ILLINOIS POLLUTION CONTROL BOARD
December 6, 2007

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

BRUCE A. MORRISON AND KATHLEEN G. HENRY OF GREAT RIVERS ENVIRONMENTAL LAW CENTER APPEARED ON BEHALF OF PETITIONERS;

JOHN T. PAPA OF CALLIS, PAPA, HALE, SZEWCZYK, RONGEY, & DANZINGER, P.C. APPEARED ON BEHALF OF THE CITY OF MADISON; and

DONALD J. MORAN OF PEDERSEN & HOUPT, AND PENNI S. LIVINGSTON OF THE LIVINGSTON LAW FIRM APPEARED ON BEHALF OF WASTE MANAGEMENT OF ILLINOIS, INC.

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

On March 13, 2007, American Bottom Conservancy and Sierra Club (petitioners) timely filed a petition asking the Board to review a February 6, 2007 decision of the City of Madison (City). *See* 415 ILCS 5/40.1(b) (2006); 35 Ill. Adm. Code 107.204. The City granted the application of Waste Management of Illinois, Inc. (Waste Management) to site a landfill expansion. The existing Waste Management landfill that is to be expanded is called "Milam Recycling and Disposal Facility" (Milam RDF). Milam RDF is located in Fairmont City, St. Clair County. The landfill expansion that received the City's siting approval is called "North Milam" and is to be located in the City of Madison, Madison County.

Petitioners appeal on the grounds that the City conducted the siting proceeding in a manner that was fundamentally unfair, and that the City's determination was contrary to the manifest weight of the evidence with respect to two siting criteria in Section 39.2(a) of the Environmental Protection Act (Act) (415 ILCS 5/39.2(a) (2006)). For the reasons discussed below, the Board finds that petitioners have failed to prove that the City's siting procedures were fundamentally unfair, or that the City's determinations regarding the two contested siting criteria were against the manifest weight of the evidence. The Board therefore affirms the City's decision to grant siting approval to Waste Management for North Milam.

In so holding, the Board reaches the following conclusions:

- The Native American sites associated with Cahokia and eligible for the National Register of Historic Places are among the relevant considerations in assessing whether North Milam "is located so as to minimize incompatibility with the character of the surrounding area" under Section 39.2(a)(iii) of the Act (415 ILCS 5/39.2(a)(iii) (2006)), as are the wetlands subject to Section 404 the federal Clean Water Act (33 U.S.C. § 1344). The City's siting procedures were not, however, rendered fundamentally unfair by prohibiting petitioners from cross-examining Waste Management's "compatibility" witness about matters beyond the scope of the witness' direct examination, and allowing Waste Management to present additional information on archaeological and wetland issues through timely-submitted public comments.

- The minutes of the City Council meeting documenting the vote to grant siting, coupled with the City hearing officer's written findings of fact and recommendation, constitute a sufficient written siting decision within the meaning of Section 39.2(e) of the Act.

- It was not against the manifest weight of the evidence for the City to determine, under siting criterion (i) (415 ILCS 5/39.2(a)(i) (2006)), that North Milam is necessary to accommodate the waste needs of the area it is intended to serve.

- The Cahokia Mounds World Heritage Site and National Historic Landmark is among the relevant considerations in assessing the "character of the surrounding area" in this case. 415 ILCS 5/39.2(a)(iii) (2006). The City's decision on siting criterion (iii) (415 ILCS 5/39.2(a)(iii) (2006)), that North Milam is located so as to minimize incompatibility with the character of the surrounding area, is not contrary to the manifest weight of the evidence.

In this opinion, the Board first provides a brief introduction to third-party siting appeals and this proceeding. That is followed by a discussion of procedural matters, including the procedural history of this case and several offers of proof made at the Board hearing. The Board then provides the statutory framework for pollution control facility siting under the Act. After that, the Board sets forth the factual background of this case. Next, the Board turns to the parties' arguments and the Board's rulings with respect to fundamental fairness. The Board then discusses the parties' arguments and the Board's rulings regarding the siting criteria at issue.

INTRODUCTION

Before the Illinois Environmental Protection Agency (IEPA) can issue a permit to develop or construct a new or expanding pollution control facility, the permit applicant must obtain siting approval for the facility from the local government (*i.e.*, the county board if in an unincorporated area or the governing body of the municipality if in an incorporated area) under Section 39.2 of the Act. *See* 415 ILCS 5/39.2 (2006). If the local government approves siting, certain third parties may appeal the local government's decision to the Board. *See* 415 ILCS 5/40.1(b) (2006).

Section 40.1(b) of the Act (415 ILCS 5/40.1(b) (2006)) allows third parties to appeal a local government's decision granting approval to site a pollution control facility if the third parties participated in the local government's public hearing and are so located as to be affected by the proposed facility. The petition for review must, among other things, specify the grounds for appeal and be filed the petition within 35 days after the local government approves siting. *See* 415 ILCS 5/40.1(b) (2006); 35 Ill. Adm. Code 107.208. Unless the Board determines that the third party's petition is "duplicative or frivolous," the Board will hear the petition. 415 ILCS 5/40.1(b) (2006).

By order of March 15, 2007, the Board accepted this third-party appeal for hearing. This appeal arises out of Waste Management's September 22, 2006 siting application filed with the City, requesting site location approval to expand the existing Milam RDF. The landfill expansion, North Milam, would be located in the City of Madison, Madison County. WM Br. at 1; Pet. Br. at 1. The City approved the application on February 6, 2007, after holding two days of public hearing on December 21 and 22, 2006. WM Br. at 1; Pet. Br. at 1. The City is a municipal corporation, governed by an Aldermanic Board of seven members and a Mayor. City Br. at 2.

Petitioners appeal the City's decision on the grounds that the siting proceedings conducted by the City were not fundamentally fair and that Waste Management failed to satisfy two of the siting criteria of Section 39.2(a) of the Act. Petitioners assert that the City's siting procedures were fundamentally unfair because (1) Waste Management presented data concerning prehistoric Native American sites and wetlands not at the public hearing but rather in public comment, and petitioners were not permitted to cross-examine Waste Management's "compatibility" witness on those subjects; and (2) the City did not provide a written decision specifying the reasons for granting the siting approval. Pet. Br. at 10-13; WM Br. at 2. Petitioners also contend that the City's findings on whether North Milam is necessary to accommodate waste needs (criterion (i)), and whether the facility is so located as to minimize incompatibility with the character of the surrounding area (criterion (iii)), were against the manifest weight of the evidence. Pet. Br. at 6, 9; WM Br. at 1.

Petitioners have the burden of proof on appeal. *See* 415 ILCS 5/40.1(b) (2006). Hearings before the Board are based exclusively on the record before the City, except that evidence may be introduced on the fundamental fairness of the City's siting procedures where the evidence is necessarily outside of the record. *See* Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E.2d 188, 194 (3rd Dist. 2000).

PROCEDURAL MATTERS

Procedural History

On March 13, 2007, petitioners filed a petition asking the Board to review the City's decision to grant Waste Management siting approval for North Milam. On March 15, 2007, the Board issued an order accepting the petition for hearing. Waste Management filed an answer to the petition on April 13, 2007, and the City filed an answer to the petition on April 30, 2007.

On April 12, 2007, with the hearing officer's leave, the City filed the record of its proceedings, along with an index of documents in the record. On April 25, 2007, the City filed a motion for leave to file an amended index with various corrected spellings of names, which the Board granted.[1]

On August 23, 2007, the Board hearing officer conducted a hearing in the Madison County Administration Building in Edwardsville. One witness testified: Kathy Andria, President of the American Bottom Conservancy and Conservation Chair of the Sierra Club Kaskaskia Group. The hearing transcript was received by the Board on August 24, 2007.[2]

Petitioners offered ten exhibits at the Board's hearing. Eight of the exhibits, all of which are already part of the City's record, were admitted. The two exhibits of petitioners not admitted were accepted as an offer of proof and are discussed below. The City offered two exhibits, both of which were admitted. Waste Management offered one exhibit. Waste Management's exhibit was not admitted but was accepted as an offer of proof and is discussed below.

Petitioners filed their initial post-hearing brief on September 17, 2007. Waste Management and the City filed their respective response briefs on October 9, 2007. On October 12, 2007, petitioners filed an unopposed motion to extend their reply brief filing deadline from October 12, 2007 to October 15, 2007, which the Board grants. On October 15, 2007, petitioners filed their reply brief.[3]

The Board received 31 public comments:

Yvonne Homeye (PC 1)
Bridget Stein (PC 2)
Marty Ganz (PC 3)
Sam Valenti (PC 4)
Annette Haines (PC 5)
J. Ziebol, Member of the North American Butterfly Association, St. Louis Chapter, and Webster Groves Nature Study Society (PC 6)
Ronald G. Trimmer and Mary C. Trimmer (PC 7)
Jared Gene Williams (PC 8)
Alice Talman (PC 9)
Robert E. Criss, Professor, Washington University in St. Louis (PC 10)
Robert D. Larson (PC 11)
Richard Ellerbrake (PC 12)
Kathleen Logan Smith, Executive Director, Missouri Coalition for the Environment (PC 13)

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[1] The Board cites the City's record as "C_."

[2] The Board's hearing transcript is cited as "Tr. at _."

[3] The Board cites the post-hearing briefs as follows: petitioners' opening brief as "Pet. Br. at _"; Waste Management's response brief as "WM Br. at _"; the City's response brief as "City Br. at _"; and petitioners' reply brief as "Pet. Reply Br. at _."

Laura De Los Santos (PC 14)
Ted J. How (PC 15)
Lynda Means (PC 16)
Martha Younkin, Natural Fiber Artist (PC 17)
Linda Brunback and Arnett Kamer (PC 18)
Jack Norman, Member, Kaskaskia Group, Sierra Club (PC 19, PC 20)
Gena L. Magee (PC 21)
Michael Magee (PC 22)
Tiffany Randall (PC 23)
John E. Kelly, Ph.D, Assistant Director of the Powell Archaeological Research Center at the Fingerhut House and an Archaeology Professor at Washington University (PC 24)
Kathy Andria, President of American Bottom Conservancy, Conservation Chair of Sierra Club Kaskaskia Group (PC 25, PC 26)
Alice Tatum (PC 27)
Lola M. Rice (PC 28)
Kelley MacCorrey/Lakota (PC 29)
Steven J. Zelman, M.D., F.A.C.P., of Southern Illinois Consultants for Kidney Disease (PC 30)
Kenneth C. Keith (PC 31).

The deadline for the Board to decide this appeal was waived by Waste Management to today, December 6, 2007. *See* 415 ILCS 5/40.1(b) (2006); 35 Ill. Adm. Code 101.308, 107.504.

Offers of Proof

At the Board's August 23, 2007 hearing, petitioner made two offers of proof (Pet. Exhs. 9 and 11) and respondents made one offer of proof (WM Exh. 1). For the reasons described below, the Board denies all three offers and accordingly does not accept the exhibits into evidence.

Petitioners' Exhibit 9 consists of pages from the Board's administrative record of American Bottom Conservancy, East St. Louis Community Action Network, Kathy Andria and Jack Norman v. Village of Fairmont City and Waste Management of Illinois, Inc., PCB 01-159, a pollution control facility siting appeal concerning the vertical expansion of Milam RDF in Fairmont City, St. Clair County. In that case, the Board issued its final opinion and order on October 18, 2001, affirming the Village of Fairmont City's grant of siting.

At the Board hearing in the currently-pending appeal, counsel for petitioners explained the contents of, and purpose in offering, Exhibit 9:

> These are pages from a different file, from the Milam landfill vertical expansion. The cover pages Illinois Pollution Board certifying that these pages came from that file. These pages are offered to show that the landfill is incompatible with surrounding uses because they show that the applicants once before represented a buffer was to have been a buffer to the north of Cahokia canal, and the landfill has now jumped over the buffer. Tr. at 137.

The Act requires that Board hearings on landfill siting decisions be based "exclusively on the record before the county board or governing body of the municipality." 415 ILCS 5/40.1(b) (2006). In some cases, however, the Board may consider new evidence relevant to the fundamental fairness of the local siting proceedings "where such evidence necessarily lies outside of the record." Land and Lakes, 319 Ill. App. 3d at 48, 743 N.E.2d at 194.

Petitioners' Exhibit 9 was not offered to substantiate petitioners' claims that the City's siting procedures were fundamentally unfair. Rather, Exhibit 9 was offered as evidence that the City should have determined that Waste Management did not meet siting criterion (iii) (415 ILCS 5/39.2(a)(iii) (2006)). Under the Act and long-established case law, when the Board reviews a local siting authority's decision on the siting criteria, the Board is limited to the record before the local siting authority. *See* 415 ILCS 5/40.1(b) (2006); Town & Country Utilities, Inc. v. PCB, 225 Ill. 2d 103, 117, 866 N.E.2d 227, 235 (2007). The Board therefore denies petitioners' offer of proof and petitioners' Exhibit 9 is not accepted into evidence.

Petitioners' Exhibit 11 consists of notes allegedly prepared before the City's siting hearing by Dr. John E. Kelly, Assistant Director of the Powell Archaeological Research Center at the Fingerhut House and an Archaeology Professor at Washington University. The notes purportedly offered a critique of various archaeological papers that Waste Management shared with Andria, President of the American Bottom Conservancy and Conservation Chair of the Sierra Club Kaskaskia Group, several weeks before the City siting hearing. According to Andria, the notes were intended to assist her in cross-examining a Waste Management witness about Native American sites. Tr. 22-30. Petitioners claim that the City hearing officer's preclusion of this line of cross-examination by Andria, along with Waste Management submitting various archaeological information through public comment rather than at hearing, was fundamentally unfair.

The Board finds that under the City's siting ordinance, which is discussed in detail later in this opinion, petitioners could have but failed to introduce the shared archaeological documentation at the City hearing or call their own witnesses to testify. According to Andria, her organization had been working not only with Dr. Kelly, but also "talking to people at the mounds, talking to other archaeologists." Tr. at 63. Unlike, for example, a fundamental fairness challenge based on *ex parte* contacts, the information in petitioners' Exhibit 11 does not constitute evidence that "necessarily lies outside of the record." Land and Lakes, 319 Ill. App. 3d at 48, 743 N.E.2d at 194. Exhibit 11 does not qualify for this exception to the requirement that the Board's review be based solely on the record before the local siting authority. Accordingly, the Board denies petitioners' offer of proof and Exhibit 11 is not entered into evidence.

Waste Management made an offer of proof of an August 3, 2007 letter from the Illinois Historic Preservation Agency to the United States Army Corps of Engineers. Tr. at 144-45. The offer was made solely to rebut petitioners' Exhibit 11 offer of proof. Because the latter offer was denied above, the Board denies Waste Management's offer of proof and the company's Exhibit 1 is therefore not accepted into evidence.

STATUTORY FRAMEWORK

Pollution control facility siting applications and their processing by local authorities are governed by Section 39.2 of the Act. *See* 415 ILCS 5/39.2 (2006). Section 39.2 addresses, among other things, the proof required of siting applicants, public hearings before the local siting authority, the opportunity for public comment, and the form of the siting decision. Specifically, Section 39.2(a) requires the applicant to submit to the local siting authority sufficient details describing the proposed facility to demonstrate compliance with the nine criteria of Section 39.2(a). *See* 415 ILCS 5/39.2(a) (2006). For purposes of this case, only siting criteria (i) and (iii) are at issue:

> (a) The county board of the county or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, shall approve or disapprove the request for local siting approval for each pollution control facility which is subject to such review. An applicant for local siting approval shall submit sufficient details describing the proposed facility to demonstrate compliance, and local siting approval shall be granted only if the proposed facility meets the following criteria:
>
> > (i) the facility is necessary to accommodate the waste needs of the area it is intended to serve;
> >
> > ***
> >
> > (iii) the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property . . . . 415 ILCS 5/39.2(a)(i), (iii) (2006).

No later than 120 days after receiving an application, the local siting authority must hold at least one public hearing. *See* 415 ILCS 5/39.2(d) (2006). For at least 30 days after the date of the last public hearing, any person may file written public comment with the local siting authority. *See* 415 ILCS 5/39.2(c) (2006). The local siting authority's decision must be:

> in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section. 415 ILCS 5/39.2(e) (2006).

Siting decisions may be appealed to the Board. *See* 415 ILCS 5/40.1(a), (b) (2006). Section 40.1(a) allows the applicant to appeal a denial or conditional grant of siting. *See* 415 ILCS 5/40.1(a) (2006). Section 40.1(b) allows certain third parties to appeal a grant of siting, as in this case. In a third-party appeal:

> the Board shall hear the petition in accordance with the terms of subsection (a) of this Section and its procedural rules governing denial appeals . . . . The burden of proof shall be on the petitioner. 415 ILCS 5/40.1(b) (2006).

In turn, subsection (a) of Section 40.1 provides in relevant part:

> In making its orders and determinations under this Section the Board shall include in its consideration the written decision and reasons for the decision of the county board or the governing body of the municipality, the transcribed record of the hearing held pursuant to subsection (d) of Section 39.2, and the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision. 415 ILCS 5/40.1(a) (2006).

FACTUAL BACKGROUND

In this section of the opinion, the Board sets forth the background facts of this case. Facts pertinent to each argument will be provided later in the opinion.

Site Location

North Milam is located in the City of Madison, Madison County. The site is on the north side of Cahokia Canal and northeast of the currently-operating Milam RDF, which is on the south side of Cahokia Canal. North Milam is north of Interstate 55/70, east of Illinois Route 203, and west of Illinois Route 111. Milam RDF has been owned and operated by Waste Management since 1984 and currently has a waste disposal area of 176 acres. Milam RDF is estimated to reach its capacity in 2012. The North Milam expansion area is owned by Waste Management and is proposed to be 180 acres in size, including a waste disposal footprint of approximately 119 acres. C0019, 0037, 0454, 0456-57, 0465, 0469. The existing entrance to Milam RDF is located off of Madison Road, west of that facility and east of Illinois Route 203. It is proposed that North Milam would be accessed using the same entrance. C0455.

Siting Proceedings

On June 13, 2006, the City adopted Ordinance No. 1670, entitled "An Ordinance Establishing a Procedure for Approving New Pollution Control Facility Site Requests in the City of Madison, Illinois." C0001A, 0011A. On September 22, 2006, Waste Management filed its application with the City to site North Milam. C0014.

On December 21 and 22, 2006, the City held a public hearing on the application. At hearing, Waste Management presented nine witnesses. No other witnesses testified. C0973-1313, 1489-1535, 2179. Waste Management and petitioners introduced hearing exhibits. C0981-82, 1314-1450, 1536-47. Oral public comment was received at hearing, including comments from representatives of petitioners. C1452-88, 2180. The City held a written public comment period for thirty days after the hearing. C2181. During that period, public comments were submitted on behalf of Waste Management, petitioners, and others. C1548-49, 1589-2177.

