BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN BOTTOM CONSERVANCY, and SIERRA CLUB,	)	
Co-Petitioners,	)	
v.	)	PCB 07-84 (Pollution Control Facility Siting Appeal)
CITY OF MADISON, and WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
Respondents.	)	

NOTICE OF FILING

TO: Bruce A. Morrison
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, MO 63101-2208

John T. Papa
Callis, Papa, Hale, Szewczyk & Danzinger
1326 Niedringhaus Avenue
Granite City, IL 62040

Carol Webb
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

PLEASE TAKE NOTICE that on October 9, 2007, I filed with the Illinois Pollution Control Board, an original and nine copies of the attached **RESPONSE BRIEF OF WASTE MANAGEMENT OF ILLINOIS, INC. IN SUPPORT OF THE CITY OF MADISON'S GRANT OF SITE LOCATION APPROVAL FOR THE NORTH MILAM FACILITY.**

WASTE MANAGEMENT OF ILLINOIS, INC.

By: _____
One of Its Attorneys

Donald J. Moran
PEDERSEN & HOUPT
161 North Clark Street, Suite 3100
Chicago, Illinois 60601
(312) 641-6888
Attorney Registration No. 1953923

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN BOTTOM CONSERVANCY, and SIERRA CLUB,	)	
Petitioners,	)	PCB 07-84
v.	)	(Third-Party Pollution Control Facility Siting Appeal)
CITY OF MADISON, ILLINOIS, and WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
Respondents.	)	

RESPONSE BRIEF OF WASTE MANAGEMENT OF ILLINOIS, INC. IN SUPPORT OF THE CITY OF MADISON'S GRANT OF SITE LOCATION APPROVAL FOR THE NORTH MILAM FACILITY

INTRODUCTION

This third-party appeal arises out of the September 22, 2006 siting application ("Application") filed by Waste Management of Illinois, Inc. ("WMII") with the City of Madison ("City") requesting site location approval for the expansion of the existing Milam Recycling and Disposal Facility (referred to herein as "North Milam" or "Facility"), pursuant to Section 39.2 of the Illinois Environmental Protection Act ("Act"). The City approved the Application on February 6, 2007, after two days of public hearing held on December 21 and 22, 2006, during which eight expert witnesses testified in support of the Application on all nine Section 39.2(a) criteria. No other expert witnesses testified.

On appeal, Petitioners, American Bottom Conservancy and Sierra Club ("Petitioners"), contend that the City's findings on need (criterion (i)) and the compatibility of North Milam with the character of the surrounding area (criterion (iii)) were against the manifest weight of the evidence. The record, however, demonstrates that WMII established all of the statutory criteria

by clear and convincing evidence, and no expert testimony or evidence was offered to controvert it. Accordingly, the City's decision granting siting approval is supported by the manifest weight of the evidence and should be affirmed.

Petitioners also contend that the local siting proceedings were fundamentally unfair because (a) WMII did not present evidence relating to American Indian Mounds and wetlands, and Petitioners were not permitted to cross-examine WMII's compatibility witness on those subjects; and (b) the City did not provide a written decision specifying the reasons for granting siting approval. Petitioners' fundamental fairness arguments must fail because (a) it is not fundamentally unfair to limit cross-examination to relevant evidence concerning the statutory siting criteria; and (b) the City's unanimous approval and adoption of the Hearing Officer's findings of fact and recommendations at a transcribed City Council meeting is sufficient to satisfy Section 39.2(e).

Because the record fully supports the City's findings that criteria (i) and (iii) of Section 39.2(a) were satisfied, and also shows that the proceedings were fundamentally fair in all respects, the City's decision to grant local siting approval of the Application should be affirmed.

FACTS

1. Site Location

North Milam is located in the City of Madison, Illinois, and is situated northeast of the currently operating Milam Recycling and Disposal Facility ("Milam RDF"), north of Interstate 55/70 and the Cahokia Canal, east of Illinois Route 203, and west of Illinois Route 111. Milam RDF currently has a waste disposal area of 176 acres and has been owned and operated by WMII since 1984. The expansion area is entirely owned by WMII and will be 180

acres, of which the waste disposal footprint will encompass approximately 119 acres. (C 0454.)[a]

2. Compatibility Evaluation

The Application contains a report prepared by Mr. Scott Schanuel of Woolpert, Inc., on his study of the compatibility of North Milam with the character of the surrounding area. The study addressed planning issues that are commonly used to make determinations of land use compatibility. (C 0454.)

Mr. Schanuel analyzed the land uses within a one-mile radius of the Facility, and determined that the character of the surrounding area is predominantly agricultural and open space mixed with industrial uses, which together represent over 97% of the land uses in the study area. (C 0458-0459.) Mr. Schanuel also considered that North Milam is within an industrial zoning district of Madison, zoned I-1, and that in addition to manufacturing, processing, and related activities, this zoning designation allows sanitary landfills and landfills as a special use. (C 0466-0468; C 0469.)

