and proposed to be operated that the public health, safety and welfare will be protected. WMII asserts that this is an issue which is not properly addressed during the siting process.

The Board agrees with WMII that this is a permitting issue, and that it is not necessary for WMII to make this showing at this time. The Board believes that a local decisionmaker is free to place some reliance on the Agency's permit review process. (Citizens Against Regional Landfill v. The County Board of Whiteside County (February 25, 1993) PCB 92-156, 139 PCB 523, 541.) While a local decisionmaker is empowered to consider any and all highly technical details of landfill design and construction, it is not necessary for the local decisionmakers to examine each request for siting approval so as to ensure compliance with every applicable regulation. (Id.; c.f. Waste Management of Illinois, Inc. v. Illinois Pollution Control Board (2d Dist. 1987), 160 Ill. App.3d 89, 457 N.E.2d 372, 380-381.) Siting a new RPCF is a two-step process, requiring siting approval from the local decisionmaker and permit approval from the Agency. The local decisionmaker is not required to perform both functions. (Id.)

We believe that ensuring compliance with the regulations concerning bird hazards posed to airports is a consideration Kane County could properly leave to the Agency. Thus, Kane County could properly find that the facility is so designed, located and

proposed to be operated that the public health, safety and welfare will be protected, while relying on the Agency to ensure compliance with this regulation.

In sum, we find that Kane County's decision that the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected is not against the manifest weight of the evidence.

3. Was Kane County's finding that the landfill expansion is consistent with Kane County's Solid Waste Management Plan against the manifest weight of the evidence?

Section 39.2(a)(8) of the Act requires that if a county board has adopted a solid waste management plan that the proposed facility being considered by the county be consistent with the plan. (415 ILCS 5/39.2(a)(8).) In Kane County's approval of WMII's application, the County found that the expansion of Settler's Hill Landfill was consistent with the SWMP adopted in 1992. (C-3319-C-3324.)

Geneva contends the proposed expansion is not consistent with the SWMP. Geneva argues that by granting the siting approval, the County has delayed the selection and development of a new landfill site within the County until a date beyond the end of the SWMP planning period and that the expansion approval allows Settler's Hill to remain in operation after the capacity period determined in the SWMP. (City Br. at 11.)

As with the other criteria, whether the county board's siting approval is to be affirmed, the decision is tested under the manifest weight standard. The standard is satisfied as long as an opposite conclusion is not clearly evident, plain or indisputable. (Worthen, et. al. v. Village of Roxana, et al. (5th Dist. January 18, 1994) No. 5-91-0807, slip op. at 9.) To satisfy the "plan criteria", the county board must apply the SWMP to the proposed facility and make a determination whether the application is drafted in such a way as to be "consistent."

The SWMP calls for an expansion of Settler's Hill Landfill to add an additional five years of site life and it establishes a priority of planning and developing a new landfill in Kane County. We find, as did the County, that WMII's application for a proposed expansion, calling for an expansion of an additional 8.96 years, is consistent with the SWMP. There is no requirement in Section 39.2(a)(8) that the SWMP be followed to the letter. It is within the County's purview to determine "consistency" on a specific circumstance as raised herein; it is the County who is responsible for drafting the plan. So long as the approval is not inapposite of the SWMP, (e.g., the SWMP calls for closure, and the siting decision expands the landfill for an additional 20 years) determining consistency is within the realm of the

County's decision-making power under Illinois' landfill siting law. (Worthen, slip op. at 12.)

D. Is Geneva entitled to "alternative relief" by adding a condition to the Kane County landfill siting decision requiring WMII to seek siting approval from Geneva?

Geneva has asked the Board to grant alternative relief even if we find Kane County's decision otherwise supportable. The City requests that we place a condition in Kane County's siting decision requiring WMII to seek local siting approval from Geneva prior to applying for a development or construction permit from the Agency. (City Br. at 12-19.) Geneva argues that the "new regional pollution control facility" at issue in this case encompasses not only the proposed expansion area, but the entire landfill site, including the facility as originally sited in 1982, and as expanded in 1986. (City Br. at 15, citing, Section 3.32(b)(1).) Geneva also argues that as provided in the original siting of the landfill in 1982, which landfill is still "open", the access roads and the entry gate to the landfill, are within the corporate limits of Geneva and are integral to the proposed expansion. Therefore, by their very nature, they are a part of the new regional pollution control facility. (City Br. at 16.)