On January 31, 2007, the City hearing officer submitted to the City his "Findings of Fact and Recommendation of Hearing Officer." C2178-2224; C0009A. On February 6, 2007, the City Council voted, by a roll call vote of eight in favor and none opposed, to approve Waste Management's siting application. C2242. Meeting minutes were kept. C2242-44.

Necessary to Accommodate Waste Needs

Sheryl R. Smith, senior project manager for Golder Associates Inc., prepared a report on the need criterion as part of Waste Management's siting application and testified at the City's public hearing. C0034-64, 1261-75, 1430-33. In evaluating the need for North Milam, Smith identified North Milam's service area (the geographic region from which the facility is proposed to accept waste) as being comprised of five counties in southwest Illinois (Madison, Monroe, St. Clair, Clinton, Bond) and seven counties in Missouri (Franklin, Jefferson, Lincoln, St. Charles, Warren, St. Louis, Washington). C0040-41, 1268-69.

Smith determined that approximately 109 million tons of waste will be generated within the service area over North Milam's proposed 17-year operating life, based on population projections and waste generation rates. Approximately 70 million tons of waste will require disposal, if 100% of the recycling goals for all of the counties in the service area are met. According to Smith, the waste capacity available to the service area is approximately 55 million tons. C0042-44, 0051, 1269-73. Given that the waste capacity 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 met, Smith opined that there is a disposal capacity shortfall of between approximately 15 million and 54 million tons. C0053, 1273-75.

Minimize Incompatibility

Waste Management's siting application contains a report prepared by Scott Schanuel, a community and land planner for Woolpert, Inc. C0452, 0993-94, 1394-1401. The report concerns Schanuel's study whether North Milam is so located as to minimize incompatibility with the character of the surrounding area. C0454. Schanuel analyzed the land uses within an approximately one-mile radius of North Milam. He determined that the character of the surrounding area is predominantly agricultural and open space, mixed with industrial uses, collectively representing over 97% of the land uses in his study area. C0454, 0458-59. Schanuel also considered that North Milam is within an industrial zoning district of the City of Madison, and that along with manufacturing, processing, and related activities, this zoning designation allows sanitary landfills and landfills as a special use. C0466-69.

Schanuel prepared a conceptual "End Use Plan." C0487. The plan proposes methods designed to screen North Milam from off-site views with natural materials, such as native trees, wildflowers, and grass vegetative cover for the landform. *Id*. Figure 17 of Schanuel's report provides the proposed detail for an evergreen and shade tree buffer around the perimeter of the landform and surrounding sedimentation basins. Native wildflowers and grasses would also be planted around North Milam's perimeter in an effort to replicate the surrounding area's natural landscape. The plan calls for enhancements at various locations intended to screen unobstructed off-site views and minimize visual impact on the landscape. C0487-88. The plan also states that native grasses and wildflowers will be "planted at the perimeter during the early stages of activity." C0487.

Schanuel found the proposed landform compatible with existing uses after comparing existing off-site views to the proposed End Use Plan. C1002-08, 0458-59. According to

Schanuel, 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. C1010-12, 0458-59. Based on his review and investigation of land use, zoning, existing views, and the projected landform, Schanuel concluded that North Milam is compatible with the character of the surrounding area. C1012, 0487.

Schanuel testified that he was engaged by Waste Management to look at the end use or conclusion of the facility's operation. It was not within the scope of his engagement to evaluate whether the landfill's siting minimizes incompatibility with the surroundings during the operation of North Milam. C1025-26, 1050-53. Schanuel accordingly did not assess the potential for odors from the facility during its operation. C1025-26.

Horseshoe Lake State Park

Horseshoe Lake State Park is a 2,968-acre Illinois State Park located to the northeast of North Milam. C0456, 0458-60. The park has group picnic shelters, playgrounds, boat ramps, a fishing pier, campsites, hiking trails, and public waterfowl hunting blinds. C0460. Much of Horseshoe Lake State Park consists of Horseshoe Lake. C0456. Horseshoe Lake is a natural oxbow lake, formed by a channel cut by the Mississippi River during heavy spring floods. C1538. Horseshoe Lake is used for fishing and hunting. C1538. The lake contains channel catfish, bass, crappie, and bluegill for fishing. *Id.* Boat fishing is permitted except during the waterfowl season. *Id.* Numerous public blinds are located along the lake for hunting. *Id.* A four-mile hiking trail, known as the "Walkers Island Birdwalk," is located on Horseshoe Lake Island. C1539.

Horseshoe Lake State Park was considered in Schanuel's "compatibility" evaluation. C0454, 0462, 1019-20. North Milam is bounded by railroad tracks on its northern boundary. C0458. The fish and wildlife area at the southern end of Horseshoe Lake State Park abuts the railroad tracks to the south, "buffering it from activities on [the] North Milam side of the railroad." C0462. Schanuel found that most of the improvements and recreational activities are located on the north side of the park, 1.5 to 2 miles from North Milam. He also noted that new and expanded wetland mitigation areas "will further buffer the recycling and disposal operations physically and visually from the park." C0462, 1019-20; *see also* C0736-51. Schanuel opined that, from a land use perspective, North Milam was not incompatible with the use of the State park. C0462, 1019-20.

The area that is now Horseshoe Lake State Park "has been inhabited by various American Indian groups throughout time," dating back to 8000 B.C. C1538. What is considered the "most impressive American Indian history" in the area occurred between 800-1600 A.D. when the "'Mighty Metropolis'" known as Cahokia Mounds was built. *Id.* An earthen platform Mound still exists within the park. *Id.*

Native American Sites

Waste Management's siting application contained an "Archaeological Study Summary Report" for North Milam prepared by the firm of Burns & McDonnell. C0719-20. Between September 2002 and June 2006, Burns & McDonnell conducted a three-phase investigation (identification, testing, and mitigation) of archaeological sites. The report discussed the findings of the survey, concluding that "all of the sites identified within the project area have been fully investigated or avoided." C0720.

On January 16, 2007, in a public comment, Orval E. "Dan" Shinn, Burns & McDonnell's Cultural Resource Department Manager, submitted a letter with attachments to supplement the report. C1591-1928. The Shinn letter states that for cultural resource investigation, Waste Management has met or exceeded the standards and guidelines of both the Secretary of the Interior and the State of Illinois, and has "avoided or mitigated all NRHP [National Register of Historic Places]-eligible historic properties within the proposed disposal area." C1593.

Waste Management and petitioners disagree about whether and to what extent various Native American sites are within or beyond the boundaries of North Milam. According to Waste Management, the January 16, 2007 Shinn public comment letter "clarified that no American Indian Mounds have been located within North Milam and there are no known burial sites within the site." WM Br. at 5, citing C1591-1593. Three archaeological sites were eligible for the National Register of Historic Places (NRHP): 11 MS 1375; 11 MS 1385; and 11 MS 1316. Waste Management maintains that the Shinn 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 [Waste Management]-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. WM Br. at 4-5, citing C1592-93.

Petitioners dispute that the Shinn public comment letter supports these conclusions about the locations of sites 1316, 1375, and 1385. Pet. Reply Br. at 10, citing C1591-93. Petitioners quote the Shinn letter in maintaining that while the "North Milam site is well outside the established boundaries of the Cahokia National Landmark/World Heritage site . . . it is certain the investigated prehistoric sites are associated with Cahokia." Pet. Reply Br. at 10, quoting C1593. According to petitioners, during its investigation, Waste Management encountered "pre-Columbian" Native American sites 1316, 1375, and 1385 on the proposed landfill site. Pet. Br. at 3, citing C1593, 2069. At site 1316, in December 2005, continue petitioners, archeologists uncovered what were later determined to be "ancient human remains." Pet. Br. at 3, citing C2087, 2095. Around the skull, pottery shards were found. Pet. Br. at 3, citing C2084. Twenty-six archaeological features and four architectural features were exposed, mapped, photographed, and covered. Pet. Br. at 3, citing C1592. At site 1375, a Native American Mound was

surrounded by a "fenced 75-foot buffer." *Id*. Petitioners add that seventy-four archaeological features and three architectural features were found and excavated. Pet. Br. at 3, citing C1593.

Cahokia Mounds

The boundaries of Cahokia Mounds World Heritage Site and National Historic Landmark are 2,140 feet from North Milam. C2069, 2074. Cahokia Mounds is recognized as a State Historic Site; a National Historic Landmark; and a United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Site. C1544. It is the largest pre-Columbian settlement north of Mexico and was occupied primarily between 800-1400 A.D. C1540. During this time period, it covered almost 1,600 hectares and included 120 Mounds. *Id*. The site's Monks Mound is the largest prehistoric earthwork in the Americas. *Id*. The Mississippians built at least 100 additional Mounds at other nearby sites, many of which have now been altered or destroyed. C1545.

Schanuel's study addressed "land use compatibility in connection with the Cahokia Mounds." WM Br. at 5, citing C1021; C0462. 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. C0464.

The Schanuel study compared an existing off-site view from Cahokia Mounds to the proposed North Milam landform. C0472-73, 0475, 0477, 0484. The comparison view of the proposed landform from Cahokia Mounds was created using a three-dimensional digital elevation computer model. C0477. From the top of Monks Mound, 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. This westward view is predominantly of rolling hills, natural vegetation, farm fields, and industrial/commercial activities. C0473, 0475, 0484. As shown in the modeled view, the completed North Milam landform, as proposed, would be visible from the top of Cahokia Mounds, appearing as a mounded rise in the horizon off to the northeast. C0475, 0484, 0489.

Mayor Hamm's February 7, 2007 Letter

Mayor John J. Hamm, III of the City of Madison wrote a letter dated February 7, 2007, addressed to two persons: Gloria Iseminger, Secretary of the Cahokia Archaeological Society, located in Collinsville; and John E. Kelly, Ph.D, Assistant Director of the Powell Archaeological Research Center at the Fingerhut House, located in Fairmont City. C2246.[4] Mayor Hamm stated that the purpose of his letter was to respond to two concerns raised in letters sent to the

[4] The Mayor's letter, which the City included in its record, is dated the day after the City Council voted to approve Waste Management's siting application. Petitioners assert that the Mayor's letter is evidence of fundamental unfairness (Pet. Reply Br. at 11), as discussed later in this opinion.

City by the Cahokia Archaeological Society and the Powell Archaeological Research Center, which were received by the City as public comment during the siting proceeding. *Id.*

The Mayor's letter noted that the two concerns regarding the "location of the Milam expansion" were "its proximity to Cahokia Mounds" and "that the expansion area may contain important archaeological features." C2246. The Mayor's letter stated:

> The concerns raised by these letters were considered by the City of Madison when it evaluated whether to grant siting approval for the Milam expansion. On February 6, after considering all of the evidence submitted at the siting hearing and all written comments, including your letters, the City of Madison council unanimously voted to approve the siting of the Milam expansion. The City does not believe that the concerns raised in your letters warranted denial for the reasons I will discuss below.
>
> With respect to the proximity of the Milam expansion to the Cahokia Mounds, the proposed facility is over 2 miles from Monks Mound and is located outside of the established boundaries of Cahokia National Landmark/World Heritage site.
>
> With respect to the concerns that human remains and other archaeological features could be located on the expansion property, I reviewed the letter and attached documents provided by Waste Management's archaeological consultant Burns & McDonnell. The documentation clearly shows that no mounds are located within the North Milam facility boundary and that the two mounds noted in your letters (11MS1375 mound and 11MS1385) are located outside of the facility boundary. Only two sites within the facility boundary were determined eligible after Phase II investigations (11MS1375 ridge area and 11MS1316). Site 11MS1375 (ridge area) has been mitigated and site 11MS1316 is not located within the disposal area and will be avoided. A Burns & McDonnell archaeologist was present when the Madison County Coroner's office removed the skull and no burial features were observed. The Burns & McDonnell letter further notes that there are no known burial sites in the project area.
>
> The City of Madison is supportive of the Cahokia Mounds and the preservation of our Native American heritage in this area. However, the City does not believe that the Milam expansion will either adversely impact Cahokia Mounds or result in the destruction of important Native American artifacts. C2246-47.

Wetlands

Waste Management proposed to excavate and remove soil from North Milam to use as cover material on Milam RDF. C0723. Approximately 8.5 acres of farmed wetlands and 9.9 acres of forested wetlands on North Milam would be impacted. C1929, 1973. The wetland referred to as Area 5 is a 13.9-acre complex of moderate to high quality, forested and scrub-shrub wetland. C1933, 1939. Vegetative and wildlife habitat are moderate to high in this wetland. C1939.

The siting application contains Waste Management's wetland permit application submitted to the United States Army Corps of Engineers (Corps) under Section 404 of the federal Clean Water Act. C0735-74. The Section 404 permit application requests that Waste Management be allowed to impact the approximately 18.4 acres of farmed and forested wetlands. To mitigate these proposed impacts, the permit application seeks to create approximately 36.65 acres of wetlands, resulting in a 2:1 mitigation ratio. C0736, 0740-42. The mitigation wetlands would be created on and adjacent to North Milam. C736, 1010.

Scott Harding, a soil scientist with SCI Engineering, Inc., submitted a letter with attachments on January 17, 2007, as a public comment. C1929-2068. The letter states that Waste Management submitted an effective wetland mitigation plan, and that IEPA has issued a federal Clean Water Act Section 401 [33 U.S.C. § 1341] Water Quality Certification to Waste Management. C1929-30. On that basis, Harding expected the Corps to issue a Section 404 permit in January 2007. C1929.

FUNDAMENTAL FAIRNESS

Petitioners' claim that the City's siting proceedings were "conducted in a fundamentally unfair manner" is based on two arguments. First, concerning the Section 39.2(a)(iii) "compatibility" criterion, petitioners maintain that Waste Management presented information about Native American sites and wetlands through public comment, not at hearing, and petitioners were not allowed to cross-examine Waste Management's "compatibility" witness on those issues. Second, according to petitioners, the City never rendered a written decision specifying its reasoning for the grant of siting as required by Section 39.2(e) of the Act. Pet. Br. at 10.

Waste Management asserts that these 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). WM Br. at 2.

The City joins in Waste Management's arguments regarding fundamental fairness. City Br. at 3.

In this portion of the opinion, the Board will first discuss the parties' fundamental fairness arguments regarding the Section 39.2(a)(iii) "compatibility" criterion, followed by the Board's legal analysis and ruling. The Board will then discuss the parties' fundamental fairness arguments on the Section 39.2(e) "writing" requirement, followed by the Board's legal analysis and ruling.

Fundamentally Fairness Concerning "Compatibility" Criterion

Petitioners' Position—Hearing and Public Comment

According to petitioners, Waste Management presented "no evidence of the on-site Native American Mounds or wetlands during the public hearing." Pet. Br. at 11. Petitioners maintain that instead of providing any "testimony, data, or information" about these concerns at hearing, Waste Management "submitted its data toward the end of the public comment period." *Id*. at 11-12, citing C1591-1928 (Native American sites), 1929-2068 (wetlands). According to the City's Mayor, continue petitioners, the City "relied on the data submitted by Waste Management toward the end of the comment period." Pet. Br. at 12, n.6, citing C2246-47.

Further, petitioners state that they attempted to cross-examine Waste Management's "compatibility" witness, Schanuel, about Native American sites but were precluded from doing so:

> Q. Are you aware that there are at least two mounds and a burial site and countless artifacts at the site?
> Mr. Moran: Objection, beyond the scope of his direct. It's also not relevant.
> Hearing Officer: Sustained.
> Q. If you knew that there were mounds on the site would you consider that compatible?
> Mr. Moran: Objection, same basis.
> Hearing Officer: Sustained.
> Pet. Br. at 11, citing C1045-46.

Likewise, petitioners explain that they tried but were not allowed to cross-examine Schanuel concerning wetlands:

> Q. Do you find it incompatible to destroy wetlands to build a landfill?
> Mr. Moran: Objection, same reason [beyond scope of direct examination].
> Hearing Officer: Sustained.
> Pet. Br. at 12, citing C1015.

Petitioners conclude that because Waste Management failed to present any evidence regarding these Native American sites or wetlands at hearing, refused to allow its witness to be cross-examined about them, and then submitted its information about them at the end of the public comment period, the siting proceedings before the City were not fundamentally fair. Pet. Br. at 11-13.

Waste Management's Response—Hearing and Public Comment

Waste Management responds that "[a]rchaeological and cultural resource reviews are not part of the local siting process under Section 39.2." WM Br. at 6. "[S]uch reviews," continues Waste Management, are part of a "separate regulatory framework established by federal law under 36 C.F.R. 60.4." *Id*. Nor is identifying and mitigating wetlands part of the statutory

criteria for local siting approval, according to Waste Management. Rather, wetlands are subject to a separate review process under Section 404 of the federal Clean Water Act. *Id*. at 8.

Waste Management then asserts that it is not fundamentally unfair to limit cross-examination to relevant evidence. WM Br. at 18. It is Waste Management's position that there is no right to cross-examine witnesses on "irrelevant subject matter." *Id*., citing Concerned Adjoining Owners v. PCB, 288 Ill. App. 3d 565, 680 N.E.2d 810, 817-818 (5th Dist. 1997). Waste Management explains that 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. WM Br. at 18, citing Concerned Adjoining Owners, 288 Ill. App. 3d at 574-75, 680 N.E.2d at 817.

Here, continues Waste Management, the consideration of archaeological sites and wetlands is "not enumerated as a statutory criterion" and therefore, under Concerned Adjoining Owners, "inquiry into those subjects is not mandatory." WM Br. at 18. Waste Management adds that as it did not address those issues with Schanuel on direct examination, the City hearing officer properly sustained Waste Management's objections when petitioners attempted to "probe into these issues on cross-examination." *Id*. at 18-19.

Next, Waste Management asserts that under the City's siting ordinance, Ordinance No. 1670, siting applicants and participants in the siting proceeding "have the discretion to submit whatever evidence they wish to include for the record at hearing." WM Br. at 20, citing C0001A-11A. According to Waste Management:

> It is up to the party submitting the evidence to determine what information they believe will be important and to make that submission. [Waste Management] 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. WM Br. at 20.

Waste Management also disputes petitioners' claim that the company's "last-minute" submission of wetland or archaeology information "created an unfair playing field," leaving petitioners without time to adequately respond. WM Br. at 20. Section 5 of the City ordinance provides procedures for public comment after the public hearing. *Id*., citing C0006A-08A. The 30-day public comment period, Waste Management continues, gave enough time for persons to prepare and submit comments to the hearing officer. Under these procedures, "numerous public

comment was submitted in favor of the Application," including Waste Management's own comments, and petitioners were permitted to make their own submissions. WM Br. at 20. Waste Management concludes that "[t]here was nothing fundamentally unfair about the manner in which public comment was submitted or received." *Id*.

The City's Response—Hearing and Public Comment

The City maintains that it provided "ample safeguards to protect the principle of fundamental fairness, and no interested party was prejudiced by its actions." City Br. at 5. According to the City, it made "particular efforts to provide all interested parties an opportunity to participate in and be heard during the siting application and hearing process." *Id*. at 2.