Mr. Schanuel prepared a conceptual End Use Plan that proposes methods for screening North Milam from off-site views with natural materials, such as native trees, wildflowers and grass vegetative cover for the landform. (C 0478.) Specifically, Figure 17 of the Application provides the proposed detail for the fairly continuous and dense buffer of evergreen and shade trees around the perimeter of the landform and surrounding sedimentation basins. Native wildflowers and grasses will also be planted around the perimeter of North Milam to replicate the character of the natural landscape of the surrounding area. The End Use Plan will be enhanced at various locations to screen unobstructed off-site views and to minimize any visual

[a] Citations to the record made before the City are referenced herein as "(C ____.).

impact on the landscape. (C 0487; C 0488.)

The End Use Plan states that aspects of the screening and buffering will begin early in the operational life of the Facility. It specifically states that native grasses and wildflowers will be "planted at the perimeter during the early stages of activity." (C 0487.) Other aspects of screening and buffering are designed to be implemented and mature during the life of the Facility. (C 0487.)

Mr. Schanuel compared existing off-site views to the proposed End Use Plan for the landform, and found the proposed landform to be compatible with existing uses. (C 1002-1008; C 0458-0459.) Mr. Schanuel testified that the End Use Plan is consistent with the 2003 City of Madison Comprehensive Plan, and the Madison County 2020 Land Use and Resource Management Plan. (C 01010-1012; C 0458-0459.)

Based on his review and investigation of the land use, zoning, existing views and the projected landform, Mr. Schanuel concluded that North Milam is compatible with the character of the surrounding area. (C 1012; C 0487.)

A. Horseshoe Lake State Park

Horseshoe Lake State Park was considered in Mr. Schanuel's compatibility evaluation. (C 1019-1020; C 0454; C 0462.) While his study recognized the importance of public parks, Mr. Schanuel found that, from a land use perspective, North Milam was not incompatible with the use of the state park because the predominance of built improvements and recreational activities are located on the north side of the park, 1.5 to 2 miles from North Milam. (C 1019-1020; C 0462.) In addition to the distance, Horseshoe Lake and the state park are significantly buffered from North Milam by the Alton & Southern Railroad tracks, open fields, and the lake itself. (C

1019; C 0462.) Furthermore, an approximately thirty-acre wetland mitigation area will be located to the north of North Milam, which will provide an additional buffer physically and visually, particularly from the northerly area of Horseshoe Lake State Park. (C 1019; C 0462; C 0735-0744.)

B. American Indian Mounds

Archaeological and cultural resource reviews are not part of the local siting process under Section 39.2. Rather, such reviews are part of a separate regulatory framework established by federal law under 36 C.F.R. 60.4. Nevertheless, the Application contained an Archaeological Study Summary Report for North Milam prepared by Burns & McDonnell Engineering Company. (C 0718-0720.) The report discussed the findings of the three-phase survey study (identification, testing, and mitigation) of archaeological sites conducted by Burns & McDonnell at various times between September 2002 and June 2006. The report ultimately concluded that all archaeological sites that were identified during the surveys were fully investigated or avoided. (C 0720.)

On January 16, 2007, as part of public comment, Mr. Orval E. "Dan" Shinn, Burns & McDonnell's Cultural Resource Department Manager, submitted a letter with attachments to clarify the report. (C 1591-1928.) The January 16, 2007 letter clarified that no American Indian Mounds have been located within North Milam and there are no known burial sites within the site. (C 1591-1593.) Although three archaeological sites were eligible for the National Register of Historic Places ("NRHP"), namely, 11 MS 1375, 11 MS 1385, and 11 MS 1316, the letter further clarified that: (i) site 1316 is not within North Milam's footprint, it will be avoided for any future activity and there were no burial features at the site; (ii) site 1385 is not on WMII-

owned property and is 1,000 feet from North Milam's boundary; and (iii) site 1375 also is outside North Milam, is protected by a fenced 75-foot buffer fence, and the ridge associated with this site has gone through a complete Phase 3 mitigation. (C 1592-1593.) Mr. Shinn's letter stated that WMII has met or exceeded the standards and guidelines of both the Secretary of the Interior and the State of Illinois for cultural resource investigation by avoiding or mitigating all NRHP-eligible historic properties within the proposed disposal area. (C 1593.)

C. Cahokia Mounds State Historic Site

WMII agrees that the Cahokia Mounds World Heritage Site and National Historic Landmark outer boundaries are located 2,140 feet away from North Milam. Cahokia Mounds State Park's boundary is even farther away from North Milam. This distance puts North Milam clearly outside of the protective boundary.