Kane County and WMII counter that the "new regional pollution control facility" at issue in this case can only be the area of expansion being added to the "currently permitted facility." (See WMII Br. at 22) Because the proposed expansion area is solely within unincorporated Kane County, both respondents assert that Kane County is the exclusive jurisdiction from which WMII must seek siting approval prior to submitting its permit application to the Agency. (See generally WMII Br. at 15-35; County Br. at 11-16.) Kane County is concerned that if we were to find that the the new regional pollution control facility is the entire landfill site, then under Section 39(c), the whole of Settler's Hill Landfill will be then be subject to the local siting process. (See generally County Br. at 15-16.) WMII also argues that Geneva's jurisdiction terminated once it gave siting approval in 1982 and WMII seems to further suggest that without jurisdiction, Geneva has no continuing interest in the landfill or any future expansion. (See generally WMII Br. at 26-31.) WMII further asserts that Geneva waived any opportunity to exercise jurisdiction in this matter, because the City failed to assert jurisdiction when WMII applied for and was granted an expansion of Settler's Hill in 1986. (See generally WMII Br. at 17-19.)

Geneva's request for "alternative relief" is denied. Geneva has failed to cite the Board to any authority for the novel proposition that the Board may add conditions to any local siting approval. Such action would be inconsistent with the Board's role as reviewing body in SB172 cases. (See cases cited at p. 17, supra). Our duty is to review the local government decision, as

written, and to affirm or reverse, not to rewrite it by adding conditions.

The question of whether additional siting approvals are or are not needed by Settler's Hill prior to expansion is not properly before the Board in this proceeding. There has been no dispute that Kane County's approval is needed, and this appeal may properly challenge only the merits of its decision and decisionmaking process.

The Board in closing reminds the parties that it has previously determined that a municipality may not "decline to exercise jurisdiction" or defer [its decisionmaking] duty to the county. A.R.F. Landfill v. Village of Round Lake Park and Lake County (July 16, 1987) 79 PCB 92 at 100-101, PCB 87-34, citing E & E Hauling, Inc. v. Pollution Control Board, 116 Ill. App. 3d 586, 451 N.E.2d 555, 567 (2d Dist. 1983), aff'd. 107 Ill. 2d 33, 481 N.E.2d 664 (1985). The Agency will determine pursuant to Section 39(c) whether it has received evidence of necessary approvals when and if WMII files an application for expansion of Settler's Hill. If the Agency should determine that any approvals are lacking, WMII may challenge such determination in a permit appeal. See, e.g. Chemical Waste Management v. IEPA (July 21, 1994), PCB 94-153 (order on summary judgment)

Questions of authority aside, nothing the Board might add to the Kane County decision could supplant the requirements of Section 39(c) of the Act. Section 39(c) requires that when submitting a permit application for the development or construction of a new regional pollution control facility to the Agency, the permittee (here, WMII) must also show proof that the location of the facility has been approved by the county board or the governing body of the municipality, depending on whether the landfill is located in an unincorporated or incorporated area. (415 ILCS 5/39(c).)

The legislative history of the "SB 172" law clearly explains that the legislature envisioned some instances of "concurrent jurisdiction" under the law even though the specific statutory language provided for either the county or the municipality giving the siting approval. On July 1, 1981, Representative Peg Breslin, the House sponsor of the SB-172 bill, explained that permittees

> must before getting a permit from the EPA, first secure the permit from the county or the local unit of government in which they lie. If they lie totally within a municipality then they get it from the municipality, if they lie in the county, in the unincorporated area they get the permission from the county, if they overlap they get it from both. And this must be granted prior to the EPA going ahead with

its siting approval. (Conference Committee Report, #1, 82nd General Assembly, House of Representatives, July 1, 1981 at 191-92.)

CONCLUSION

Kane County's decision granting siting approval to expand the Settler's Hill Landfill is affirmed in its entirety. In so holding, the Board has determined that the local siting procedures are not the equivalent of the jurisdictional notice requirements set forth in Section 39.2(b) of the Act. We have also reaffirmed that local governments may take into account economic considerations such as the placement of an administrative condition in a siting decision requiring the renegotiation of, an operating agreement. Such action does not infringe upon the participants due process rights and thus, does not render a local siting process unfair.

We have also found that under the manifest weight of evidence standard of review, Kane County's decision is supported by the record as to the challenged criteria ("need", "design" and "SWMP" criteria). Finally, we have found that the question of whether Geneva is a proper siting authority is prematurely before us and we have declined to add a condition to Kane County's siting approval requiring WMII to file an application for siting approval with the City of Geneva. We believe the issue of whether Geneva holds "concurrent" siting authority is not properly before us, and Section 39(c) of the Act requires the Agency to determine WMII obtained all the appropriate local siting approvals during the Agency's review of WMII's application for a development/construction permit.

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

ORDER

The January 11, 1994 decision of Kane County granting approval to Waste Management of Illinois to expand Settler's Hill Landfill is hereby affirmed.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order were adopted on the 21st day of July, 1994, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board