The City explains that it adopted Ordinance No. 1670 on June 13, 2006, establishing the procedures which all interested parties, including Waste Management, would have to follow during the siting process. City Br. at 2-3. Under the ordinance, continues the City, the procedures:

> provided numerous opportunities to participate in various ways, so that the City Council would be able to consider multiple view points.
>
> All interested parties were encouraged to: (1) submit documents prior to the hearings on December 21 and 22, 2006; (2) provide testimony, make statements or submit relevant documents during the hearing; (3) cross-examine witnesses appearing for the Applicant or in opposition; and (4) submit comments as to any issue deemed significant or critical to the decision making process for a period of thirty (30) days subsequent to the hearing. City Br. at 3.

The City Council also directed that the public hearing include morning, afternoon, and evening hours to, the City asserts, "accommodate any and all who wished to participate in the process." City Br. at 3.

Despite the opportunities for public participation provided by Ordinance No. 1670 "before, during and after the hearing," the City argues that petitioners "failed to offer any evidence or information of substance on the pertinent siting issues for the Hearing Officer or City Council to consider." City Br. at 3-4. The City goes further and claims that:

> By not taking advantage of the thirty day post hearing comment period to submit evidence or comment concerning issues they felt they were prohibited from introducing during the hearing, Petitioners effectively waived any fundamental fairness issue on those subjects. To the extent they submitted materials, their objections to not being able to do so during the hearing are moot. *Id*. at 4.

Petitioners' Reply—Hearing and Public Comment

Petitioners claim that Waste Management's response brief leaves the issue "clearly defined" for the Board:

> If the Native American Mounds and wetlands are a part of the "character of the surrounding area," then Waste Management should have presented proof of the landfill's compatibility with the Mounds and the wetlands, and petitioners should have been permitted to inquire about the Mounds and the wetlands during the hearing before the City. Pet. Reply Br. at 8.

Petitioners assert that the Native American Mounds and the wetlands are as much a part of the character of the surrounding area as the open fields or farmland addressed by Waste Management's "compatibility" analysis. Pet. Reply Br. at 8-9. Yet Waste Management "declined to put forth its proof" needed to satisfy one of the siting criteria "until 28 days after the conclusion of the hearing" when the company filed its public comments. *Id*. at 9.

Petitioners maintain that before hearing, they received "papers concerning the mounds" from Waste Management and in turn forwarded those papers to archeologist Dr. John Kelly for his review. Pet. Reply Br. at 9, citing Tr. 22-23. According to petitioners, Dr. Kelly:

> was critical of the papers, the procedures, the absence of an archaeological report on the discovery of the human remains, and the way the surveys were reported and conducted. Pet. Reply Br. at 9, citing Tr. 27.

Petitioners explain that Dr. Kelly gave petitioners "notes for petitioners to use to question and rebut Waste Management's report." Pet. Reply Br. at 9. Petitioners claim they were prepared to elicit testimony from Waste Management at hearing about North Milam's "impact to the Native American Mounds discovered." *Id*. at 10, citing C1045-46.

According to petitioners, Dr. Kelly told them that "it is not clear what sites are actually within the project area and what will be impacted." Pet. Reply Br. at 10. Petitioners argue that this "lack of clarity" concerning impacts to these sites remains:

> For example, in its brief, Waste Management points to (pp. 5-6) a January 16, 2007, letter from Mr. Shinn to support the following assertions: "no American Indian Mounds have been located within North Milam;" "there are no known burial sites within the site;" "site 1316 is not within North Milam's footprint;" "site 1385 is not on [Waste Management]-owned property and is 1,000 feet from North Milam's boundary;" and "site 1375 also is outside North Milam." A careful reading of Mr. Shinn's letter (C 1591-1593), however, shows that none of these statements is supported by that letter. What the letter does say is that although the "North Milam site is well outside the established boundaries of the Cahokia National Landmark World Heritage site . . .[,] it is certain the investigated prehistoric sites are associated with Cahokia." C 1593. Further, an attachment to this same letter says that the "investigation of the 180 acres that make up the proposed project contained 7 archeological sites." C 1607. Pet. Reply Br. at 10.

Petitioners also dispute the claim of Waste Management and the City that it was up to petitioners to determine what information they believed was important and to submit that information to the City: "That simply is not feasible when petitioners lack access to the land that would allow them to gather the data." Pet. Reply Br. at 10. Petitioners conclude that Waste Management's submission of information on these Native American sites through public comment rather than at hearing, coupled with the restriction on petitioners' cross-examination, is:

> even more fundamentally unfair because Mayor John Hamm wrote to the two archaeological organizations stating that the City's decision was based on the archaeological report submitted as public comment. Pet. Reply Br. at 11, citing C2246-47.

Board Analysis—Legal Standards for Fundamental Fairness Review

The Board must consider the fundamental fairness of the procedures used by the City in reaching its decision to approve siting for North Milam:

> In making its orders and determinations under this Section the Board shall include in its consideration . . . the fundamental fairness of the procedures used by the county board or the governing body of the municipality in reaching its decision. 415 ILCS 5/40.1(a) (2006); *see also* 415 ILCS 5/40.1(b) (2006).

A non-applicant who participates in a local pollution control facility siting hearing has a "statutory right to 'fundamental fairness' in the proceedings before the local siting authority." Land and Lakes, 319 Ill. App. 3d at 47, 743 N.E.2d at 193. It is well-settled, however, that this right does not require "the protection afforded by the constitutional guarantee of due process." Land and Lakes, 319 Ill. App. 3d at 47, 743 N.E.2d at 193. The courts have interpreted the "right to fundamental fairness" as:

> incorporating minimal standards of procedural due process, including the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence. Land and Lakes, 319 Ill. App. 3d at 47-48, 743 N.E.2d at 193; *see also* Daly v. PCB, 264 Ill. App. 3d. 968, 970-71, 637 N. E.2d 1153, 1155 (1st Dist. 1994).

Board Analysis—Fundamental Fairness Concerning "Compatibility" Criterion

Section 39.2 of the Act requires the local siting authority to both hold a public hearing and allow for the submission of written public comment:

> At least one public hearing is to be held by the county board or governing body of the municipality no sooner than 90 days but no later than 120 days after the date on which it received the request for site approval. 415 ILCS 5/39.2(d) (2006).

> Any person may file written comment with the county board or governing body of the municipality concerning the appropriateness of the proposed site for its intended purpose. 415 ILCS 5/39.2(c) (2006).

The Board disagrees with the City that petitioners' fundamental fairness arguments, about their cross-examination at hearing being unduly restricted, are waived or mooted by the opportunity to file, or the filing of, post-hearing public comments. The City cites no authority for its position. Contrary to the City's characterization, petitioners' specific complaint here is that they were not allowed to cross-examine a witness as they wished, not that they were disallowed from introducing documents at hearing. In fact, a number of exhibits from petitioners were accepted into the record at hearing.

As provided above, a public comment period is required by the Act, in addition to the public hearing. The Board cannot find that the existence of the statutorily-required comment period, or the fact that petitioners and Dr. Kelly filed public comments, bars petitioners from challenging the fundamental fairness of the public hearing itself. Petitioners attempted to cross-examine Schanuel regarding Native American sites and wetlands, but were denied when Waste Management's objections were sustained by the City's hearing officer. By the City's siting ordinance, Ordinance No. 1670, rulings of the City hearing officer could not have been appealed. C0006A (Section 4(E): "No ruling of the Hearing Officer shall be appealable to the governing body of the City."). Public comment in no way waives or renders moot petitioners' fundamental fairness arguments about being so denied the chance to subject this witness to "the crucible of cross-examination." Varilek v. Mitchell Engineering Co., 200 Ill. App. 3d 649, 671, 558 N.E.2d 365, 380 (1st Dist. 1990).

Nor can the Board agree with Waste Management's broad statement that such subjects as prehistoric Native American sites and wetlands are not to be considered by the local siting authority because they are not explicitly listed in the Section 39.2(a) criteria. Waste Management interprets Concerned Adjoining Owners too mechanistically. The landfill objectors there sought to, but were denied, the opportunity to question the siting applicant on the economics of the proposed facility, maintaining that economics is part of the criterion (i) "needs assessment." The court stated:

> Although economics is not listed in *section 39.2*, TOTAL argues that it is relevant and should have been considered. Since economics is not a specifically listed criteria, its potential for consideration is discretionary, not mandatory. Concerned Adjoining Owners, 286 Ill. App. 3d 565, 680 N.E.2d 810,

Concerned Adjoining Owners held that economics, or "how much the landfill would cost to run or how much it would make," is simply not relevant to whether the facility is necessary to meet the waste needs of its intended service area, *i.e.*, to criterion (i), which requires that:

> the facility is necessary to accommodate the waste needs of the area it is intended to serve. 415 ILCS 5/39.2(a)(i) (2006).

By Waste Management's logic, the failure of Section 39.2(a) to explicitly list "land use" as a siting criterion would render much of its "compatibility" expert's analysis irrelevant. The Board finds that on this issue, Concerned Adjoining Owners is of no aid to Waste Management.

Petitioners assert that they were denied cross-examination of Schanuel on matters of Native American sites and wetlands. Section 39.2(a)(iii) requires, in pertinent part, that:

> the facility is located so as to minimize incompatibility with the character of the surrounding area. 415 ILCS 5/39.2(a)(iii) (2006).

The Board finds that the NRHP-eligible Native American sites associated with Cahokia and the Section 404 wetlands are relevant to assessing whether North Milam "is located so as to minimize incompatibility with the character of the surrounding area." *See, e.g.*, Land and Lakes, 319 Ill. App. 3d at 47, 743 N.E.2d at 193 (considering Midewin National Tallgrass Prairie under criterion (iii)); Those Opposed To Area Landfills (T.O.T.A.L.) v. City of Salem, PCB 96-79, PCB 96-82 (consol.) (Mar. 7, 1996) (wetlands considered under criterion (iii)), *aff'd sub nom.* Concerned Adjoining Owners v. PCB, 286 Ill. App. 3d 565, 680 N.E.2d 810 (5th Dist. 1997). That Native American sites and wetlands may also be subject to separate federal regulatory schemes, or for that matter separate Board location standards at permitting (35 Ill. Adm. Code 811.102[5]), does not make the sites here any less relevant to the "compatibility" criterion in this case. The Board declines to read exceptions or limitations into the plain and ordinary meaning of the language of criterion (iii). *See* Town & Country, 225 Ill. 2d at 117, 866 N.E.2d at 235 ("We must not depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent.").

It is, however, a most basic procedural tenet that the cross-examination of a witness is limited to the scope of direct examination. *See, e.g.*, Hansen v. Miller, 145 Ill. 538, 542, 32 N.E. 548, 549 (1892) ("The rule is familiar, that the cross-examination of a witness should be confined to matters to which he has testified on his direct examination."). This principle is codified in Section 4(G), Rule 10 of the City's siting ordinance, Ordinance No. 1670, which governed the public hearing:

> RULE 10: Any participant, or their attorneys, may conduct cross-examination of

[5] Part 811 addresses standards for new solid waste landfills. Section 811.102(c) provides: "The facility shall not be located in areas where it may pose a threat of harm or destruction to the features for which an irreplaceable historic, or archaeological site was listed pursuant to the National Historic Preservation Act (16 U.S.C. 470 et seq.) or the Illinois Historic Preservation Act (Ill. Rev. Stat. 1989, ch. 127, par. 133d1 et seq.) for which a Natural Landmark was designated by the National Park Service or the Illinois State Historic Preservation Officer, or for which a natural area was designated as a Dedicated Illinois Nature Preserve pursuant to the Illinois Natural Area Preservation Act (Ill. Rev. Stat. 1989, ch. 105 par. 701 et seq.)." Section 811.102(e) states: "The facility shall not cause a violation of Section 404 of the Clean Water Act (33 U.S.C. 1344)."

> witnesses. Any *cross-examination shall be relevant to the testimony* of any witness and non-duplicative of other cross-examination questions. Cross examination of witnesses shall be permitted only during that period of time immediately following each witness' testimony. C0008A (emphasis added).

When petitioners attempted to cross-examine Schanuel about Native American sites and wetlands, counsel for Waste Management objected each time as follows: petitioners' attempted cross-examination was irrelevant (Native American sites (C1045-46)) and beyond the scope of direct examination (Native American sites (C1045-46) and wetlands (C1015)). The City hearing officer each time sustained the objection. The Board finds that the proposed cross-examination was beyond the scope of Schanuel's direct examination. For that matter, it was also beyond the scope of his "compatibility" report in the siting application. Petitioners do not argue otherwise. The Board can find no fault with the hearing officer's rulings.

In addition, petitioners had multiple opportunities to present information to the City regarding the Native American sites and wetlands. Besides the post-hearing public comment period discussed below, the City's siting ordinance permitted petitioners to offer documentary evidence and call their own witnesses at hearing. Section 4 of the ordinance, entitled "Public Hearing," reads in pertinent part:

> RULE 1: All reports, studies, exhibits or other evidence or copies thereof, other than testimony, which any applicant or participant who desires to submit for the record at the public hearing must be filed with the City Clerk at least five (5) days before the public hearing and shall be available for public inspection in the office of the City Clerk.
>
> RULE 2: The applicant and any participant shall submit a written list of proposed witnesses to the Hearing Officer at least five (5) days prior to the commencement of the public hearing. Said witness list shall state the name, address and occupation of said witnesses and shall contain a summary of the subject matter and substance of the testimony of the witness. C0006A-7A (Section 4(G), Rules 1 and 2).

Under the City's siting ordinance, petitioners could have but did not seek to have entered at hearing the Waste Management archaeological information shared with Andria, President of the American Bottom Conservancy and Conservation Chair of the Sierra Club Kaskaskia Group, or present their own witnesses to testify about Native American sites and wetlands. Petitioners imply that they would have needed site access to be able to present information about Native American sites at the City hearing. Not only is there no allegation that site access was ever sought by or denied to petitioners, but petitioners claim that they were prepared to cast doubt, through cross-examination, on the Waste Management's archaeological documentation, all without any such property access.

Moreover, petitioners did provide oral comments at the City hearing, including comments from Andria critical of "the archaeological work that's been done on this site" and comments from Andria and Bensman, Conservation Chair for the Piasa Palisades Group of the Sierra Club, about wetland impacts. C1467-68, 1472-77. Petitioners also had seven exhibits entered into the record at hearing. C1436-44, 1445-50, 1536-37, 1538-39, 1540-43, 1544-45, 1546-47.

Further, contrary to petitioners' suggestion, Waste Management did present archaeological and wetland evidence at the City's December 21-22, 2006 public hearing. Waste Management's siting application, filed with the City on September 22, 2006, was entered into evidence as an exhibit at hearing. C0981-82. Waste Management's siting application includes the Burns & McDonnell report concerning archaeological investigations at North Milam. C0719-20. Waste Management's siting application also includes its Section 404 (federal Clean Water Act) permit application and other studies and documentation related to wetlands. C0735-74; *see also* WM Br. at 15.

Waste Management did not call, as witnesses at hearing, any representatives of the firms that prepared these archaeological and wetland reports. However, "[t]here is no rule that any person authoring a report relied upon in a siting application must be called as a witness in the siting hearing." Concerned Adjoining Owners, 288 Ill. App. 3d at 575, 680 N.E.2d at 818. Additionally, at the City hearing, as in Concerned Adjoining Owners:

> all of the objectors were allowed to present evidence and object to evidence presented. They were given ample opportunity to cross-examine all of the witnesses. The procedures followed in the siting hearing were fair. Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818 ("Some of the people whose reports were contained in the siting application did not testify, but all those who testified were offered for cross-examination").

Nor can the Board find anything improper about Waste Management presenting additional information on Native American sites and wetlands through public comments. Consistent with Section 39.2(c) of the Act (415 ILCS 5/39.2(c) (2006)), the City siting ordinance provided petitioners and all others with the chance to file public comments after hearing. Section 5 of the Ordinance, entitled "Public Comment," states:

> A. Any person may file written comment with the City Clerk (on behalf of the Hearing Officer) concerning the appropriateness of the proposed site for its intended purpose. The City Clerk shall accept and the Hearing Officer shall consider any comment received or postmarked not later than 30 days after the date of the last public hearing. In the event that the 30th day falls on a Sunday or a federal holiday, the next day on which mail is delivered shall be considered the 30th day for purposes of this paragraph.
>
> B. Copies of such written comments shall be made available for public inspection in the offices of the City Clerk, and members of the public shall be allowed to obtain a copy of any written comment upon payment of actual cost of reproduction.

> C. Any such written comment received by the City Clerk shall be made part of the record of the public hearing as hereinafter described and the Hearing Officer shall consider any such timely written comments in making his/her report and recommendation concerning said request to the governing body of the City. C0009A.

The two public comments on behalf of Waste Management were timely submitted, received by the City on January 19, 2007, three days prior to the January 22, 2007 end of the comment period. C1591-1928 (letter with attachments from Orval E. "Dan" Shinn of Burns & McDonnell), 1929-2068 (letter with attachments from Scott D. Harding of SCI Engineering, Inc.).

In Land and Lakes, on the last day of the public comment period, Waste Management submitted "approximately 2,000 pages of material" consisting of:

> a number of engineering and other technical reports addressing the geology and hydrology of the Prairie View site, federal government efforts concerning environmental remediation of the Arsenal property, and the suitability of the Prairie View site for landfill development. Land and Lakes, 319 Ill. App. 3d at 51, 743 N.E.2d at 196.

A Waste Management expert who testified at the local siting hearing "relied on *some* of the documents in her testimony." Land and Lakes, 319 Ill. App. 3d at 51, 743 N.E.2d at 196 (emphasis added).

The Land and Lakes court affirmed the Board's decision that the filing of the documents on the last day of the public comment period was not fundamentally unfair:

> The documents in question were submitted within the 30-day public comment period. A party cannot cross-examine written material submitted as public comment. [citation omitted] Moreover, the Act does not require that the public comment period be held open to allow parties to respond to materials submitted on the last day. Land and Lakes, 319 Ill. App. 3d at 51, 743 N.E.2d at 196; *see also* Southwest Energy Corp. v. PCB, 275 Ill. App. 3d 84, 93, 655 N.E.2d 304, 310 (4th Dist. 1995) ("Obviously, the parties cannot cross-examine those who submit written comments.").

Accordingly, petitioners' implication that they did not have enough time to respond (Tr. at 30) to the Waste Management public comments (Burns & McDonnell on archaeological sites and SCI Engineering, Inc. on wetlands) does not help petitioners. Further, contrary to petitioners' characterization (Pet. Reply Br. at 9), the public comment filed on the last day by the siting applicant in Land and Lakes was not merely a summary of prior record information. In addition, the public comment there did include documentation that was relevant to the siting criteria and that was not relied upon by the applicant's witness at hearing. Land and Lakes, 319 Ill. App. 3d at 51, 743 N.E.2d at 196.