Mr. Schanuel's study addressed land use compatibility in connection with the Cahokia Mounds, which is approximately two miles east of North Milam. (C 1021, C 0462.) The study found that Cahokia Mounds "is physically and visually separated [from North Milam] by a number of intervening uses including [Interstate Highway] I-55/70, Illinois [Route] 111, considerable residential and commercial development in the Village of Fairmont City, the Cahokia Canal and associated vegetation, and natural areas." (C 0464; C 0464.)

The study compared an existing off-site view from Cahokia Mounds to the proposed North Milam landform. (C 0472-0473; C 0477; C 0475; C 0484.) The comparison view of the proposed landform from Cahokia Mounds was created using a 3-D digital elevation computer model. (C 0477.) View 7 in the study is an existing broad view looking westward from the top *of Monks Mound* located within Cahokia Mounds. From this perspective, the St. Louis skyline

is visible to the southwest, the existing Milam RDF is visible to the west, and North Milam would be to the northwest. View 7 is predominantly of rolling hills, natural vegetation, farm fields, and industrial /commercial activities. (C 0473; C 0475; C 0484.) As shown from View 7 on Figure 14, the completed North Milam landform is barely visible from the top of Cahokia Mounds. (C 0484.) The views show that North Milam is compatible with both the immediately surrounding land use and with Cahokia Mounds, located more than two miles away. (C 0489, C 0475, C 0484.)

The Illinois Historic Preservation Agency ("IHPA") concurs that "the proposed North Milam landfill expansion site does not pose an adverse visual impact to Cahokia Mounds National Historic Landmark." (WMII IPCB Ex. 1.) The IHPA, therefore, has stated that it has no objection to North Milam. (WMII IPCB Ex. 1.)

D. Wetlands

The identification and mitigation of wetlands is not part of the statutory criteria for local siting approval. Rather, wetlands are subject to a separate review process under Section 404 of the Clean Water Act. Nonetheless, the Application contains WMII's wetland permit application to the United States Army Corps of Engineers under Section 404 of the Clean Water Act. (C 0735-0774.) WMII's Section 404 permit application requests the allowance of approximately 18.4 acres of farmed and forested wetland to be impacted and the creation of approximately 36.65 acres of wetland to mitigate these proposed impacts, resulting in a 2:1 mitigation ratio. (C 0736, C 0740-0742.) The mitigated wetlands will be created to the north of North Milam, thereby enhancing the natural buffer between the Facility and the Horseshoe Lake State Park as well as providing key habitat for local and transitory wildlife. (C 1010.)

In addition to the Section 404 permit application materials in the Application, Mr. Scott Harding, a soil scientist with SCI Engineering, Inc., submitted a letter with attachments on January 17, 2007, as part of public comment. (C 1929-2068.) Mr. Harding's letter confirmed that WMII submitted an effective wetland mitigation plan, and that the Illinois Environmental Protection Agency ("IEPA") has issued to WMII a Clean Water Act Section 401 Water Quality Certification. (C 1929-1930.)

3. Need

Ms. Sheryl R. Smith, senior project manager for Golder Associates, prepared the report and testified on the need criterion. (C 0034-0064; C 1261-1275.)

In evaluating the need for the Facility, Ms. Smith identified the service area for the Facility, *i.e.*, the geographic region from which the Facility intends to take waste. The service area is comprised of five counties in southwest Illinois, namely Madison, Monroe, St. Clair, Clinton and Bond counties, and seven counties in Missouri, namely Franklin, Jefferson, Lincoln, St. Charles, Warren, St. Louis and Washington counties. (C 1268-1269; C0040-0041.)

Based on population/employment projections and waste generation rates, Ms. Smith determined that approximately 109 million tons of waste will be generated within the service area over North Milam's 17-year operating life. If 100% of the recycling goals for all of the counties in the service area are achieved, then approximately 70 million tons of waste will require disposal. The waste capacity available to the service area, however, is only approximately 55 million tons. (C 1269-1273; C 0042-0044, C0051.) Given that the waste capacity available to the service area is approximately 55 million tons, and the amount of waste requiring disposal ranges between approximately 70 million and 109 million tons (depending on

whether recycling goals are achieved), there is a disposal capacity shortfall ranging between approximately 15 million and 54 million tons. (C 1273-1275; C 0053.)

ARGUMENT

I. STANDARD OF REVIEW FOR CHALLENGE TO STATUTORY CRITERIA

A decision of the local siting authority regarding an applicant's compliance with the statutory siting criteria will not be disturbed unless the decision is contrary to the manifest weight of the evidence. *Land and Lakes v. Pollution Control Board*, 319 Ill. App. 3d 41, 51, 743 N.E.2d 188, 196-97 (3rd Dist. 2000). A decision is against the manifest eight of the evidence only if the opposite conclusion is clearly evident, plain, or indisputable from a review of the evidence. *Turlek v. Pollution Control Board*, 274 Ill. App. 3d 244, 653 N.E.2d 1288 (1st Dist. 1995); *CDT Landfill Corporation v. City of Joliet*, PCB 98-60, slip op. at 4 (March 5, 1998). If there is any evidence which reasonably supports the local siting authority's decision, the decision must be affirmed. *File v. D & L Landfill*, PCB 9-94, slip op. at 3 (August 30, 1990). That a different decision might also be reasonable is insufficient for reversal. The opposite conclusion must be clear and indisputable. *Willowbrook Motel v. Pollution Control Board*, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1985).

Petitioners failed to present any evidence to establish that the City's findings on criteria (i) and (iii) were clearly and indisputably wrong. Instead, Petitioners' arguments are based on factual misstatements, distortions of the record, and speculation. On this record, the Board must affirm the City's finding that criteria (i) and (iii) were satisfied.

II. THE UNCONTROVERTED EVIDENCE IN THE RECORD SUPPORTS THE CITY'S FINDING THAT NORTH MILAM IS COMPATIBLE WITH THE CHARACTER OF THE SURROUNDING AREA

Criterion (iii) of Section 39.2 consists of two parts: that the facility is located so as to (a) minimize incompatibility with the character of the surrounding area; and (b) minimize the effect on the value of the surrounding property. 415 ILCS 5/39.2(a)(iii). Petitioners only challenge the City's finding that North Milam is located so as to minimize incompatibility with the character of the surrounding area. Specifically, Petitioners argue that North Milam is incompatible because (a) there is no substantive buffer between North Milam and Horseshoe Lake State Park; (b) American Indian Mounds are located on the proposed site; (c) the Cahokia Mounds State Historic Site is too close; (d) wetlands will be disturbed; and (e) the compatibility assessment did not consider compatibility during the Facility's operational life. As discussed below, these arguments should be rejected.

A. WMII Demonstrated the Facility's Compatibility with the Surrounding Area

Petitioners' arguments must fail because Mr. Schanuel gave clear and convincing testimony that North Milam is compatible with the character of the surrounding area. Mr. Schanuel testified that the predominant land uses within a one-mile radius are agricultural and open space mixed with industrial uses. He also testified that the area is zoned for landfills as a special use. Proximate property uses and zoning classifications are proper considerations for determining whether a proposed facility is compatible with the character of the area. *See Fairview Area Citizens Taskforce v. IPCB*, 198 Ill. App. 3d 541, 555 N.E.2d 1178 (3d Dist. 1990) (proposed landfill was compatible with an area of abandoned strip mines). No other witness contradicted or refuted Mr. Schanuel's findings or opinions. Thus, the unrefuted

evidence of surrounding land uses was sufficient evidence to support the City's finding that North Milam is compatible with the character of the surrounding area.

B. WMII Presented Evidence of Sufficient Buffers Between North Milam and Horseshoe Lake State Park

Petitioners argue that "there is no substantive buffer between the proposed landfill and Horseshoe Lake State Park." (Pet. Br., pp. 6-7.) They base this argument on the incorrect assumption that the Alton and Southern Railroad tracks on the northern boundary of the Facility are the only buffer between North Milam and Horseshoe Lake State Park. The evidence in the record shows that there are additional significant buffers between North Milam and Horseshoe Lake State Park.

Specifically, Mr. Schanuel testified that distance is a significant buffer given that most of the recreational activities occur on the north side of the park approximately 1.5 to 2 miles from North Milam. (C 1019-1020.) He also testified that other significant buffers include the railroad tracks, open fields, Horseshoe Lake itself, and an approximately thirty-acre wetland mitigation area. (C 1020.)

Mr. Schanuel's report discussed the End Use Plan that proposes methods for phased-in screening of North Milam from off-site views with natural materials, including a fairly continuous and dense buffer of evergreen and shade trees, native wildflowers and grasses around the perimeter of the landform and surrounding sedimentation basins, to replicate the character of the natural landscape of the surrounding area. (C 0487-0488.)

Criterion (iii) requires an applicant to demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. *File v. D & L Landfill, Inc.*, 219 Ill. App. 3d 897, 900, 579 N.E.2d 1228, 1231, 1236 (5th Dist. 1991); *Waste Management v. Pollution*

Control Board, 123 Ill. App. 3d 1075, 1090, 463 N.E.2d 969, 980 (5th Dist. 1984). Where there is no incompatibility, however, minimization is not required. *Tate v. Illinois Pollution Control Board*, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1197 (1989). Thus, because Mr. Schanuel's testimony satisfied the first part of criterion (iii), WMII was not required to show any steps to minimize what did not exist. Nonetheless, Mr. Schanuel provided ample testimony as to WMII's efforts to enhance North Milam's compatibility with the surrounding area by providing significant landscaped screenings and buffers around the Facility. This type of screening and buffering is recognized as an appropriate effort to reduce incompatibility with neighboring properties. *See Peoria Disposal Co. v. Peoria County Board*, PCB 06-184, slip op. At 95-96 (June 21, 2007).