Additionally, petitioners here, while asserting that some of the archaeological information in the public comment is unclear (Pet. Reply Br. at 10), have not demonstrated that either public comment submitted on behalf of Waste Management contains "erroneous data or conclusions." Land and Lakes, 319 Ill. App. 3d at 51, 743 N.E.2d at 196. Though petitioners sought to cross-examine Schanuel on archaeological and wetland issues, petitioners have not articulated to the Board "how [they] would have responded" to the substance of the technical information provided in these public comments. Indeed, in their briefs, petitioners cite to the Waste Management public comments in support of petitioners' positions on appeal. *See* Pet. Br. at 3-4, 7-8, citing C1592-93, 1929, 1933, 1939, 1973; Pet. Reply Br. at 5, 7, 10, citing C1591-93, 1607, 1939. Under these circumstances, as the court held in Land and Lakes, "even assuming that the [local siting authority] erred by considering the documents, any such error must be considered harmless." Land and Lakes, 319 Ill. App. 3d at 52, 743 N.E.2d at 196.

Moreover, anyone, including petitioners, could have filed a public comment pursuant to the City's siting ordinance, and certainly Waste Management was not precluded from doing so. In fact, petitioners, as well as the Cahokia Archaeology Society and Dr. Kelly's organization, the Powell Archaeological Research Center, did submit timely public comments that were received by the City several days after its receipt of the Waste Management comments. The objectors' comments addressed concerns over archaeological and wetland impacts. C2069-70, 2074, 2077-96, 2097-2122, 2123-43, 2156-75.

The City therefore had before it both the objectors' and the siting applicant's public comments on these issues. And, as with its opportunity to introduce evidence at hearing, petitioners never explain why they did not submit, as a public comment, the archaeological information shared with Andria before hearing, along with any critique of that information by Dr. Kelly.

The Act requires the public comment period held by the City. *See* 415 ILCS 5/39.2(c) (2006). That the City considered the information contained in Waste Management's timely-submitted public comments is far from fundamentally unfair, as petitioners argue. Rather, it is required by the Act:

> The county board or governing body of the municipality *shall consider* any comment received or postmarked not later than 30 days after the date of the last public hearing. 415 ILCS 5/39.2(c) (2006) (emphasis added); *see also* Southwest Energy, 275 Ill. App. 3d at 93, 655 N.E.2d at 310 ("*Section 39.2(c)* of the Act requires the local governing body to consider any written comment filed within 30 days of the last public hearing.").

For the reasons above, the Board is not persuaded by petitioners' arguments concerning the hearing and public comments and finds that petitioners have failed to prove that the City's siting procedures were rendered fundamentally unfair on those grounds.

Fundamental Fairness Concerning Section 39.2(e) "Writing"

Petitioners' Position—Written Siting Decision

Petitioners state that, under the Act, the decision of the local siting authority "must be in writing and must specify the reasons for the decision." Pet. Br. at 13, citing 415 ILCS 5/39.2(e) (2006) and 415 ILCS 5/40.1(a) (2006) (Board shall include in its consideration the written decision and reasons for the decision of the local body). According to petitioners, there is "no written decision of the City of Madison here that specifies the reasons for the City's decision to approve the landfill." Pet. Br. at 13. "The only writing," continue petitioners, "is the City of Madison City Council Meeting Minutes from February 6, 2007":

> It was moved by Alderman Grzywacz, seconded[,] by Alderperson Armour, to approve the Waste Management Siting Application dated September 22, 2006. Roll call vote as follows: Yeas: Armour, Bridick, Grzywacz, Riskovsky, Hampsey, Vrabec, Gardner, and Treadway. Nays: None. Motion carried. *Id*., quoting C2242.

Petitioners argue that even if the City's minutes were sufficient to be considered the "writing" required by the Act, " the minutes fail to give any reason for the City's decision." Pet. Br. at 13-14. Petitioners then conclude that for this reason, "the proceedings conducted by the City of Madison were not fundamentally fair." *Id*. at 14.

Waste Management's Response—Written Siting Decision

Waste Management argues that the February 6, 2007 City Council minutes, together with the City hearing officer's January 31, 2007 findings of fact and recommendation, constitute the City's written decision. WM Br. at 21. Waste Management explains that Section 7 of the City's siting ordinance governs the "site approval decision process." *Id*., citing C0009A. According to Waste Management, Section 7(A) provides 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. [citation omitted] 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. WM Br. at 21, citing C0009A.

Waste Management states that on January 31, 2007, the City hearing officer "timely submitted to the City a written findings of fact and recommendation supported by the record." WM Br. at 21, citing C2178-2217. Then, continues Waste Management, 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. WM Br. at 21, citing C2242.

The fact that the City did not prepare a separate written decision, argues Waste Management, "does not invalidate the approval or render the proceedings fundamentally unfair." WM Br. at 21. Waste Management relies on Peoria Disposal Co. v. Peoria County Board, PCB 06-184, slip op. at 33-34 (June 21, 2007), *appeal pending sub nom.* Peoria Disposal Co. v. PCB and County of Peoria, No. 3-07-435 (3rd Dist.). In Peoria Disposal, Waste Management explains:

> 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. [citation omitted] 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." WM Br. at 21-22, citing Peoria Disposal, PCB 06-184, slip op. at 12, 33-34.

Waste Management concludes that under Peoria Disposal, the City hearing officer's written findings of fact and recommendation here, coupled with the "written transcript of the City's approval on February 6, 2007," constitute a written decision in compliance with Section 39.2(e). WM Br. at 22.

The City's Response—Written Siting Decision

The City likewise cites Peoria Disposal and asserts that the "action taken by the City Council reflected in its written minutes of February 6, 2007 is . . . sufficient to comply with the statutory requirement of a written decision with reasons given." City Br. at 4. According to the City, at that February 6, 2007 meeting:

> the City Council cited the written findings of the Hearing Officer as the basis for its unanimous vote to approve the Application. Given the paucity of competent information submitted by Petitioners during the lengthy siting process, there was no basis for the City Council to have voted otherwise. *Id*.

Petitioners' Reply—Written Siting Decision

Petitioners assert that Peoria Disposal is distinguishable from this case. Pet. Reply Br. at 11-12. In Peoria Disposal, according to petitioners, the Board:

> had before it "the entire decision . . . stated verbatim in the transcript." [citation omitted] As pointed out by one of the parties, "the County Board could not have

> created a written decision that was more accurate and complete than the final meeting transcript. [citation omitted] With the reasons for the County Board's decision set out verbatim in the transcript, this Board found that the transcript and the recommended findings of fact satisfy the requirements of Section 39.2(e). *Id*. at 11, citing Peoria Disposal, PCB 06-184, slip op. at 13.

Petitioners argue that in contrast, the City here "did not even mention or refer to any reasons or to any findings or to any documents stating the reasons for its approval." Instead, maintain petitioners, the City "simply voted." Pet. Reply Br. at 12, citing C2242. "The vote, without reasons," does not comply with the Act, according to petitioners. Pet. Reply Br. at 12.

Petitioners dispute Waste Management's contention that there is a "transcript" of the February 6, 2007 City Council meeting: "There are only meeting minutes that give no reason for the City's decision." Pet. Reply Br. at 12. Petitioners also dispute the assertion of both the City and Waste Management that, on February 6, 2007, the City "adopted the Hearing Officer's written findings of fact and recommendation." *Id*. According to petitioners, "[t]here is nothing in the record to support these assertions," and these "unsupported assertions made by counsel . . . should be disregarded" by the Board. *Id*.

Petitioners conclude that given the City's "bare vote" without reasons, "there can be no meaningful administrative or judicial review of the City's decision." Pet. Reply Br. at 13. Petitioners quote from the Illinois Supreme Court's decision in Reinhardt v. Board of Ed. of Alton Community Unit School Dist. No. 11:

> It is clear that a decision by an administrative agency must contain findings to make possible a judicial review of the agency's decision. The Supreme Court in *Securities and Exchange Com. v. Chenery Corp*., 318 U.S. 80, 94, 63 S.Ct. 454, 462, 87 L.Ed. 626, described the requirement stating that 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.' Pet. Reply Br. at 13, quoting Reinhardt v. Board of Ed. of Alton Community Unit School Dist. No. 11, 61 Ill. 2d 101, 103-104, 329 N.E.2d 218, 220 (1975).

Board Analysis—Fundamental Fairness Concerning Section 39.2(e) "Writing"

Section 39.2(e) of the Act states:

> Decisions of the county board or governing body of the municipality are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section. 415 ILCS 5/39(e) (2006).

Petitioners' opening brief argues that the City did not comply with this provision of the Act, but fails to explain how this alleged noncompliance rendered fundamentally unfair "the procedures used by . . . the governing body of the municipality in reaching its decision." 415 ILCS 5/40.1(a) (2006). In its reply brief, petitioners suggest that there can be no meaningful review of the City's decision. For the reasons below, the Board disagrees and further finds that

the City satisfied the requirement of Section 39.2(e) that its decision be in writing, specifying the reasons for the decision.

Waste Management states that the City Council "adopted the Hearing Officer's written findings of fact and recommendation into consideration" before approving the siting application at the City Council's February 6, 2007 meeting. WM Br. at 21. Likewise, according to the City, the City Council at that meeting "cited the written findings of the Hearing Officer as the basis for its unanimous vote to approve the Application." City Br. at 4. The Board agrees with petitioners, however, that the face of the meeting minutes reveal only a roll call vote approving Waste Management's siting application. C2242. The Board also agrees with petitioners that no verbatim transcript was made of the City Council's February 6, 2007 meeting. The Board finds, however, that petitioners' Section 39.2(e) argument is premised on reading the City Council minutes in a vacuum.

The City adopted a siting ordinance on June 13, 2006, Ordinance No. 1670. Section 4(G), Rule 12 of the ordinance states:

> The decision of the governing body of the City will be in writing and specify the reasons therefor, such reasons to be in conformity with Section 5/39.2(a) of the Act. C0008A.

Section 7 of the City ordinance is entitled "Site Approval Decision." That section reads in its entirety as follows:

> A. After the public hearing and any continuation thereof, the Hearing Officer shall make written findings of fact and a recommendation concerning the site approval request. 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.
>
> B. The governing body of the City may consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant and any subsidiary, parent corporation, or subsidiary of the parent corporation in the field of solid waste management.
>
> C. The governing body of the City shall consider the record from the public hearing and the findings of fact and recommendations of the Hearing Officer and shall 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.
>
> D. No determination by the governing body of the City of a site approval request may be reconsidered. C0009A.

The City's public hearing concluded on December 22, 2006. On January 31, 2007, the City hearing officer submitted to the City Council his findings of fact and recommendation. C2178-2224. The hearing officer's submittal was 47-pages long and addressed each of the nine

siting criteria of Section 39.2(a). The submittal states that the hearing officer considered, among other items in the record, all of the hearing exhibits and written public comments, each of which is identified in appendices. C2180-81, 2218-24. In Appendix III to his findings and recommendation, the hearing officer summarized the position taken in each public comment and listed any attachments provided within the comment. C2220-24. For each criterion, the hearing officer separately described testimony, made findings of fact, and rendered a conclusion of law. The hearing officer concluded that each of the nine siting criteria had been met. C2183-2216. At the end of this analysis, the hearing officer recommended that the City grant site location approval for North Milam. C2217. On February 6, 2007, the City Council voted to grant site location approval. C2242.

Accordingly, the City hearing officer, under Section 7(A) of the ordinance, timely submitted his written findings of fact and recommendation concerning Waste Management's application. Section 7(C) of the ordinance provides that the City Council then "shall consider the record from the public hearing and the findings of fact and recommendations of the Hearing Officer and shall make a determination concerning a site approval request." The City Council met six days after the hearing officer's submittal and voted to approve Waste Management's siting application. It is plain from the chronology of these events and the language and structure of the City's siting ordinance that the City Council's vote, as reflected in the meeting minutes, and the hearing officer's findings of fact and recommendation, constitute the City's siting decision. That decision, the Board finds, was "in writing, specifying the reasons for the decision." 415 ILCS 5/39.2(e) (2006).

Put in the proper context then, this decision of the City to grant siting for North Milam is subject to meaningful review. "All of the statutory criteria must be satisfied before approval of the siting application can be granted." Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818; *see also* Land and Lakes, 319 Ill. App. 3d at 45, 743 N.E.2d at 191 ("An applicant seeking siting approval must submit sufficient details of the proposed facility demonstrating that it meets each of nine criteria."); Waste Management of Illinois, Inc. v. PCB, 160 Ill. App. 3d 434, 443, 513 N.E.2d 592, 597-98 (2nd Dist. 1987). The City Council's vote, combined with the hearing officer's findings, reflect a determination that Waste Management satisfied all nine criteria. In E & E Hauling, Inc. v. PCB, 116 Ill. App. 3d 586, 451 N.E.2d 555 (2nd Dist. 1983), *aff'd on other grounds*, 107 Ill. 2d 33, 481 N.E.2d 664 (1985), the court held that the local siting authority:

> need only indicate which of the criteria, in its view, have or have not been met, and this will be sufficient if the record supports these conclusions so that an adequate review of the County Board's decision may be made. E & E Hauling, 116 Ill. App. 3d at 616, 451 N.E.2d at 577-78.

Further support for the Board's ruling is found in Clutts v. Beasley, 185 Ill. App. 3d 543, 541 N.E.2d 844 (5th Dist. 1989). There, the court addressed an objector's argument that the local siting authority's "written decision [granting siting] did not include specific findings of fact, but instead, merely recited the criteria for approving landfills prescribed by statute." Clutts, 185 Ill. App. 3d at 544, 541 N.E.2d at 845. The court stated that contrary to the objector's claim, there "can be meaningful review of the County Board's decision, because there is a record of all

matters that were presented to the Board." *Id*. The court then listed the Section 39.2(a) siting criteria and held:

> These criteria are factual as well as ultimate findings to be made by the County Board. In the ordinary case, it would be difficult for a County Board to be more specific than what is set out as criteria. For example, either a proposed facility is, or is not, outside the boundary of the 100-year flood plain. The purpose of these criteria is to impose standards, so that the decision of the County Board to approve or deny operation of a proposed landfill is made with guidance, rather than arbitrarily or by whim. We hold that so long as the decision is in writing, and a record has been made showing the basis for the decision, neither a detailed statement finding specific facts, nor a detailed explanation of the relationship between the facts, the criteria, and the conclusions is necessary, and the decision can be framed in the language of the criteria set out in the statute. Clutts, 185 Ill. App. 3d at 544, 541 N.E.2d at 845-46.

Here, to find noncompliance with Section 39.2(e) by reading the City Council's meeting minutes in isolation, as petitioners urge, would "elevate procedural form over the substance and intent of Section 39.2." Peoria Disposal, PCB 06-184, slip op. at 33-34, *appeal pending sub nom.* Peoria Disposal Co. v. PCB and County of Peoria, No. 3-07-435 (3rd Dist.). The minutes of the City Council meeting that document the vote to grant siting, combined with the City hearing officer's written findings of fact and recommendation, all pursuant to the City's siting ordinance, constitute a sufficient written siting decision within the meaning of Section 39.2(e) of the Act. Accordingly, contrary to petitioners' claims, a written siting decision, specifying its reasoning, was not lacking in this case.

The Board finds that petitioners have failed to prove that "the procedures used by . . . the governing body of the municipality in reaching its decision were fundamentally unfair." 415 ILCS 5/40.1(a) (2006).

SITING CRITERIA

In this part of the opinion, the Board will first discuss the parties' arguments about the City's determination that Waste Management satisfied siting criterion (i) on "need." This is followed by the Board's legal analysis and ruling. Next, the Board discusses the parties' arguments concerning the City's determination that Waste Management satisfied siting criterion (iii) on "compatibility." The Board then provides its legal analysis and ruling on that criterion.

Criterion (i): Necessary to Accommodate Waste Needs

One of the two Section 39.2 siting criteria at issue is whether the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve. *See* 415 ILCS 5/39.2(a)(i) (2006).

Petitioners' Position—Need

Petitioners argue that to satisfy this siting criterion, the applicant must demonstrate "an urgent need for the new facility as well as the reasonable convenience of establishing a new landfill." Pet. Br. at 9, citing File v. D&L Landfill, Inc., 219 Ill. App. 3d 897, 906, 579 N.E.2d 1228, 1235 (5th Dist. 1991). Petitioners note that according to a 2005 IEPA landfill capacity report, North Milam falls within IEPA's Region Six, the landfill capacity of which "increased by almost 33.9 million gate cubic yards (29 percent) from the previous year." C1445. Further, landfill operators in the Region reported 17 years of remaining waste disposal capacity. *Id*.

According to petitioners, because Metro East landfill capacity increased 29% from the previous year, and seventeen years of capacity remains, "there is no urgent need for North Milam" and Waste Management accordingly failed to meet the need criterion. Reply Br. at 9, citing Waste Management of Illinois, Inc. v. PCB, 175 Ill. App. 3d 1023, 1033, 530 N.E.2d 683, 691 (2nd Dist. 1988) (no need for proposed landfill where nine years of capacity remained).

Waste Management's Response—Need

Waste Management begins by observing that its "need" expert, Smith, took into account the data referred to by petitioners from the 2005 IEPA landfill capacity report for Region Six. WM Br. at 16. Smith testified on cross-examination that she analyzed not only this data, but also other data on the remaining permitted capacity for the landfills evaluated in 2005 and 2006. *Id*., citing C1290-91, 0062-63. Waste Management asserts therefore that "this data does not affect the correctness of the City's finding that criterion (i) was met." WM Br. at 16.

Criterion (i) is met, states Waste Management, when the applicant shows that a proposed facility is "reasonably required by the waste needs of the service area taking into consideration its waste production and disposal capabilities." WM Br. at 17, citing File. A siting applicant is not required to show "absolute necessity" to meet criterion (i), according to Waste Management. *Id.* The company acknowledges that the court in Waste Management, 175 Ill. App. 3d at 1031, 530 N.E.2d at 689, affirmed the local siting authority's finding that "remaining capacity of nine years was insufficient need." WM Br. at 17-18. Waste Management points out, however, that in E & E Hauling, 116 Ill. App. 3d 586, 451 N.E.2d 555, the court "found the need criterion established when the remaining capacity of the area landfills [was] ten years." WM Br. at 18.

Waste Management maintains that it 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." WM Br. at 18. Based on Smith's testimony, "there is a disposal capacity shortfall ranging between approximately 15 million and 54 million tons." *Id*., citing C1273-74, 0053. According to Waste Management, "[n]o contrary evidence regarding need was offered." WM Br. at 18. Therefore, concludes Waste Management, "the evidence supports the City's finding of need and the decision is not against the manifest weight of the evidence." *Id*., citing Industrial Fuels & Resources v. PCB, 227 Ill. App. 3d 533, 592 N.E.2d 148, 156 (1st Dist. 1992). The City joins in Waste Management's criterion (i) arguments. City Br. at 3.