C. Archaeological Issues Are Not Part of the Siting Criteria, And Petitioners Failed to Present Evidence that American Indian Mounds Are Located Within the Subject Site, or That WMII Has Not Made Efforts to Minimize Any Incompatibility with Archaeological Sites

The Act requires the local siting authority to approve or disapprove site location suitability considering the nine criteria listed in Section 39.2(a). *See Clutts v. Beasley*, 185 Ill. App. 3d 543, 546, 541 N.E.2d 844, 846 (5th Dist. 1989) (rejecting argument that proposed landfill was incompatible with a totally residential and agricultural area where water supply could be contaminated because there is no criteria requiring guarantee against water supply contamination or that the facility to be built in the "best" place). Archaeologic impact from a proposed landfill is not part of the analysis under Section 39.2(a), and criterion (iii) is not intended to make any such evaluation part of the local siting authority's review. Rather, Criterion (iii) is concerned with an independent review of the character of the surrounding area and its compatibility with the proposed use. *Hoesman v. City Council of the City of Urbana*,

PCB 84-162, slip op. at 10-11 (March 7, 1985). That compatibility evaluation cannot be negated by issues relating to construction, operation or design. *Id.* As discussed above, an independent assessment was conducted and a determination of compatibility was made.

Nevertheless, Petitioners argue that North Milam is incompatible with the surrounding area based on the incorrect statement that American Indian Mounds are located within the Facility boundary. (Pet. Br. P. 7.) Petitioners did not present any evidence at the hearing to support this contention, and nothing contained in the Application or presented by WMII at the hearing supports it. Thus, Petitioners' claim that American Indian Mounds are located within the Facility boundary should be disregarded as unsupported conjecture that is insufficient to warrant a reversal of the City's finding that WMII satisfied criterion (iii).

Indeed, the evidence in the record demonstrates that American Indian Mounds are not located within North Milam. WMII included in the Application information concerning the archaeological investigation at North Milam, namely, the Burns & McDonnell report. That report identified sites of archaeologic interest that were discovered during its surveys and concluded that all identified sites were fully investigated or avoided. (C 0718-0720.) In addition to the report in the Application, Burns & McDonnell submitted additional materials as public comment to clarify that no mounds have been located within North Milam and there are no known burial sites within the Facility. (C 1591-1593.) With regard to the specific sites referenced by Petitioners, Burns & McDonnell clarified that: (i) site 1316 is not within North Milam's footprint, and in any event, it will be avoided for any future activity and there were no burial features at the site; (ii) site 1385 is not on WMII-owned property and is 1,000 feet from North Milam's boundary; and (iii) site 1375 also is outside North Milam, is protected by a fenced

75-foot buffer fence, and the ridge associated with this site has gone through a complete Phase 3 mitigation. (C 1592-1593.) Thus, WMII submitted sufficient evidence to show that it has made sufficient efforts to minimize any incompatibility with archaeologic sites by mitigating or avoiding any such sites.

D. The Potential "Impact" or "Effect" on Cahokia Mounds Is Not Part of the Siting Criteria, And Petitioners Have Failed to Present Any Evidence of Negative Impact or Adverse Effects on Cahokia Mounds

Petitioners also oppose North Milam "because of the landfill's potential impact on Cahokia Mounds." (Pet. Br., p. 8.) Whether North Milam has any potential negative impact or "adverse effect" on the Cahokia Mounds, as that term is defined in the regulations of Section 106 of the National Historic Preservation Act ("NHPA"), 36 CFR Part 800.5(a)(1), (b), is not relevant to the local siting process under Section 39.2. Because Section 39.2 requires the local siting authority to base its approval or disapproval on the nine statutory criteria, *Clutts*, 185 Ill. App. 3d at 546, 541 N.E.2d at 846, it would have been improper for the City to find incompatibility based on this issue. It also would have been against the manifest weight of the evidence presented to find that North Milam is incompatible with Cahokia Mounds.

Notwithstanding the irrelevance of Petitioners' argument, Mr. Schanuel provided evidence that North Milam is compatible with Cahokia Mounds. First, he determined (and Petitioners apparently do not dispute) that Cahokia Mounds is approximately two miles away from North Milam to the northeast. (C 1021.) He further determined that Cahokia Mounds is physically and visually separated from North Milam by a number of intervening uses including Interstate Highway I-55/70, Illinois Route 111, considerable residential and commercial development in the Village of Fairmont City, the Cahokia Canal and associated vegetation, and

natural areas. (C 0462-0464.) Mr. Schanuel also based his opinion on his consideration of off-site views of North Milam from Cahokia Mounds, which showed that the proposed landform is barely visible from the top of the Mounds. (C 0472-0473; C 0477.)