Board Analysis—Legal Standards for Siting Criteria Review

As discussed above, siting approval is to be granted only if a proposed facility meets all nine of the criteria set forth in Section 39.2(a) of the Act (415 ILCS 5/39.2(a) (2006)). *See* Town & Country, 225 Ill. 2d at 109, 866 N.E.2d at 231 ("a negative decision as to one of the criteria is sufficient to defeat an application for site approval of the pollution control facility"); *see also* Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818; Land and Lakes, 319 Ill. App. 3d at 45, 743 N.E.2d at 191.

The Board will not disturb a local siting authority's decision regarding the applicant's compliance with the statutory siting criteria unless the decision is contrary to the manifest weight of the evidence. *See* Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818; *see also* Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197. "That a different conclusion may be reasonable is insufficient; the opposite conclusion must be clearly evident, plain or indisputable." Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818, quoting Turlek v. PCB, 274 Ill. App. 3d 244, 249, 653 N.E.2d 1288, 1292 (1st Dist. 1995). The Board may not reweigh the evidence on the siting criteria to substitute its judgment for that of the local siting authority. *See* Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3d Dist. 1990); Waste Management of Illinois, Inc. v. PCB, 187 Ill. App. 3d 79, 81-82, 543 N.E.2d 505, 507 (2nd Dist. 1989); Tate v. PCB, 188 Ill. App. 3d 994, 1022, 544 N.E.2d 1176, 1195 (4th Dist. 1989). "[T]he manifest weight of the evidence standard is to be applied to each and every criteria on review." *See* Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818.

It is for the local siting authority to weigh the evidence, assess witness credibility, and resolve conflicts in the evidence. *See* Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818; *see also* Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Fairview, 198 Ill. App. 3d at 550, 555 N.E.2d at 1184; Tate, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195. Where there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits one group of witnesses and does not credit the other. *See* Waste Management, 187 Ill. App. 3d at 82, 543 N.E.2d 505, 507. "[M]erely because the [local siting authority] could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the [local siting authority's] finding." File, 219 Ill. App. 3d at 905-906, 579 N.E.2d at 1235.

Board Analysis—Criterion (i) "Need"

An applicant before the local siting authority does not have to show an "absolute necessity" for the proposed facility to satisfy criterion (i). File, 219 Ill. App. 3d at 906, 579 N.E.2d at 1235; *see also* Clutts, 185 Ill. App. 3d at 546, 541 N.E.2d at 846; A.R.F. Landfill, Inc. v. PCB, 174 Ill.App.3d 82, 91, 528 N.E.2d 390, 396 (2nd Dist. 1988); Waste Management of Illinois, Inc. v. PCB, 122 Ill. App. 3d 639, 645, 461 N.E.2d 542, 546 (3rd Dist. 1984); Waste Management of Illinois, Inc. v. PCB, 123 Ill. App. 3d 1075, 1084, 463 N.E.2d 969, 976 (2nd Dist.1984); Waste Management, 175 Ill. App. 3d at 1031, 530 N.E.2d at 689. In File, the court held that the applicant:

> must demonstrate an urgent need for the new facility as well as the reasonable convenience of establishing a new or expanding an existing landfill. (*Waste Management of Illinois, Inc. v. Pollution Control Board (1988), 175 Ill. App. 3d 1023, 1031, 530 N.E.2d 682, 689*.) The applicant must show that the landfill is reasonably required by the waste needs of the area, including consideration of its waste production and disposal capabilities. (*Waste Management of Illinois, Inc., 175 Ill. App. 3d at 1031, 530 N.E.2d at 689*.) The applicant need not show that every other potential landfill site in the region is unsuitable but must show more than mere convenience. *Waste Management of Illinois, Inc. v. Pollution Control Board (1984), 123 Ill. App. 3d 1075, 1084, 463 N.E.2d 969, 976*. File, 219 Ill. App. 3d at 906-07, 579 N.E.2d at 1235-36; *see also* Industrial Fuels, 227 Ill. App. 3d at 545-46, 592 N.E.2d at 156 (court declining to enter "what appears to be a semantic battle" over different articulations of the meaning of "necessary": "That different courts may use different phraseology does not, in our view, mean that the various districts of the appellate court apply substantively different definitions.")

Petitioners rely on a portion of a 2005 IEPA landfill capacity report for IEPA's Region Six, which was entered at the City hearing as an American Bottom Conservancy exhibit. C1292, 1445-50. Region Six consists of the following nine Illinois counties: Bond, Clinton, Fayette, Madison, Marion, Monroe, Randolph, St. Clair, and Washington. The report states:

> On Jan. 1, 2006, Region 6 landfill capacity increased by almost 33.9 million gate cubic yards, or up 29 percent from the previous year. Landfill operators in the region reported 17 years of capacity remaining for waste disposal. C1445.

Petitioners argue that there accordingly is "no urgent need for North Milam." Pet. Reply Br. at 9.

The record contains the siting application "criterion (i)" report (C0033-64) and the testimony (C1261-94) of Smith, Waste Management's "needs" expert. Smith is a solid waste consultant with twenty-four years of experience in the solid waste industry. She has prepared need reports for sixteen solid waste landfills, eight transfer stations, and one thermal destruction facility, and has testified as an expert on need in nineteen local siting hearings. C1261-67, 1430-33.

Smith identified the service area for, and the types of waste to be accepted by, North Milam. The facility plans to accept waste from five Illinois counties (Bond, Clinton, Madison, Monroe, St. Clair) and seven Missouri counties (Franklin, Jefferson, Lincoln, St. Charles, St. Louis, Warren, Washington). The types of waste North Milam plans to accept are: municipal solid waste, construction and demolition debris, asbestos, nonhazardous permitted special waste, and nonhazardous permitted liquids for solidification. C1268-69.

Smith determined that within this service area, 108,854,284 tons of waste will be generated over the course of North Milam's 17-year operating life (from 2012 to 2028). Smith calculated this figure by considering population projections and waste generation rates. If 100%

of the recycling goals for all 12 counties in the service area are reached, then 70,028,952 tons of waste will require disposal. According to Smith, the estimated disposal capacity available to the service area as of January 2012, however, is only 55,077,874 tons. C0053, 1269-73. Smith concluded:

> Depending on the recycling goals achieved each year by the counties in the service area, the service area will experience a capacity shortfall ranging from 14,951,078 to 53,776,410 tons, over the operating life of North Milam. The capacity of North Milam is needed to accommodate a portion of the projected capacity shortfall. C0053; *see also* 1273-75.

The Board finds that the City's decision that North Milam is necessary to accommodate the waste needs of the area it is intended to serve is not contrary to the manifest weight of the evidence. Smith's calculations took into account the data in the 2005 IEPA landfill capacity report relied on by petitioners, as well as data on Missouri facilities. C0054-55, 0062-63, 1288-91. Smith considered projections of population, rates of waste generation, and distances to alternate disposal sites. C0042-44, 0051. With waste requiring disposal projected at approximately 70 to 109 million tons over North Milam's planned operating life of 2012 to 2028, and available disposal capacity estimated at approximately 55 million tons as of 2012, resulting in a disposal capacity shortfall of approximately 15 to 54 million tons, Smith testified that the facility is necessary to meet the waste needs of its intended service area. No witness testified to the contrary.

Waste Management was not required to show an absolute necessity for North Milam to satisfy criterion (i). Waste Management demonstrated an urgent need for, as well as the reasonable convenience of, establishing North Milam. The record shows that North Milam is reasonably required by the waste needs of its service area, considering the area's waste production and disposal capabilities, along with other relevant factors. *See* File, 219 Ill. App. 3d at 906-07, 579 N.E.2d at 1235-36. The opposite conclusion, that North Milam is unnecessary to accommodate the service area's waste needs, is not clearly evident, plain or indisputable. *See* Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818. Accordingly, the City's determination that Waste Management met criterion (i) is not against the manifest weight of the evidence.

Criterion (iii): Located to Minimize Incompatibility with the Character of the Surrounding Area

The other of the two siting criteria at issue is whether the proposed facility is "located so as to minimize incompatibility with the character of the surrounding area." 415 ILCS 5/39.2(a)(iii) (2006).

Overview of the Parties' Arguments on Criterion (iii)

According to petitioners, there are five reasons why North Milam is not located to minimize incompatibility with the character of the surrounding area:

1. There is no "substantive buffer" between North Milam and Horseshoe Lake State Park.
2. "American Indian Mounds" are located on North Milam and "ancient human remains" have been found at the site.
3. North Milam is within 2,140 feet of the "Cahokia Mounds World Heritage Site and National Historic Landmark Boundary."
4. North Milam will "take" 18 acres of wetlands.
5. No effort was made to determine whether North Milam would be compatible with the surrounding area "during the landfill's operation." Pet. Br. at 6.

Ultimately, petitioners conclude that "it is not possible to minimize the incompatibility of the proposed landfill with the character of the surrounding area." Pet. Reply Br. at 7-8.

Waste Management argues that each of petitioners' five arguments on criterion (iii) should be rejected. First, Waste Management points out that petitioners challenge only the City's finding that North Milam is located so as to minimize incompatibility with the character of the surrounding area, not the City's finding on the other component of criterion (iii): the facility is located "so as to minimize the effect on the value of the surrounding property." WM Br. at 10, citing 415 ILCS 5/39.2(a)(iii) (2006).

Waste Management asserts that "[p]roximate property uses and zoning classifications" are proper considerations for determining whether a proposed facility is compatible with the character of the surrounding area. WM Br. at 10, citing Fairview (proposed landfill compatible with area of abandoned strip mines). Waste Management maintains that the Schanuel study addressed "planning issues that are commonly used to make determinations of land use compatibility." WM Br. at 3, citing C0454. By Waste Management's account, Schanuel gave "clear and convincing testimony" that North Milam is compatible with the character of the surrounding area. WM Br. at 10. He testified, continues Waste Management, that the "predominant land uses" within a one-mile radius are agricultural and open space mixed with industrial uses, and that the area is zoned for landfills as a special use. *Id*.

Waste Management states that petitioners failed to present any evidence establishing that the City's findings on criterion (i) were "clearly and indisputably wrong." WM Br. at 9. Instead, according to Waste Management, petitioners' arguments are based on "factual misstatements, distortions of the record, and speculation." *Id*. Because, according to Waste Management, "[n]o other witness contradicted or refuted Mr. Schanuel's findings or opinions," 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. WM Br. at 10-11.

The City joins in Waste Management's criterion (iii) arguments. City Br. at 3. The City adds that:

> there was overwhelming, competent evidence submitted by the Applicant to support the findings made by the Hearing Officer and City Council in approving the siting application. In fact, the record is virtually devoid of competent

> evidence or comments submitted by American Bottom Conservancy or the Sierra Club that challenges or questions the evidence submitted by the Applicant. *Id*.

Buffers Between North Milam and Horseshoe Lake State Park

Petitioners' Position Concerning Buffers for the Park. North Milam is incompatible with the surrounding area, according to petitioners, "because there is no substantive buffer between the proposed landfill and Horseshoe Lake State Park." Pet. Br. at 6.

Petitioners state that northern end of North Milam would be bounded by railroad tracks, which are abutted by a fish and wildlife area at the southern end of Horseshoe Lake State Park. Pet. Br. at 6, citing C0458, 0462. Waste Management's consultant, according to petitioners, asserts that the tracks serve as "strong physical demarcations between the Open Space/Recreation/ Conservation uses and North Milam" (Pet. Br. at 6, citing C0471) and a buffer for the fish and wildlife area (Pet. Br. at 6, citing C0462). The consultant concludes, continue petitioners, that due to "physical and visual buffers," North Milam is not incompatible with the use of Horseshoe Lake State Park. Pet. Br. at 6, citing C0464, 0489.

Petitioners argue that "[t]here is no noticeable buffer unless a train happens to be passing by." Pet. Br. at 6, compare View 2 on C 0479 (train present) with Views 3 and 4 on C 0474 (without train). Even then, park users need only "glance upward to view the landfill." Pet. Br. at 7, n.2. When there is no train present, according to petitioners, park users looking south "would have an unobstructed view of the proposed landfill." Pet. Br. at 6-7. Whether a train is present or not, petitioners argue, the railroad tracks provide "no meaningful visual buffer for persons using Horseshoe Lake State Park." *Id*. at 7. Train tracks also do not prevent landfill odors, continue petitioners, "from migrating to the public use areas of Horseshoe Lake, immediately upwind" of North Milam. *Id*.

Waste Management's Response Concerning Buffers for the Park. Waste Management maintains that it presented evidence of sufficient buffers between North Milam and Horseshoe Lake State Park. WM Br. at 11. According to Waste Management, petitioners' argument is:

> based 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. *Id*.

Waste Management argues that the evidence in the record shows that there are additional significant buffers between North Milam and Horseshoe Lake State Park. WM Br. at 11. Specifically, 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." *Id*., citing C1019-20. Schanuel also testified, continues Waste Management, that other significant buffers include "the railroad tracks, open fields, Horseshoe Lake itself, and an approximately thirty-acre wetland mitigation area." *Id*., citing C1020. Waste Management asserts that Schanuel's report discussed the "End Use Plan," which 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. *Id*., citing C0487-88.

Waste Management asserts that under criterion (iii), an applicant is required "to demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility." WM Br. at 11-12, citing File, 219 Ill. App. 3d at 900, 579 N.E.2d at 1231, 1236; Waste Management, 123 Ill. App. 3d at 1090, 463 N.E.2d at 980. Where there is no incompatibility, however, according to Waste Management, "minimization is not required." Tate, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1197. Waste Management maintains that because "Schanuel's testimony satisfied the first part of criterion (iii), [Waste Management] was not required to show any steps to minimize what did not exist." WM Br. at 12. Despite this, concludes Waste Management, Schanuel provided "ample testimony" as to the company's "efforts to enhance North Milam's compatibility with the surrounding area by providing significant landscaped screenings and buffers around the Facility." *Id*.

Petitioners' Reply Concerning Buffers for the Park. Petitioners note that Horseshoe Lake State Park consists of 2,968 acres. Pet. Reply Br. at 1, citing C0456, 0458-60. Petitioners concede that uses at the far north end of the park "may be buffered by the acreage that consists of the Park itself." *Id*., citing C1020. However, continue petitioners, "that is not the case for those who use the other parts of the Park." *Id*. at 1-2.

Specifically, petitioners reiterate that the fish and wildlife area at the southern end of the park abuts the railroad tracks at the northern boundary of North Milam. Pet. Reply Br. at 2, citing C0458, 0462. "Much of the nature and wildlife observation is at the southern end of the Park," continue petitioners. Pet. Reply Br. at 2. Fishing, including subsistence fishing, takes place in Horseshoe Lake, which is "just 2,000 feet from the proposed landfill." *Id*., citing C0456, 1538, 2160, 2165. Petitioners also state that people hunt along and on the lake, the southern portion of which has many of the park's public hunting blinds. *Id*., citing C1538, 1543. According to petitioners, "[t]he record simply does not support the assertion that there are additional significant buffers between most of the Park and North Milam." C0456.

Petitioners also take issue with Waste Management assertion that its consultant's report proposed a "phased-in screening of North Milam from off-site views with natural materials." Pet. Reply Br. at 2. Petitioners argue that Waste Management is "attempting to fabricate a buffer for the landfill, *while in operation*, where none exists." *Id*. (emphasis added). Petitioners stress that this part of the consultant's discussion appears in the "section of his report that deals with North Milam's 'End Use Plan.'" *Id*., citing C0487. According to petitioners, further evidence that these materials were never proposed to serve as a buffer during the landfill's operation is provided by the fact that Waste Management's "compatibility" expert did not evaluate the landfill's visual impacts during operation or "impacts from odor during the landfill's operation upon nature observers, birdwatchers, those walking trails, fishing, picnicking, camping and hunting, or upon anyone else." *Id*., citing C1021, 1051.

Petitioners conclude that North Milam's location, "just 2,000 feet from a State park used by hundreds of thousands of people every year," is "incompatible with the surrounding area." Pet. Reply Br. at 3, citing C0456. According to petitioners, "[i]t not possible to minimize that incompatibility." *Id*.

Native American Sites

Petitioners' Position Concerning Native American Sites. Petitioners state that during its investigation, Waste Management "encountered Native American sites (sites 1316, 1375, and 1385) on the proposed landfill site." Pet. Br. at 7. "Numerous archeological and architectural features have been uncovered at these sites," according to petitioners. *Id*., citing C1592-93. Petitioners add that:

> Ancient human remains, together with pottery shards, were discovered at one of the sites. C 2087, 2095. These pre-Columbian sites are associated with Cahokia Mounds. C 1593, 2069. *Id*.

Petitioners further assert that the "contemporary American Indian community opposes the siting of the landfill (Pet. Br. at 7, citing C1589, 2069), quoting the following comment from the City hearing provided by a member of the Tongva Nation from California:

> you are digging into our ancestors, you are desecrating our ancestors, especially these burials. . . . This affect [sic] us indigenous people, our native people all over the world . . . . Pet. Br. at 7, citing C1459.

Waste Management's Response Concerning Native American Sites. Waste Management responds with a two-part argument: first, archaeological issues are not part of the Section 39.2(a) siting criteria; and second, petitioners failed to present evidence of any Native American Mounds located within North Milam or that Waste Management has not made efforts to minimize any incompatibility with archaeological sites. WM Br. at 12.

First, Waste Management states that the Act requires the local siting authority to "approve or disapprove site location suitability considering the nine criteria listed in Section 39.2(a)." WM Br. at 12, citing Clutts, 185 Ill. App. 3d at 546, 541 N.E.2d at 846. "Archaeologic impact from a proposed landfill," continues Waste Management, is not part of the Section 39.2(a) analysis 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. [WM Br. at 12-13, citing Hoesman v. City Council of the City of Urbana, PCB 84-162, slip op. at 10-11 (Mar. 7, 1985)]. That compatibility evaluation cannot be negated by issues relating to construction, operation or design. [WM Br. at 13, citing Hoesman, PCB 84-162, slip op. at 10-11].

Waste Management maintains that it provided such an "independent assessment" and "a determination of compatibility was made." WM Br. at 13.

Second, Waste Management asserts that petitioners' incompatibility argument is "based on the incorrect statement that American Indian Mounds are located within the Facility boundary." WM Br. at 13. According to Waste Management, not only did petitioners present no evidence at the City hearing to support their claim of on-site Mounds, but nothing contained in the siting application or presented by Waste Management at hearing supports the claim. *Id*. Waste Management therefore argues that this claim of petitioners "should be disregarded as unsupported conjecture that is insufficient to warrant a reversal of the City's finding that [Waste Management] satisfied criterion (iii)." *Id*.

On the contrary, the record before the City "demonstrates that American Indian Mounds are not located within North Milam," according to Waste Management. WM Br. at 13. Waste Management notes that it included, in its siting application, "information concerning the archaeological investigation at North Milam, namely, the Burns & McDonnell report." *Id*. That report, continues Waste Management, identified sites of archaeological interest that were discovered during the surveys and concluded that all identified sites were "fully investigated or avoided." *Id*., citing C0718-20. Waste Management adds that 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." *Id*., citing C1591-93. Waste Management further responds that regarding the specific sites referred to by petitioners (sites 1316, 1385, 1375), the public comment of 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 [Waste Management]-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. WM Br. at 13-14, citing C1592-93.

Waste Management accordingly concludes there is sufficient evidence to demonstrate that it "has made sufficient efforts to minimize any incompatibility with archaeologic sites by mitigating or avoiding any such sites." WM Br. at 14.

Petitioners' Reply Concerning Native American Sites. Disagreeing with Waste Management's position that "impacts to these Mounds are irrelevant and not part of the siting criteria analysis," petitioners state that the Native American Mounds are "a predominant part of the surrounding area," associated with the Cahokia Mounds World Heritage Site. Pet. Reply Br. at 3, citing C1539, 2069. According to petitioners, neither Hoesman nor Clutts refutes that "the Native American Mounds are as much a part of the 'character of the surrounding area' as are the other areas in the vicinity of the proposed landfill." *Id*. at 5.

Petitioners add that "Waste Management's disturbance of these sites" has "provoked an ongoing outcry from the Native American community" and "provoked criticism from persons

who study these Mounds." Pet. Reply Br. at 3-4. Petitioners quote the following from public comments received by the City:

> The value of Cahokia Mounds . . . is inestimable as both a Sacred Site for American Indians and an important resource for people throughout the world. . . . There is no other place in the United States that has a greater claim to importance as a Sacred Place than does Cahokia. Pet. Reply Br. at 3, quoting Sam Valenti, American Indian, at C1589.
>
> There are mounds on the land that they want to expand into. There's also a burial site and this is very sacred to indigenous people. Pet. Reply Br. at 3, quoting Deanna Wagner-Brice at C1457.
>
> You're putting in a landfill next to Cahokia proper and potentially directly on top of where remains have been discovered. We in contemporary society have a moral obligation to do the right thing. We wouldn't do that to a cemetery of today. Nobody would stand for that. Pet. Reply Br. at 3-4, quoting Carrie Wilson, consultant for the Osage Nation, at C2153 (*St. Louis Post-Dispatch*, January 18, 2007 "Proposed landfill expansion runs afoul of Native American activists" by Adam Jadhav).
>
> [I]f you do this landfill, you are – you are digging into our ancestors, you are desecrating our ancestors, especially these burials. It's like me going to a cemetery and dig up your relatives, your families, your relatives and take them out to do a landfill so the City can make money out of this . . . . This affect [sic] us indigenous people, our native people all over the world. Pet. Reply Br. at 4, quoting Ruben Aguirre, member of the Tongva Nation, at C1459.
>
> In addition to this garbage adversely affecting one of Illinois['] most important tourist attractions, two pre-Columbian mounds associated with the Cahokia mounds culture are located within the proposed area of development, as is another site containing human remains and other features such as houses that are significant. Pet. Reply Br. at 4, quoting John Kelly, Ph.D., Archaeologist, Assistant Director, Powell Archaeological Research Center, at C2069.
>
> [T]he identification of two pre-Columbian mounds within the proposed development, and recovery of human remains from a site that has been determined eligible for inclusion on the National Register of Historic Places, are additional reasons that consideration be given to finding another location for the St. Louis region's garbage. Pet. Reply Br. at 4, quoting Cahokia Archaeological Society, at C2074.

Finally, petitioners insist that they showed in their opening brief that Waste Management "encountered Native American sites (sites 1316, 1375, and 1385) at the proposed landfill site." Pet. Reply Br. at 3. Contrary to Waste Management's conclusion that "Mounds are not located within North Milam," petitioners argue "that is not what the record shows." *Id*. at 5. Moreover,

conclude petitioners, "whether some of the Mounds are onsite or offsite, Waste Management's actions to develop the proposed landfill have disturbed these sites." *Id*., citing C1592, 1593, 2084, 2087, 2095.

Impact of North Milam on the Cahokia Mounds

Petitioners' Position Concerning Cahokia Mounds. Petitioners state that North Milam is within 2,140 feet of the "Cahokia Mounds World Heritage Site and National Historic Landmark Boundary." Pet Br. at 8. Cahokia Mounds is recognized as a State Historic Site; a National Historic Landmark; and a UNESCO World Heritage Site. *Id*., citing C1544. It therefore comes as no surprise, according to petitioners, that the siting of North Milam is opposed both by the Cahokia Archaeological Society because of the landfill's "potential impact on Cahokia Mounds" (*id*., C2074) and by "the contemporary American Indian community" (*id*., citing C1459, 1589, 2069).

Petitioners further note that the Powell Archaeological Research Center opposes North Milam's siting (1) because of the importance of Cahokia Mounds as "an American Indian Cultural Site, a past ritual center for ancient Americans, a sacred site to contemporary Indians, and a valuable source of tourism for the state of Illinois"; and (2) because "objectionable smells, sights and sounds associated with the proposed landfill would detract from the overall experience of visitors to the Cahokia Mounds Heritage Site." Pet. Reply Br. at 8, citing C2069.

Waste Management's Response Concerning Cahokia Mounds. Waste Management argues first that the potential "impact" or "effect" on Cahokia Mounds is not part of the Section 39.2(a) siting criteria, and second that petitioners failed to present any evidence of negative impact or adverse effects on Cahokia Mounds. WM Br. at 14. Specifically, states Waste Management, 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)(l), (b), is not relevant to the local siting process under Section 39.2. *Id*.

Waste Management argues that "it would have been improper for the City to find incompatibility based on this issue" because Section 39.2(a) requires the local siting authority to base its approval or disapproval on the nine statutory criteria. *Id*., citing Clutts, 185 Ill. App. 3d at 546, 541 N.E.2d at 846.

Waste Management also asserts that it would have been against the manifest weight of the evidence to find North Milam incompatible with Cahokia Mounds. WM Br. at 14. "Notwithstanding the irrelevance of Petitioners' argument," according to Waste Management, "Schanuel provided evidence that North Milam is compatible with Cahokia Mounds." *Id*. First, Waste Management notes that Schanuel determined that "Cahokia Mounds is approximately two miles away from North Milam to the northeast," though Waste Management acknowledges that the Cahokia Mounds World Heritage Site and National Historic Landmark boundaries are 2,140 feet from North Milam. *Id*. at 6, 14, citing C1021. Second, Waste Management states that it was

Schanuel's determination 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. *Id*. at 14-15, citing C0462-64.

Third, Schanuel also based his opinion, continues Waste Management, 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." *Id*. at 15, citing C0472-73, 0477.

According to Waste Management then, petitioners again offered no evidence to refute Schanuel's findings or opinions. WM Br. at 15. Waste Management concludes therefore that its evidence of "compatibility" with Cahokia Mounds "is uncontroverted and was sufficient to support the City's finding that [Waste Management] met criterion (iii)." *Id*.

Petitioners' Reply Concerning Cahokia Mounds. Petitioners argue that one needs look no further than the existing landfill, Milam RDF, to find evidence that North Milam is not "visually separated" from Cahokia Mounds:

> You go up on Monks Mound, you look out and you see a landfill and its very distressing. Some people ask if this is another mound. Pet. Reply Br. at 5, quoting comment of Deanna Wagner-Brice at C1457.

> You go up on Monks Mound and you can see it. Monks Mound is the highest Native American site. It's disrespectful to build a landfill higher than that. Pet. Reply Br. at 5, quoting comment of Jim Bensman, Conservation Chair for the Piasa Palisades Group of the Sierra Club, at C1469.

Petitioners also quote from the public comment of Dr. Kelly:

> The landfill will certainly detract from the overall experience of visitors to Cahokia Mounds Heritage Site in that it will be a visual detraction, especially from the top of Monk's Mound. Pet. Reply Br. at 6, citing C2069.

A landfill "by its very nature is a mound," note petitioners, and "Monks Mound is the largest prehistoric earthen construction in the Americas." Pet. Reply Br. at 6, citing C1547. Petitioners conclude that it is "simply not possible" to minimize North Milam's incompatibility with Cahokia Mounds. *Id*.

North Milam's Impact on Wetlands

Petitioners' Position Concerning Wetlands. Petitioners state that North Milam "will take 8.5 acres of farmed wetlands and 9.9 acres of forested wetlands." Pet. Br. at 8, citing C1929, 1973. Some of these wetlands, according to petitioners, are "moderate to high quality,

forested and scrub-shrub wetland." *Id*., citing C1933, 1939. Petitioners further note that, in these wetlands, the quality of the vegetative and wildlife habitat is moderate to high. *Id*., citing C1939.

Waste Management's Response Concerning Wetlands. Waste Management again makes a two-part argument: first, the potential impact on wetlands is not part of the Section 39.2(a) siting criteria; and second, Waste Management has presented sufficient evidence of "compatibility" based on its mitigation plans. WM Br. at 15.

Citing Clutts, 185 Ill. App. 3d at 546, 541 N.E.2d at 846, Waste Management reiterates that it was not required by Section 39.2(a) to "submit evidence to the City about potential impacts to wetlands in the area." WM Br. at 15. Despite this, continues Waste Management, the company:

> 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.) [Waste Management]'s plan includes a 2:1 impact-to-mitigation ratio. (C 0736; C 0740-0742.) Petitioners presented no evidence challenging [Waste Management]'s plan. *Id*.

Petitioners' Reply Concerning Wetlands. According to petitioners, that the wetlands are subject to a separate review process under the federal Clean Water Act "does not insulate them from review here." Pet. Reply Br. at 6. Likewise, petitioners argue, that the Illinois Department of Natural Resources administers the State's parks "did not insulate Waste Management from evaluating the impact of the proposed landfill on Horseshoe State Park." *Id*., n.3, citing, *e.g.*, C0462.

Petitioners assert that the wetlands:

> are as much a part of the "character of the surrounding area" as are, for example, the "natural open areas," discussed by Waste Management's consultant in his report. C 0459. Wetlands provide "fish and wildlife habitats, natural water quality improvement, flood storage, . . . opportunities for recreation and aesthetic appreciation . . . Wetlands are among the most productive ecosystems in the world, comparable to rain forests and coral reefs." U.S Environmental Protection Agency, *Wetlands Functions and Values*, online at http://www.epa.gov/watertrain/wetlands. See also C 2158. Horseshoe Lake and the area wetlands are on the Mississippi River flyway. C 2164. Pet. Reply Br. at 6-7.

Petitioners maintain that the siting criterion requires Waste Management to "locate the proposed landfill in a manner that minimizes incompatibility with the surrounding area, including the wetlands." Pet. Reply Br. at 7. The 13.9-acre moderate to high quality wetlands complex, petitioners add, "lies in the central portion of the property." *Id*., citing C1939.

Petitioners conclude that "[i]t is not possible" to minimize the incompatibility of North Milam "with these wetlands." *Id*.

North Milam's "Compatibility" During the Facility's Operation

Petitioners' Position Concerning "Compatibility" During Operation. Petitioners note that North Milam is proposed to operate for 17 years. Pet. Br. at 8-9. Waste Management made no effort, petitioners maintain, to determine whether North Milam would be compatible with its surroundings "during its operation." *Id*. at 9, citing C1025-26, 1051. Rather, petitioners continue, Waste Management's consultant only evaluated whether the landfill, "after it ceased operating, would be compatible with the surrounding uses, ignoring the seventeen years (or longer) when the landfill would be in operation." *Id*. "For this reason," according to petitioners, Waste Management did not assess "smell," "noise impacts," or "visual impacts" during North Milam's operation. *Id*., citing C1025, 1039, 1051.

Waste Management's Response Concerning "Compatibility" During Operation. Waste Management maintains that Schanuel's evaluation did consider North Milam's "compatibility" with the surrounding area not only at closure, but also during operation. WM Br. at 16. The "End Use Plan," according to Waste Management, "discussed a phased-in plan for screening and buffering," specifically stating that native grasses and wildflowers will be "planted at the perimeter during the early stages of activity." *Id*., quoting C0487. Waste Management states that the End Use Plan 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." *Id*., citing C0487.

Waste Management also asserts that petitioners did not introduce any evidence that North Milam would be incompatible with the surrounding area during operations because of objectionable odors, sights, or sounds. WM Br. at 16. In contrast, according to Waste Management, the company 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).[6] Petitioners do not challenge the City's findings that criteria (ii) and (v) were satisfied. *Id*.

The "operational issues" that petitioners raise, Waste Management states, "are not meant to be determinative of compatibility under criterion (iii)." WM Br. at 16, citing Hoesman, PCB 84-162. The Board in Hoesman explained, maintains Waste Management, that if criterion (iii) is to be given a meaning distinct from criteria (ii) and (v) of Section 39.2(a), then criterion (iii) must be interpreted as requiring a review of the proposed facility's "location in terms of the character of the surrounding area, and independent of any measures which may be taken to

[6] Criterion (ii) requires that "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected." 415 ILCS 5/39.2(a)(ii) (2006). Criterion (v) requires that "the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents." 415 ILCS 5/39.2(a)(v) (2006).

mitigate an adverse impact on the area." *Id*. According to Waste Management, Hoesman requires that the Board reject petitioners' argument that the company failed to satisfy criterion (iii) "by not considering odor, noise or visual impacts as part of its compatibility evaluation." WM Br. at 17.

Petitioners' Reply Concerning "Compatibility" During Operation. According to petitioners, Hoesman makes clear that "the future reconstruction or development of the site [is] irrelevant to the current *compatibility of an operating site* with the surrounding area." Pet. Reply Br. at 7, quoting Hoesman (emphasis added by petitioners). That Waste Management "mentions" landfill operations during its discussion of criteria (ii) and (v), or "mentions" its phased-in plan for screening as part of its End Use Plan, does not, in petitioners estimation, "cure a complete failure" to evaluate the "compatibility" of the landfill during its operation. *Id*.

Board Analysis—Criterion (iii) "Minimize Incompatibility"

Section 39.2(a)(iii) requires, in relevant part, that the applicant demonstrate the following before the local siting authority:

> the facility is located so as to minimize incompatibility with the character of the surrounding area. 415 ILCS 5/39.2(a)(iii) (2006).

For the reasons below, the Board finds that the City's determination that Waste Management met criterion (iii) on "compatibility" is not contrary to the manifest weight of the evidence.

Scope of "Compatibility" Criterion

The Board found above, contrary to Waste Management's contentions, that the NRHP-eligible Native American sites associated with Cahokia and the Section 404 wetlands are relevant to assessing whether North Milam "is located so as to minimize incompatibility with the character of the surrounding area." Clutts does not dictate a different result. The court's holding there, that Section 39.2(a) does not require the proposed facility to be built in the "best" place, has no bearing on whether these Native American sites and wetlands are relevant to the "compatibility" criterion in this case. Clutts, 185 Ill. App. 3d at 547, 541 N.E.2d at 846.

The same analysis applies with respect to the Cahokia Mounds World Heritage Site and National Historic Landmark. That the issue of any potential "adverse effect" on Cahokia Mounds from North Milam may be separately reviewed under Section 106 of the NHPA does not render the Cahokia Mounds any less relevant to the "character of the surrounding area" here. It is undisputed that North Milam is approximately 2,140 feet from the boundary of the Cahokia Mounds World Heritage Site and National Historic Landmark. In Waste Management, 123 Ill. App. 3d 1075, 463 N.E.2d 969, the court affirmed the Board's finding that the 500-foot study area used to assess "compatibility" with the character of the surrounding area was inadequate:

> We agree with the PCB that the compatibility with the area of a landfill site should be demonstrated by a study based upon an area greater than 500 feet surrounding the proposed facility. In this case, for example, the facility when full

> will remain in the area as a 30-acre mound with a height above grade of 70 to 90 feet. *** [T]he PCB justifiably observed that "in this case a 30-acre mound with a height above grade of 70-90 feet would generate an effect upon the surrounding area to a greater extent than 500 feet." Waste Management, 123 Ill. App. 3d at 1088-89, 463 N.E.2d at 979.

North Milam is planned to be a 119-acre mound with a height above grade of 188 feet, and it is not contested that the North Milam landform will be visible from the top of Monks Mound. C0476, 0484. The Board finds that the Cahokia Mounds site, as a State Historic Site, National Historic Landmark, and UNESCO World Heritage Site, is a relevant consideration in assessing whether North Milam "is located so as to minimize incompatibility with the character of the surrounding area."

Proof Required on Criterion (iii) "Minimize Incompatibility"

Concerning what an applicant must demonstrate to satisfy criterion (iii), the court in File held that the criterion:

> requires an applicant to demonstrate more than minimal efforts to reduce the landfill's incompatibility. An applicant must demonstrate that it has done or will do what is reasonably feasible to minimize incompatibility. (*Waste Management of Illinois, Inc. v. Pollution Control Board (1984), 123 Ill. App. 3d 1075, 1090, 463 N.E.2d 969, 980.*) Furthermore, an applicant should not be able to establish compatibility based upon a preexisting facility. (*Waste Management of Illinois, Inc., 123 Ill. App. 3d at 1088, 463 N.E.2d at 979.*) It is important to note, however, that the statute does not speak in terms of guaranteeing no increase of risk concerning any of the criteria. *City of Rockford v. Pollution Control Board (1984), 125 Ill. App. 3d 384, 390, 465 N.E.2d 996, 1001*. File, 219 Ill. App. 3d at 907-08, 579 N.E.2d at 1236.

In Tate, the court commented on Waste Management, 123 Ill. App. 3d 1075, 463 N.E.2d 969, which:

> discussed the type of evidence which might appropriately be considered with reference to minimizing the impact of the proposed facility to the surrounding area. However, it is logical to require this evidence to be presented only if there is indeed some incompatibility with the surrounding area shown to exist. Tate, 188 Ill. App. 3d at 1025, 544 N.E.2d at 1197.

In Clutts, the court stated:

> the law requires only that the location minimize incompatibility and effect on property values, not guarantee that no fluctuation will result; nor does the statute require the facility to be built in the "best" place. Clutts, 185 Ill. App. 3d at 547, 541 N.E.2d at 846.

Finally, the Board notes that the parties mistakenly cite, as the Board's decision in Hoesman, what is actually an opinion written by two Board Members in that case. *See* Hoesman, PCB 84-162 (Mar. 7, 1985) (opinion by Dumelle and Forcade). In fact, as noted at the outset of that two-Member opinion, there was no majority Board opinion in Hoesman. Instead, siting was deemed approved by operation of Section 40.1(b) of the Act when the Board "deadlocked," unable to reach a final decision by the statutory deadline. *See* Hoesman, PCB 84-162 (Mar. 7, 1985) (order by Dumelle).

Buffers Between North Milam and Horseshoe Lake State Park

At the City hearing, Andria, President of the American Bottom Conservancy and Conservation Chair of the Sierra Club Kaskaskia Group, provided comment concerning what she perceived as North Milam encroaching on Horseshoe Lake State Park:

> Now [after Milam RDF] they want to go on the other side and that whole peninsula thats surrounded by the oxbow lake of Horseshoe Lake is -- is threatened. All of that open space, all of that green space with the fish and wildlife area that's so much a part of -- important part of Horseshoe Lake. There are 308 species of birds there. There are so many butterflies that people come all over for that. *** There are a lot of people who come over from St. Louis to Horseshoe Lake. But not a landfill. C1478-79.