Furthermore, on August 3, 2007, the IHPA issued a letter to the U.S. Army Corps of Engineers wherein the IHPA concluded that "the proposed North Milam landfill expansion site does not pose an adverse visual impact to Cahokia Mounds National Historic Landmark." (WMII IPCB Ex. 1.) It further stated that it has no objection to North Milam. (WMII IPCB Ex. 1.) The IHPA, therefore, disagrees with Petitioners' contention that North Milam will have an adverse visual impact on Cahokia Mounds.

Again, Petitioners did not offer any evidence to refute Mr. Schanuel's findings or opinions. Accordingly, WMII's evidence that North Milam is compatible with Cahokia Mounds is uncontroverted and was sufficient to support the City's finding that WMII met criterion (iii).

E. The Potential Impact on Wetlands is Not Part of the Siting Criteria, And WMII Has Presented Sufficient Evidence of Compatibility Based on Its Mitigation Plans

Again, WMII is not required by Section 39.2 to submit evidence to the City about potential impacts to wetlands in the area. *See Clutts*, 185 Ill. App. 3d at 546, 541 N.E.2d at 846. Nonetheless, WMII included in the Application its Section 404 permit application and other relevant studies and documentation related to its plans to mitigate any negative impacts the proposed landfill would have on area wetlands. (C 0735-0774.) WMII's plan includes a 2:1 impact-to-mitigation ratio. (C 0736; C 0740-0742.) Petitioners presented no evidence challenging WMII's plan.

F. Schanuel's Evaluation Considered North Milam's Compatibility with the Surrounding Area During Operation and at End Use

Petitioners' argument that Mr. Schanuel's compatibility evaluation only considered "end use" compatibility is incorrect. (Pet. Br., pp. 8-9.) The compatibility evaluation considered North Milam's compatibility with the character of the surrounding area both during operation and at closure. The End Use Plan discussed a phased-in plan for screening and buffering. It specifically stated that native grasses and wildflowers will be "planted at the perimeter during the early stages of activity." (C 0487.) It further indicated that other aspects of screening and buffering will be implemented throughout the life of the Facility, and not just at the end use stage. (C 0487.)

Petitioners also argue that North Milam would be incompatible with the surrounding area during its operating life because of objectionable smells, sights, and sounds, but they did not introduce any evidence to that effect. (Pet. Br., p. 9.) WMII, on the other hand, provided ample evidence at the public hearing and in the Application addressing concerns relating to odor, noise, and litter in connection with the operations assessment under criteria (ii) and (v). Petitioners do not challenge the City's findings that criteria (ii) and (v) were satisfied.

In any event, the operational issues Petitioners raise are not meant to be determinative of compatibility under criterion (iii). *See Hoesman*, PCB 84-162, slip op. at 10-11. The Board in *Hoesman* explained that if criterion (iii) is to be given a meaning which is distinct from criterion (ii) and criterion (v), it must be interpreted as requiring a review of the proposed site's location in terms of the character of the surrounding area, and independent of any measures which may be taken to mitigate an adverse impact on the area. *Id.* The Board stated:

> This is not to say that construction, design, and operational features

> are irrelevant. They may certainly be evidence of the character of the site itself. However, they do not negate the need to independently consider the character of the area in which the site is to be located.

Id. In light of *Hoesman*, the Board should reject the argument that WMII has not satisfied criterion (iii) by not considering odor, noise or visual impacts as part of its compatibility evaluation.

III. WMII DEMONSTRATED THAT NORTH MILAM IS NECESSARY TO ACCOMMODATE THE WASTE NEEDS OF THE AREA IT INTENDS TO SERVE TAKING INTO CONSIDERATION THE REMAINING WASTE DISPOSAL CAPACITY FOR REGION SIX

Petitioners contend that WMII cannot satisfy criterion (i) because, according to a 2005 IEPA landfill capacity report for Region Six, Region Six increased its landfill capacity by 29% from 2004, and landfill operators for that Region reported 17 years of capacity remaining for waste disposal. (Pet. Br., pp. 9-10.) Sheryl Smith testified on cross-examination that she considered this data as well as other data on the remaining permitted capacity for the landfills evaluated in 2005 and 2006, that this data is contained in Table 1-3 of her report, and that the data is included in her analysis. (C1290-1291; C0062-0063.) Thus, this data does not affect the correctness of the City's finding that criterion (i) was met.