Andria urged the City to "respect Horseshoe Lake," noting that there are 350,000 or 360,000 people who go there annually, including people who fish all around the lake. C1479; *see also* C1536-37 (Madison County Transit 2006 Bikeway Map & Trail Guide); C1538-39 (Horseshoe Lake State Park brochure). In written public comment filed with the City, Andria stated:

> The proposed site is within 2100 feet of Horseshoe Lake—and the landfill could well expand beyond the proposed 119 acres, as has the existing Milam landfill expanded countless times. People fish, walk trails, observe nature, hunt, picnic and camp at Horseshoe Lake. *** People fishing, camping, walking trails, observing nature and picnicking will undoubtedly be subjected to the stench from the proposed landfill, which would be even closer to them [than Milam RDF] and immediately upwind of Horseshoe Lake. A landfill is incompatible with a state park and would minimize its value. C2157.

The Piasa Palisades Group of the Sierra Club also filed a public comment regarding these concerns:

> There are negative cumulative impacts associated with developing a new landfill adjacent to Horseshoe Lake State Park. Many visitors from Missouri and throughout the state come to watch birds, camp, fish and hunt at the state park. They shop at local stores, eat at local restaurants, stay at local motels. Ecotourism is one of the biggest industries in the state. A landfill could impact both wildlife and tourists from the area with a resultant loss in revenue. C2072-73.

Schanuel, a community and land planning professional consultant for twenty-four years, testified at the City hearing on behalf of Waste Management about whether North Milam is located so as to minimize incompatibility with the character of the surrounding area. Schanuel's report was part of the siting application. Schanuel evaluated land use within an approximately one-mile radius, as well as existing municipal and county zoning and comprehensive land use plans. Schanuel also prepared an "End Use Plan" and compared existing off-site views to the proposed end use of the landform. According to Schanuel, North Milam "is compatible with the character of the surrounding area." C0489.

Schanuel stated that "farm fields and natural open space are the predominant land uses located within a one-mile radius of North Milam." C0448. Schanuel described the area as predominantly agricultural and open space and recreational (82.4% of the total land area), mixed with industrial uses (14.6%). Residential uses account for 1.7% of the study area, according to Schanuel, and commercial uses make up 1.3%. Schanuel added:

> Immediately surrounding North Milam are a number of compatible land uses. These include farm fields, natural open space, railroad tracks, radio towers, an existing recycling and disposal facility, interstate and state highways, and a drainage canal. C0458.

Schanuel's report further stated:

> North Milam is bounded by open space and Illinois Route 111 on the eastern boundary; by the Cahokia Canal and Interstate 55/70 on the southern boundary; by the Milam RDF, farm fields, and Illinois Route 203 on the western boundary; and by the Alton & Southern ("A&S RR") Railroad on the northern boundary. All of these immediately adjacent land uses, natural features, and man-made physical improvements serve as land use buffers or transitions between North Milam and the surrounding land uses. *Id*.

Within the one-mile study area, zoning is "almost exclusively Industrial/Manufacturing," according to Schauel's report. C0468. Schanuel explained that North Milam is in an industrial zoning category that allows landfills by special permit. *Id*. The 2003 City of Madison Future Land Use map proposes "Open Space/Agricultural and Industrial" land uses for the study area, while the 2000 Madison County Land Use Plan map designates North Milam as "Open Space" and the rest of the study area within Madison County as "Agricultural/Vacant." C0471. These land use designations, Schanuel opined, are compatible uses with North Milam. *Id*.

Schanuel commented that located along Horseshoe Lake's northern and eastern shores, as well as on an island formed by the lake, are the park's "recreational amenities," including five group picnic shelters, three playgrounds, three small boat ramps, and a fishing pier, 48 tent or trailer camp sites, four miles of hiking trails, and public waterfowl hunting blinds. The report states:

> While this study recognizes the importance of public parks and open space, from a land use perspective, North Milam will not be incompatible with the use of the

> State Park. Most active recreation is located on the northern end of the park, 1.5 to two miles from North Milam. The Fish & Wildlife Area on the southern end of the park abuts the A&S RR on the south, buffering it from activities on North Milam side of the railroad. In addition, new and expanded wetland mitigation areas will further buffer the recycling and disposal operations physically and visually from the park, and provide additional habitat for area wildlife. C0462.

Further, the 2000 Madison County Greenways map in the Land Use Plan delineates the Horseshoe Lake Recreational Area as being bounded by the Alton & Southern Railroad on the south. These man-made features, according to Schanuel's report, "serve as strong physical demarcations between the Open Space/ Recreation/Conservation uses and North Milam." C0471.

Schanuel's report also used a computer-generated elevation model designed to depict how North Milam would appear in the future from various vantages:

> Photographs were then taken of existing conditions for both a leaf-off (January 2006) and a leaf-on (May 2006) condition (Figures 5 and 6: *Existing Views*). Photographs and geo-spatial locations were used from the photographs taken in January 2006 to establish the specific location, direction, and elevation of the actual photographic "view". These positions were entered into the digital elevation model that represented the future North Milam landform, and a model was generated that accurately captured future "views" of North Milam from plotted positions. C0477.

Nine photographs, or views, were selected to represent North Milam's future condition. C0477. View 3 was taken from a location "immediately north of the railroad tracks and North Milam in a direction looking south toward the Milam RDF." C0472. View 6 is:

> a view to the west from Illinois 111 between I-55/70 and the railroad tracks looking across Horseshoe Lake at North Milam. Just to the southern edge of the photo is the Milam RDF. The view includes the lake and natural vegetation in both the foreground and background. C0473.

Native American Sites

Dr. Kelly, Ph.D., Archaeologist, Assistant Director, Powell Archaeological Research Center, commented that two pre-Columbian Mounds associated with the Cahokia Mounds culture "are located within the proposed area of development, as is another site containing human remains and other features such as houses that are significant." C2069. "All are eligible," according to Dr. Kelly, "for inclusion on the National Register of Historic Places and have protection under Illinois law." *Id*. The Cahokia Archaeological Society also referred to the identification of two pre-Columbian Mounds "within the proposed development," as well as "human remains from a site that has been determined eligible for inclusion on the National Register of Historic Places." C2074.

Wagner-Brice commented that there are "mounds on the land" that Waste Management wants "to expand into" and there is also a "burial site" and this is "very sacred to indigenous people." C1457. Wilson, a consultant for the Osage Nation, stated that Waste Management is "putting in a landfill . . . potentially directly on top of where remains have been discovered." C2153. Aguirre of the Tongva Nation from California commented that if Waste Management proceeds with North Milam, it would be "digging into [and] desecrating our ancestors, especially these burials." C1459.

Andria commented at the City hearing:

> I've been in touch with Illinois Historic Preservation Agency. The archaeological work that's been done on this site is not adequate. It has not been performed correctly. It's -- There are several sites that are -- I think there are three mounds from I can understand and one burial site that I don't believe is a mound, but it's a burial site. We shouldn't be even thinking about putting a landfill there. Digging that stuff up, digging that stuff, digging the remains of -- of human beings, of ancestors of people as Mr. Aguirre said. *** It's not only their culture. It's their history. It's the history of all of our area and it's very important. And when you dig something up to get rid of it to put a landfill, to dig up the soil, to cart it off to put it on top of garbage, that is really truly the height of disrespect. C1471-72.

In written comment filed with the City, Andria provided a coroner's report that was also included in a Waste Management public comment (C1912-27):

> I am forwarding a copy of a Madison County Coroner's Report, Case Number 06-0018—"Bone Case"—which I today obtained from the Coroner's office. This document proves that the North Milam site does indeed contain an ancient Indian burial site. In addition, there are at least nine sites and several mounds identified by Burns & McDonnell, the archeology firm hired by Waste Management. Although a Phase 1 has been completed, the Phase II is incomplete and thus additional burial areas may be present on the property. Given the state of knowledge with at least one burial and several mounds, Waste Management should vacate this project out of respect for American Indians and their ancestors. This is even more so because the intended purpose of the site—as you now know—is to construct a new landfill, which would in effect be putting garbage on sacred Indian grounds. *** There are . . . a number of other serious problems with the archeological investigation at this site. C2078.

The referenced report of the Madison County Office of the Coroner stated that the bone uncovered was a human skull and "[i]t was determined the skull may be ancient." C2084 (investigative report); *see also* C2081 (preliminary report noted that "[t]he skull appeared to be ancient."). In another written public comment to the City, Andria added:

> The site itself has been identified by archeologists hired by Waste Management as being eligible for the National Historic Registry. Indian remains have been found at the site. *** A landfill is clearly NOT compatible with the character of not

> only the surrounding area but of the site itself. Putting garbage on a site sacred to Native Americans is an outrage—and you should not be complicit in allowing that to happen. C2157 (emphasis in original).

Waste Management concedes that its consultant encountered three NRHP-eligible sites. According to Waste Management, while site 1316 is within the boundary of North Milam, sites 1375 and 1385 are located off-site. WM Br. at 13-14. At various times from September 2002 to June 2006, Burns & McDonnell performed archaeological investigations on behalf of Waste Management in and around North Milam. C0719. As discussed above, a Burns & McDonnell report was part of the siting application.

Burns & McDonnell stated that its archaeological investigations consisted of Phase I Surveys, Phase II Surveys, and a Phase III Survey. The latter is also known as "mitigation." C0719. The Phase I Surveys, explained Burns & McDonnell, involved "walking the site on a five meter interval to collect any artifacts that were present at the ground surface," and included the services of a soil scientist known as a geomorphologist, who assisted by "advising the archaeologists on the potential of the soils to contain buried artifacts." *Id*. The primary purpose of the Phase I Surveys, according to Burns & McDonnell, was "to determine if additional investigation was needed to determine if potential sites contained intact historic information." *Id*. Burns & McDonnell added that the Phase I investigations also included:

> archival research of the files held at the Illinois Historic Preservation Agency, state and local libraries, and review of published sources to obtain historic maps, documents, and information on previous archaeological investigations and recorded sites. The data obtained was used to assist the investigators in establishing a historical context for all the cultural resources encountered, thus allowing for a thorough evaluation of the cultural resources investigated during this and the following phases of investigation. C0719.

Burns & McDonnell explained that the Phase II Surveys consisted of "the testing (using backhoe trenches) of selected sites" that might "contain historical information and whose importance could not be determined during the Phase I Surveys." C0719. The Phase III Survey, or mitigation, involved "excavating and recovering any information and artifacts from the site identified in the Phase II Survey that was determined to warrant additional review." *Id*.

According to Burns & McDonnell, out of the 11 "potential archaeological sites" identified by the Phase I Surveys:

> a portion of one site was avoided and fenced because the slightly elevated ground on which the old Dorris House was located could potentially be a mound. This area is not within the North Milam site. C0719.

Five of the potential archaeological sites warranted and received Phase II Surveys. The remaining potential sites, Burns & McDonnell noted, were "excluded from additional work because they were destroyed by past farming activities, contained little intact information or

were outside of the North Milam site." C0719. The Phase II Surveys of the five sites indicated that:

> one of the five remaining potential archaeological sites was located north of the North Milam site and would be avoided, two of the potential sites contained very little intact information, one potential site contained intact soil stains identified by the archaeologists as features which were excavated and the data recovered during the Phase II investigation, and one site that would require a Phase III Survey. *Id.*

Burns & McDonnell stated that the archaeological site for the Phase III Survey was "located immediately east of the old Dorris house" referred to above. C0720. The disturbed soil or "plowzone" was removed because of agricultural activities over the last 150 years and the soil structure. *Id.* Removal of the plowzone, Burns & McDonnell explained, "revealed 77 soil stains labeled as features":

> Three of the features were historic and one was determined to be a modern rodent den. The remaining features were associated with the prehistoric occupation of the site. The features were interpreted to be storage pits, middens or trash pits, post molds (stains left where posts were placed in the ground), house trenches (prehistoric trenches for house construction), and small basins that could be the bottom of pits or possible fire hearths. *Id.*

According to Burns & McDonnell, the following artifacts were recovered:

> • Stone Hoe - A large stone hoe was found in one of the larger storage pits. This tool was made from a chert called Mill Creek.
> • Ceramic Figurine – In another pit a ceramic figurine was recovered. This ceramic piece lacked hands, feet, and the head.
> • Marine Shell Beads – A few beads made from marine shell were recovered from some of the storage pits. Evidence of production of these beads was also found.
> • Variety of Ceramic Shards – A number of ceramic shards from vessels, funnels, and platforms (stumpware) were recovered from the site. The ceramic shards were generally 1 to 3 inches in size with some of the shards having painted slips or decorated exterior surfaces. C0720.

In the report included with Waste Management's siting application, Burns & McDonnell concluded that "all of the sites that were identified within the project area have been fully investigated or avoided." C0720. Further, according to Burns & McDonnell, all work was conducted to:

> professional standards and guidelines in accordance with the *Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation,* (48 FR 44742-44742), the *Secretary's Standard for Identification* (48 FR 44720-44723), and the Illinois State Agency Historic Resources Preservation Act (State 707, Public Act 86-707, 20 ILCS 3425). *Id.*

Orval E. "Dan" Shinn, the Cultural Resource Department Manager of Burns & McDonnell, submitted a public comment to the City after hearing, consisting of a letter and six attachments. Shinn first noted that he has 18 years of experience in Cultural Resource Management under Section 106 of the NHPA, "which includes archaeological investigations performed to the standards and guidelines of the Secretary of the Interior, and evaluations under 36 C.F.R. 60.4." C1591. Shinn reiterated that based on the performed "Phase I Cultural Resource Identification Surveys, Phase II [NRHP] Testing and Phase III Mitigation," Waste Management "has met the standards established by Section 106 of the NHPA and the State of Illinois." *Id*. Shinn also explained that the public comment was being submitted because Waste Management had requested that he "describe the extensive work that has been done to clarify or correct any suggestions to the contrary made by the objectors at the public hearing." *Id*.

Shinn stated that in October 2002, a Phase I Survey entitled "Archaeological Survey Short Report" ("Dorris Report") was submitted to the Illinois Historic Preservation Agency (IHPA). C1591, 1594. The Dorris Report found, in part, that five sites were not eligible for the NRHP and that one site ("11 MS 1375") was eligible. In September and October 2004, the Madison City Property and North Milam revised short reports were submitted to IHPA. *Id*. The Madison City Property Report found, among other things, that site "11 MS 1385" was "eligible, but much smaller then previously recorded." C1591-92. For site 11 MS 1385, "[a]voidance . . . was recommended and implemented by [Waste Management]." C1592. The North Milam Report recommended that site 11 MS 1316 receive "additional testing to determine NRHP eligibility." *Id*.

In January 2005, the Phase II evaluation of site 11 MS 1316 was submitted to IHPA, according to Shinn. "Site 11 MS 1316 was determined eligible, and a mitigation plan was included to conduct data recovery on the south portion of the site." C1592. Shinn stated that in August 2005, Waste Management and Burns & McDonnell met with IHPA in Springfield, at which time it was agreed that:

> • the site 11 MS 1375 mound would be protected by a fenced 75 foot buffer;
> • sites 11 MS 1316, 11 MS 2043, 11MS 2045, 11 MS 1373 and 11 MS 1375 (area outside buffer) would be tested using mechanical stripping of the plow zone, and mitigated if necessary; and
> • [Waste Management] would submit an excavation plan for the Madison City Property, and monitor the installation of the 75 foot buffer fence. *Id*.; *see also* C C1908-11 (Sept. 29, 2005 letter from Shinn to IHPA describing agreements made at meeting).

In November 2005, Burns & McDonnell monitored the installation of the 75-foot buffer fence around the Mound of 11 MS 1375. C1592. Over a five-month period culminating in June 2006, sites 11 MS 1316, 11 MS 2043, 11 MS 2045, 11 MS 1373, and 11 MS 1375 were tested, and site 11 MS 1375 was mitigated. *Id*. Sites 11 MS 2043, 11 MS 2045, and 11 MS 1373 were determined to be ineligible. *Id*. At site 11 MS 1316, twenty-six archaeological features and four architectural features were exposed. Shinn stated that these features were "mapped, photographed and covered." *Id*. In addition, during "mechanical stripping" of 11 MS 1316:

> a possible human skull was identified. IHPA and the Madison County Coroner were notified, and all work at the site ceased pending response from those agencies. The County Coroner assumed jurisdiction and removed the skull. A Burns & McDonnell archaeologist was present and observed the Coroner's removal of the skull. No burial features were observed. [Waste Management] elected to avoid site 11 MS 1316. C1592-93.

At site 11 MS 1375, seventy-four archaeological features and three architectural features were found and excavated. "Mitigation in the form of data recovery was conducted." C1593.

> In the public comment, Shinn's letter concluded:
>
> While it is certain the investigated prehistoric sites are associated with Cahokia, Burns & McDonnell's extensive archaeological investigations of the North Milam site concluded that only truncated/heavily damaged features remain. No intact living floors were found. This confirmed what the geomorphology in the prior reports had indicated. In addition, the North Milam site is well outside the established boundaries of the Cahokia National Landmark/World Heritage site.
>
> In summary, [Waste Management] has met or exceeded the standards and guidelines of both the Secretary of the Interior and the State of Illinois for cultural resource investigation, [Waste Management] has avoided or mitigated all NRHP-eligible historic properties within the proposed disposal area. In addition, I do not believe there are any burial sites within the proposed disposal area. C1593

Cahokia Mounds

> Andria filed a public comment with the City concerning Cahokia Mounds:
>
> The location of the proposed site is within a half-mile of the Cahokia Mounds World Heritage and National Historic Registry boundary. It is the Metro East's most important asset. *** Locating another mammoth landfill, even closer to the Cahokia Mounds boundary, denigrates the importance of the Mounds. The existing Milam landfill is already taller than Monks Mound, the largest prehistoric earthen mound in North America. A landfill is clearly incompatible with Cahokia Mounds and minimizes its value. C2157.

The Piasa Palisades Group of the Sierra Club also filed a public comment with the City addressing this issue:

> The site was once part of the prehistoric city called Cahokia and undoubtedly contains important prehistoric resources. The proposed site is very near Cahokia Mounds, which has been designated by the United Nations as a World Heritage Site and as a National Historic Landmark by U.S. Department of Interior. We understand there are important prehistoric Indian cultural resources, including perhaps a burial mound and cemetery on the site, which will be adversely

> impacted by both the soil removal and the development of a landfill. There should be consultation with IHPA and appropriate tribal consultation. Allowing such desecration would be against the public interest and show immense disrespect for Native American peoples, their culture and heritage. Clearly, the [s]iting should be denied on this basis alone. C2073.

Wilson, a consultant for the Osage Nation, "which claims ties to the inhabitants of Cahokia Mounds," stated that Waste Management is "putting in a landfill next to Cahokia proper." C2153. Wagner-Brice found it distressing to be able to see a landfill from Monks Mound, noting that people ask if Milam RDF is one of the Cahokia Mounds. C1457; *see also* C1469 (Bensman of Sierra Club commenting that it is disrespectful to build a landfill taller than Monks Mound), C1540-47 (Cahokia Mounds State Historic Site internet pages and brochures). Dr. Kelly opined that the landfill would certainly detract from the overall experience of visitors to Cahokia Mounds Heritage Site, particularly from the top of Monks Mound. C2069.

Schanuel's report noted that Cahokia Mounds is the site of "one of the largest prehistoric Indian cities north of Mexico" and that the historic site "protects features of this Mississippian city which was the center of a complex region of satellite communities, connecting roads, and a vast trade system." C0462. According to Schanuel, since the purchase and dedication of the historic site in 1931, the site has been "impacted by Interstate highway construction, and continued residential, commercial, and industrial development." *Id*. The current site contains "an Interpretive Center and various outdoor amenities for walking tours of the grounds." *Id*.

The "significance of the activities and on-going research being conducted at Cahokia Mounds" is recognized by Schanuel's study, but he maintains that preservation of the historic site will depend on "acquisition of adjacent properties and continued efforts to protect the site from incompatible adjacent uses." C0462. Schanuel emphasizes that North Milam and the Cahokia Mounds State Historic Site are:

> physically and visually separated by a number of intervening uses including I-55/70, Illinois 111, considerable residential and commercial development in the Village of Fairmont City, the Cahokia Canal and associated vegetation, and natural areas. *Id*.

View 7 in Schanuel's report provided the computer-generated North Milam landform in:

> a broad view of the American Bottoms looking westward from the top of Monks Mound in the Cahokia Mounds State Historic Site. From this perspective, the St. Louis skyline is visible to the southwest, the Milam RDF is visible to the west, and North Milam would be to the northwest. C0473.

Wetlands

Citing the flood of '93, Bensman, Conservation Chair for the Piasa Palisades Group of the Sierra Club, commented at the City hearing that wetlands are too important for water storage during flood events to allow "putting a landfill in a wetland." C1467-68. Andria echoed the

sentiment, citing the floods of '93 and '95, adding that "one acre of wetlands can hold one to 1.6 million gallons of water." C1477. She further commented:

> when you take away that sponge and you put something on top of it, that water has to go somewhere and that water is going to go elsewhere and start flooding somewhere else. *Id*.

Andria also filed a public comment with the City concerning wetlands:

> The proposed location would destroy 18 acres of wetlands. *** Wetlands are valuable in flood control, able to hold more than a million gallons of stormwater, floodwater or snowmelt per acre. The area has been declared a federal disaster area for flooding a number of times. Destroying wetlands and adjacent farmland would remove 119 acres of flood storage, with the potential for many more acres that would be lost in future expansion of the landfill. Destroying wetlands to site a landfill is not compatible with the existing use of the site and the surrounding area and would minimize its value. C2158.

In another public comment filed with the City, the Piasa Palisades Group of the Sierra Club stated:

> Destruction of wetlands to provide soil for landfill cover and landfill space is not in the public interest. It is only in the company's economic interest and for its convenience. [Waste Management] has allowed outside entities to remove soil from its wetland mitigation and its other properties in, adjacent to or near the subject area—to be hauled and used offsite, unrelated to any Milam activity. This is all the more disturbing because of the potential existence of cultural resources and perhaps cemeteries. This activity negates the economic benefits/need claimed by Waste Management to justify its desire to destroy wetlands. The immediate soil removal would destroy 18.4 acres of wetlands in the "proposed activity area," according to the [Waste Management] mitigation document. One acre of wetlands can hold up to 1.6 million gallons of water—floodwater, stormwater, and snowmelt. Areas around the site have flooded and are documented by the Corps and pictures of Cahokia Canal. The American Bottom has repeatedly been declared a federal disaster area for flooding. C2072.

Waste Management's siting application, which was submitted to the City on September 22, 2006, included documentation concerning wetlands, noting that North Milam and the Fowles Mitigation Property are located west and north of Milam RDF. Approximately 26.8 of North Milam's 222 acres are wetlands. C0723. Waste Management proposed to excavate and remove soil from North Milam to use as cover material on Milam RDF. As a result of this activity, 18.4 acres of wetlands on North Milam would be impacted. *Id*.

Waste Management's siting application provided, specifically, an April 2005 submittal to the Corps, setting forth a permit application under Section 404 of the federal Clean Water Act, which included a January 2005 wetland delineation and assessment report and a March 2005

mitigation plan. C0736-74. An alternatives analysis under 40 C.F.R. 230.10(a) was also included, by which:

> no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. C0738.

In its alternatives analysis, Waste Management stated that the North Milam activities would be directly associated with daily operation of the adjacent Milam RDF, which "requires large amounts of soil for daily cover." C0738Movement of soil from North Milan to Milam RDF could be accomplished with "no truck travel over public roadways, and a haul distance of less than one mile." *Id*. According to the alternatives analysis:

> Complete avoidance of all wetlands in the proposed activity at North Milam is not feasible due to their scattered locations. Over 31% of the wetlands on this parcel will be avoided, however (8.4 acres of the 26.8 total acres of wetland on the property). The only alternative for the proposed impacts would be to purchase an equal-sized parcel of land elsewhere that would yield less wetland impact. Since Waste Management . . . already owns the North Milam parcel, purchase of new land would incur an expense of approximately $1,665,000 (222 acres at $7,500 per acre), assuming a parcel this large could be found with few jurisdictional areas present. Any new parcel would be considerably farther from the RDF than North Milam, resulting in substantial additional expense for trucking, fuel usage, wear on public roadways, etc. *Id*.C0738.

The mitigation plan included in the siting application stated that five wetlands and two wetland ditches were identified on North Milam, and that "[i]mpacts to a total of 18.4 acres of wetland will occur." C0741. According to the plan:

> A total of 8.5 acres of farmed wetland (all or parts of Wetlands 1-4 and two wetland ditches), and 9.9 acres of forested and scrub/shrub wetland (Wetland 5) comprise the impacted wetland area. Avoidance of jurisdictional areas was a design criterion for the proposed facility, and impacts have been minimized to the extent possible. A total of 8.4 acres of wetland (Portions of Wetlands 1 and 5 north of the gas pipline) will be avoided, and preserved without impacts. Mitigation for these wetland impacts is proposed in upland areas located in the northern portion of the subject property, and on the adjacent Fowles property, where wetland mitigation from past [Waste Management] projects has already been constructed in some areas. Most areas proposed for mitigation currently consist of actively farmed or fallow agricultural land, although small areas of woodland and an abandoned farmstead also lie within the proposed mitigation area. C0741.

The mitigation plan further stated that mitigating the wetland impacts would be accomplished by "constructing forested wetland, emergent wetland, and open water." C0741. A mitigation ratio of:

> 2.00:1 for forested wetland impacts (19.8 acres of creation/9.9 acres of impact), and a 1.51:1 mitigation ratio for farmed wetland impacts (12.8 acres of creation/8.5 acres of impact) is proposed, along with creation of 8.1 acres of open water, lacustrine habitat on the Fowles property for which 50% mitigation credit is proposed (8.1 acres x 0.5 = 4.05 acres mitigation credit). These mitigation ratios were chosen after preliminary consultation with the U.S. Army Corps of Engineers, and result in an overall wetland mitigation ratio of 36.65 acres of creation/18.40 acres of impact, or 2.0:1. C0741-42.

The forested and emergent wetland creation areas, according to the mitigation plan, would be placed in a "permanent conservation easement" and upon their completion, deeded to a local governmental entity. C0742. In addition, undisturbed portions of Wetlands 1 and 5 totaling 8.4 acres would also be included in the easement. The proposed mitigation area:

> lies in a relatively isolated location near Canteen and Horseshoe Lakes. These lakes provide substantial habitat for water-dependent flora and fauna, and the proposed mitigation areas will provide an extension of this habitat. *Id*.

Also included in the siting application is a September 14, 2006 "biological opinion," issued by the U.S. Department of the Interior, Fish and Wildlife Service (Service). The opinion addresses the effects on the "threatened decurrent false aster (*Boltonia decurrens*)" from the proposed activities in jurisdictional wetlands under the Corps' pending permit. C0722-34. The Service concluded:

> After reviewing the current status of *Boltonia decurrens*, the environmental baseline for the action area, the effects of the proposed action and the cumulative effects, it is the Service's biological opinion that the action as proposed is not likely to jeopardize the continued existence of the *Boltonia decurrens*. No critical habitat has been designated for this species; therefore, none will be affected. C0727-28.

Scott Harding, a soil scientist with SCI Engineering, Inc. (SCI), filed a public comment after hearing. The comment consisted of a letter with 13 attachments. Harding has 12 years of experience in "wetland delineation and 404/401 permitting." C1929-30. SCI was retained by Waste Management to review the "North Milam property and the Fowles property wetland delineation, permit application and wetland mitigation plan." *Id*. Harding stated that Waste Management:

> has submitted an effective wetland mitigation plan for the site, and the Illinois Environmental Protection Agency (IEPA) has issued a Clean Water Act Section 401 Water Quality Certification. On that basis, I fully expect that the United

> States Army Corps of Engineers (CE) will issue a Section 404 permit in January 2007. *Id*.

According to Harding, after "certain references to Section 404 permitting and wetlands at the subject site were made by objectors" during the City hearing, Waste Management requested that he submit the public comment to "provide facts and information that will clarify the status of the 404/401 permits and correct any unfounded impressions created by the objectors." *Id.*

Harding noted the wetland delineation and assessment report prepared for North Milam in January 2005, as well as the March 2005 wetland mitigation plan, which proposed to "compensate for 8.5 acres of farmed wetland and 9.9 acres of forested wetland impacts." C1929. The compensation, stated Harding, included 12.8 acres of emergent wetland, 19.8 acres of forested wetland, and 8.1 acres of open water to be created. In April 2005, also as noted above, the Section 404/401 permit application, including the alternatives analysis, was submitted to the Corps. *Id*. Based on the information submitted, the Corps issued a public notice on June 30, 2005. Public comments were received. In a September 2005 response letter, Waste Management reiterated that alternatives were carefully considered on the basis of cost, logistics, and wetland avoidance. *Id*.

Responding to IEPA's review of the project, the mitigation plan was revised and re-submitted for review in November 2005. The new mitigation plan "changed the mitigation monitoring from three to five years as requested by IEPA." C1930. Also in November 2005, the Illinois Department of Natural Resources (DNR) issued a letter recommending that a "bird population study" be performed for the North Milam site. In June 2006, a bird population study was completed by a DNR-approved consultant, identifying no threatened and endangered species, or any rookeries. The Service had stated in its June 2005 letter that "there is no designated critical area in the project area at this time" and "suitable habitat for gray bat, bald eagle, least tern, and pallid sturgeon is not known to occur within the project area." *Id*.

Because of previous concerns regarding impacts to *Boltonia deccurens* on the adjacent Fowles Mitigation area, a management plan was developed "to protect or re-establish the plant Species" and a "management plan activities report" was submitted in December 2005. C1930. Harding added that once created, wetland mitigation areas for North Milam would be analyzed for *Boltonia decurrens* re-establishment. The Service, upon completing its formal consultation on *Boltonia decurrens,* issued a letter in September 2006 determining, as discussed above, that the proposed actions for the site are not likely to jeopardize the continued existence of *Boltonia deccurens*. *Id*.; *see also* C0277-78

Responding to IEPA comments, Waste Management, according to Harding, submitted drawings in September 2006 demonstrating that:

> all surface water drainage from the site would be collected, and directed south. Water is not proposed to drain north or east towards Horseshoe Lake and Canteen Lake. Upon review of the submitted materials, the IEPA determined that the proposed activities on the North Milam site could be completed without

> impacting surface waters. The IEPA then issued the Section 401 Water Quality Certification dated November 30, 2006. C1930.

Minimize Incompatibility During North Milam's Operation

Andria commented at the City hearing about landfill odor concerns:

> There's smell and no one has denied that there are bad smells that come from a landfill and there are bad smells that will come from this landfill if it's put and that will be right next to Horseshoe Lake. The wind comes from that direction from the southwest is the prevailing wind and that smell, if it goes over a half a mile to Fairmont City, it will go over to the campground where people are sleeping all night who don't know that they're in the way of a landfill smell. C1479-80.

In written public comment, Andria added:

> The consultant hired by Waste Management admitted that he did not consider "smell" in his assessment of compatibility. People living in Fairmont City, at least a half-mile or more away from the existing Milam landfill, have complained to us about the smell. C2157.

As discussed, Schanuel prepared an "End Use Plan" on behalf of Waste Management, which is part of his report in the siting application. The plan "portrays methods of screening North Milam with natural materials from off-site 'views.'" C0487. The objective of the plan is to provide "an attractive, natural, visual buffer to assist in blending North Milam into the character of the surrounding conditions." *Id*. This objective is, according to the End Use Plan, accomplished through:

> the addition of native trees, grasses, and wildflowers. Shade trees and evergreen trees will provide the predominant visual buffer. *** Shade trees will be a minimum of 2 ½" caliper and evergreen trees will be a minimum of 6 feet tall. *** Native grasses and wildflowers will be planted around the perimeter of North Milam. Native plants will be used to replicate the character of the natural landscape in the surrounding area.
>
> The End Use Plan will be enhanced at various locations to screen unobstructed off-site views and to minimize North Milam's visual impact on the landscape. The plant materials will provide a visual buffer at the time of planting and will continue to mature and grow in height and density over time. The closure ground cover for North Milam will be seeded with native grasses and wildflowers, similar to those planted at the perimeter during the early stages of activity, and the perimeter trees and ground cover will mature and stay in place. C0487.

Board Ruling on Criterion (iii) "Minimize Incompatibility"

Waste Management maintains that issues of NRHP-eligible Native American sites and Section 404 wetlands, as well as potential "adverse impacts" to Cahokia Mounds, are irrelevant under Section 39.2(a)(iii) of the Act. Nevertheless, as discussed above, Waste Management submitted to the City considerable amounts of information about these Native American sites and wetlands through hearing exhibit and in public comment. Schanuel's report and testimony addressed the potential incompatibility of North Milam with Cahokia Mounds, and buffers for Horseshoe Lake State Park. Petitioners and other objectors expressed opposing views through hearing exhibits and oral and written public comment.

Contrary to petitioners' claims, Waste Management also addressed potential incompatibility *during* North Milam's operation. It is not dispositive that the section of the Schanuel's report is entitled "End Use Plan." Nor is it critical what Schanuel understood to be the scope of his engagement. The fact remains that the plan does state that aspects of the buffering will begin early in the operational life of North Milam:

> The plant materials will provide a *visual buffer at the time of planting and will continue to mature and grow in height and density over time*. The closure ground cover for North Milam will be seeded with native grasses and wildflowers, similar to those *planted at the perimeter during the early stages of activity* . . . . C0487 (emphasis added).

Petitioners presented little if any evidence to substantiate their concerns over incompatibility with the character of the surrounding area based on odors, noise, and views of North Milam during the landfill's operation. Petitioners also fail to cite any authority for their argument that these concerns must be addressed under criterion (iii) on "compatibility." Waste Management asserts that it provided evidence on these matters under criteria (ii) and (v), and the record confirms as much. See C0419, 0423-24, 0596-0602, 1204-18, 1221, 1225-27, 1229-30, 1238-39. Petitioners did not appeal the City's determination that Waste Management satisfied criteria (ii) and (v), and petitioners cannot do so now. *See* Batavia, Illinois Residents Opposed to Siting of Waste Transfer Station v. Onyx Waste Services Midwest, Inc. and City Of Batavia, PCB 05-1 (July 22, 2004) (petitioner must specify grounds for appeal in petition and cannot "wait until later").

Waste Management was not required to prove that North Milam "is compatible" with the character of the surrounding area. *See* Clutts, 185 Ill. App. 3d at 547, 541 N.E.2d at 846 ("the law requires only that the location minimize incompatibility"); *see also* City of Rockford v. PCB, 125 Ill. App. 3d 384, 390, 465 N.E.2d 996, 1001 (2nd Dist. 1984) ("The statute speaks of minimizing incompatibility . . . , it does not speak of guaranteeing no increase of risk concerning any of the criteria."). In discussing siting criterion (vi) on traffic patterns to or from the facility having to be "so designed as to minimize the impact on existing traffic flows" (415 ILCS 5/39.2(a) (2006)), the court noted that the "operative word is 'minimize,'" recognizing that it is "impossible to eliminate all problems." Tate, 188 Ill. App. 3d at 1024, 544 N.E.2d at 1196. The same can be said of the "compatibility" requirement of criterion (iii).

After carefully reviewing the record, the Board finds that Waste Management met its burden before the City of demonstrating that the company "has done or will do what is reasonably feasible to minimize incompatibility." File, 219 Ill. App. 3d at 907, 579 N.E.2d at 1236. Petitioners and Waste Management draw different conclusions from the information in the record. It is for the local siting authority, however, to weigh the evidence, assess witness credibility, and resolve conflicts in the evidence. *See* Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818; *see also* Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d at 197; Fairview, 198 Ill. App. 3d at 550, 555 N.E.2d at 1184; Tate, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195. Where there is conflicting evidence, the Board is not free to reverse merely because the local siting authority credits one group of witnesses and does not credit the other. *See* Waste Management, 187 Ill. App. 3d at 82, 543 N.E.2d at507. "[M]erely because the [local siting authority] could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the [local siting authority's] finding." File, 219 Ill. App. 3d at 905-906, 579 N.E.2d at 1235.

The Board cannot reweigh the evidence to substitute its judgment for that of the City. *See* Fairview, 198 Ill. App. 3d at 550, 555 N.E.2d at 1184; Waste Management, 187 Ill. App. 3d at 81-82, 543 N.E.2d at 507; Tate, 188 Ill. App. 3d at 1022, 544 N.E.2d at 1195. The Board finds that the opposite conclusion, that North Milam is not located so as to minimize incompatibility with the character of the surrounding area, is not clearly evident, plain or indisputable. *See* Concerned Adjoining Owners, 288 Ill. App. 3d at 576, 680 N.E.2d at 818. Accordingly, the City's determination that Waste Management met criterion (iii) is not against the manifest weight of the evidence.

CONCLUSION

The Board finds that that petitioners have failed to prove that the City's siting procedures were fundamentally unfair, or that the City's determinations on siting criteria (i) and (iii) of Section 39.2(a) of the Act were contrary to the manifest weight of the evidence. Therefore, the Board affirms the City's decision granting siting approval to Waste Management for North Milam.

This opinion constitutes the Board's findings of facts and conclusions of law.

ORDER

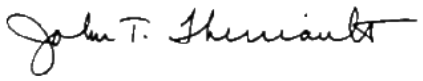
The decision of the City granting Waste Management's application to site North Milam is affirmed for the reasons expressed in the Board's opinion.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The

Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 6, 2007, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board