Criterion (i) is established where it is shown that a proposed facility is reasonably required by the waste needs of the service area taking into consideration its waste production and disposal capabilities. *File v. D & L Landfill*, 219 Ill. App. 3d 897, 579 N.E.2d 1228 (5th Dist. 1991). WMII is not required to show absolute necessity to satisfy criterion (i). *Id.* Petitioners cite *Waste Management of Illinois, Inc. v. Pollution Control Board*, 175 Ill. App. 3d at 1023, 1031, 530 N.E.2d 682, 689 (2d Dist. 1988), because in that case, the court affirmed the finding of

a local siting authority that remaining capacity of nine years was insufficient need. However, case law has found the need criterion established when the remaining capacity of the area landfills is ten years. *See E & E Hauling, Inc. v. Pollution Control Board*, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2d Dist. 1983).

In any event, WMII has presented credible evidence and expert opinion establishing that North Milam is necessary to accommodate the waste needs of the area it is intended to serve. Ms. Smith testified that there is a disposal capacity shortfall ranging between approximately 15 million and 54 million tons. (C 1273-1274; C 0053.) No contrary evidence regarding need was offered. Thus, the evidence supports the City's finding of need and the decision is not against the manifest weight of the evidence. *Industrial Fuels & Resources v. Pollution Control Board*, 227 Ill. App. 3d 533, 592 N.E.2d 148, 156 (1st Dist. 1992).

IV. THE LOCAL SITING PROCEEDING WAS FUNDAMENTALLY FAIR

Petitioners argue that the City's local siting proceedings were fundamentally unfair because (a) they were not permitted to cross-examine WMII's witnesses concerning the American Indian Mounds and the wetlands; (b) information concerning the American Indian Mounds and the wetlands was submitted during the public comment period, rather than during the hearing; and (c) the City did not prepare a written decision specifying the reasons for its decision. (Pet. Br., pp. 10-14.) These arguments are all without merit.

A. It Is Not Fundamentally Unfair to Limit Cross-Examination to Relevant Evidence

While fundamental principles of due process apply to local siting procedures, it is well-settled that such procedures are not required to comply with constitutional guarantees of due process. *Daly v. Pollution Control Board*, 264 Ill. App. 3d. 968, 637 N.E.2d 1153, 1155 (1st

Dist. 1994). To comport with fundamental due process, local siting proceedings must include the opportunity to be heard, a fair opportunity to present evidence, object to evidence and cross-examine witnesses, and impartial rulings on the evidence. *T.O.T.A.L. v. City of Salem*, 288 Ill. App. 3d 565, 573-74, 680 N.E.2d 810, 818 (5th Dist. 1997); *Daly*, 264 Ill. App. 3d. at 972, 637 N.E.2d at 1155. However, there is no right to cross-examine witnesses on irrelevant subject matter. *See Concerned Adjoining Owners v. Pollution Control Board*, 288 Ill. App. 3d 565, 680 N.E.2d 810, 817-818 (5th Dist. 1997).

In *Concerned Adjoining Owners*, the city of Salem purchased land for a proposed landfill. The city manager filed an application for site approval for the landfill. After conducting a hearing, the city council approved the application. The petitioners sought to cross-examine a witness on the issue of economics and profitability of the proposed landfill, but were denied the opportunity. The petitioners argued that the decision granting site approval should be reversed because their inability to cross-examine a witness was fundamentally unfair. The petitioners argued that the information they sought from the witness is part of the needs assessment and, therefore, was a relevant consideration. The appellate court disagreed, and held that because economics is not specifically listed in Section 39.2, its potential for consideration by the local siting authority is discretionary, not mandatory. *Id.*, at 574-75, 680 N.E.2d at 817.

Here, consideration of archaeologic sites and wetlands is not enumerated as a statutory criterion, and is not a necessary part of the compatibility evaluation. Thus, in accordance with *Concerned Adjoining Owners*, inquiry into those subjects is not mandatory. WMII did not address those issues with Mr. Schanuel on direct examination, so the Hearing Officer properly sustained WMII's objections when Petitioners attempted to probe into these issues on cross-

examination. In short, there was nothing fundamentally unfair about limiting the hearing to relevant evidence.

B. Public Comment Was In Accordance with the Ordinance

Petitioners' argument that the proceedings were fundamentally unfair because WMII failed to present evidence relating to American Indian Mounds and the wetlands is simply untenable. According to Ordinance No. 1670 ("Ordinance"), applicants and participants have the discretion to submit whatever evidence they wish to include for the record at hearing. (C 0001A-0011A.) It is up to the party submitting the evidence to determine what information they believe will be important and to make that submission. WMII submitted documentary and testimonial evidence relating to each of the nine siting criteria. It was not required to submit evidence on subjects that Petitioners wanted to address.

Petitioners also contend that WMII's "last-minute" submission of wetland or archaeology information created an unfair playing field in that Petitioners were without time to adequately respond. Section 5 of the Ordinance outlines the submission procedures for public comment upon the conclusion of the public hearing. (C 0006A-0008A.) The 30-day public comment period provided adequate time for the preparation and submission of comment to the hearing officer to consider his decision-making. In accordance with these procedures, numerous public comment was submitted in favor of the Application. Petitioners were permitted to make their own timely submissions. There was nothing fundamentally unfair about the manner in which public comment was submitted or received. *See Land and Lakes v. Pollution Control Board*, 319 Ill. App. 3d 41, 51, 743 N.E.2d 188, 196 (3rd Dist. 2000) ("the Act does not require that public comment period be held open to allow parties to respond to materials submitted on the last day.")

C. The February 6, 2007 City Council Minutes Together with the Hearing Officer's January 13, 2007 Findings of Fact and Recommendation Constitute the City's Written Decision

Petitioners contend that the City's approval is fundamentally unfair because it does not constitute a written decision. Section 7 of the Ordinance governs the site approval decision process. (C 0009A.) Section 7(A) states that the hearing officer shall make written findings of fact and a recommendation concerning the site approval request, and that any findings of fact and recommendation shall be supported by the record and shall be presented to the governing body of the City within 45 days of the conclusion of the public hearing. (C 0009A.) Section 7(C) states that the City only need make a determination concerning a site approval request within 180 days from the date of the City Clerk's receipt of the site approval request. (C 0009A.)

On January 13, 2007, the Hearing Officer timely submitted to the City a written findings of fact and recommendation supported by the record. (C 2178-2217.) On February 6, 2007, during a scheduled City Council meeting, the City adopted the Hearing Officer's written findings of fact and recommendation into consideration and voted unanimously to approve the Application. These events were transcribed in the form of the meeting minutes. (C 2242.)

The fact that the City did not prepare a separate written decision does not invalidate the approval or render the proceedings fundamentally unfair. *See Peoria Disposal Co. v. Peoria County Board*, PCB 06-184, slip op. at 33-34 (June 21, 2007). In *Peoria Disposal*, the local siting authority met to vote on a final decision concerning local siting. A motion to approve the recommended findings of fact was moved and seconded, but then failed by a vote of twelve against to six in favor. A court reporter transcribed the meeting and the local siting authority included those transcripts in the siting record, but the local siting authority kept no minutes of the

meeting and did not draft any subsequent summary of the vote. *Id.*, at 12. The petitioners in that case argued that there was no final action taken or written decision issued as required under Section 39.2(e) of the Act. The Board disagreed and found that "the transcript and recommended findings of fact constitute the written decision required by the Act" and that "to hold otherwise would elevate procedural form over the substance and intent of Section 39.2, which is to allow for local government to have meaningful say on issues of pollution control facility siting." *Id.*, slip op. at 33-34. Therefore, under the Board's ruling in *Peoria Disposal*, the Hearing Officer's written findings of fact and recommendation together with written transcript of the City's approval on February 6, 2007, constitute a written decision in accordance with Section 39.2(e).

CONCLUSION

For the reasons set forth above, the City's findings that WMII satisfied criteria (i) and (iii) were not against the manifest weight of the evidence. Furthermore, the proceedings before the City were fundamentally fair. Therefore, the City's decision granting siting approval for North Milam should be affirmed.

Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

By _____
One of Its Attorneys

Donald J. Moran
Lauren Blair
Pedersen & Houpt, P.C.
161 North Clark Street, Suite 3100
Chicago, Illinois 60601
(312) 641-6888

Penni S. Livingston
Livingston Law Firm
5701 Perrin Road
Fairview Heights, Illinois 62208
618-628-7700

464471

CERTIFICATE OF SERVICE

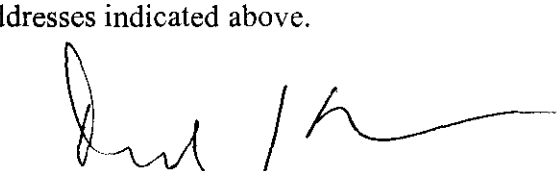
I, Donald J. Moran, an attorney, on oath state that I caused a copy of the foregoing **RESPONSE BRIEF OF WASTE MANAGEMENT OF ILLINOIS, INC. IN SUPPORT OF THE CITY OF MADISON'S GRANT OF SITE LOCATION APPROVAL FOR THE NORTH MILAM FACILITY** to be served on the following parties via electronic mail:

Bruce A. Morrison
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, MO 63101-2208
bamorrison@greatriverslaw.org

John T. Papa
Callis, Papa, Hale, Szewczyk & Danzinger
1326 Niedringhaus Avenue
Granite City, IL 62040
jtp@callislaw.com

Carol Webb
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274
webbc@ipcb.state.il.us

and by depositing same in the U.S. mail at 161 N. Clark St., Chicago, Illinois 60601, on or before 5:00 p.m. on this 9th day of October, 2007 to the addresses indicated above.



Donald J. Moran