BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.,	)	
Petitioner,	)	
v.	)	PCB 04-186
	)	(Pollution Control Facility Siting Appeal)
COUNTY BOARD OF KANKAKEE COUNTY, ILLINOIS,	)	
Respondent.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on December 12, 2007, the undersigned electronically filed with the Clerk of the Illinois Pollution Control Board **REPLY BRIEF OF PETITIONER WASTE MANAGEMENT OF ILLINOIS, INC.** in the above entitled matter, a copy of which is attached hereto**.**

WASTE MANAGEMENT OF ILLINOIS, INC.

By: /s/ *Donald J. Moran*
One of Its Attorneys

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

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REPLY BRIEF OF PETITIONER
WASTE MANAGEMENT OF ILLINOIS, INC.

Petitioner, Waste Management of Illinois, Inc. ("WMII"), by and through its attorneys, Pedersen & Houpt, states as follows for its reply.

INTRODUCTION

The site location approval process must be fundamentally fair. This means that the decision of the local siting authority may not be based on matters outside the record, or tainted by improper actions or communications. Here, the County Board of Kankakee County, Illinois ("County Board") denied WMII's 2003 Application to expand the Kankakee Landfill ("Expansion") despite having approved its 2002 Application that was in all material respects the same.[1] The only significant difference between the 2002 Application that was approved and the 2003 Application that was denied was the onslaught of threats, harassment and argument by Mr. Bruce Harrison, a landfill opponent.

[1] The approval was subsequently reversed by the Illinois Pollution Control Board for alleged lack of notice.

After the public hearings concluded, Mr. Harrison conducted an aggressive and relentless campaign against at least eighteen County Board members. Although his contacts with County Board members were uninvited and unwelcome, Mr. Harrison would not be denied. Notwithstanding their best efforts to avoid or rebuff Mr. Harrison, the County Board members were subjected to harassment, political threats, false claims about the propriety of the *ex parte* communications, and information opposed to the expansion. Mr. Harrison showed no regard for personal privacy or safety as he approached County Board members, without notice or permission, at their workplace, vehicle or home. His message was simple: deny this Application and here are the reasons why.

That some County Board members actually changed their vote as a result of Mr. Harrison's strong-arm tactics is evidenced by the reversal of the 2003 Application that, in all material respects, was identical to the 2002 Application. However, whether County Board members in fact changed their decisions based on the threatening and harassing *ex parte* contacts is not necessarily determinative of whether the proceedings were fundamentally unfair. Under the circumstances of this case, the proceedings were also rendered fundamentally unfair because the nature and extent of the *ex parte* contacts created the unavailing appearance of impropriety. WMII was denied a fundamentally fair proceeding because the *ex parte* contacts tainted the siting process and, at a minimum, created the appearance of impropriety. WMII is entitled to have the denial reversed and the matter remanded for a new hearing.

ARGUMENT

I. THE COUNTY BOARD DOES NOT DENY THAT THE 2003 AND 2002 APPLICATIONS WERE IDENTICAL IN ALL MATERIAL RESPECTS

The County Board takes the position that because the 2003 Application contained updated data, it was not exactly the same as the 2002 Application. (Resp. Br., pp. 41-43.)[2] There is no question that the 2003 Application contained updated information regarding criteria (i), (iii) and (viii), and new information relating to prefiling notice. To that extent, the 2003 Application contained additional updated information and was not exactly the same as the 2002 Application. Yet the methodology and analysis for all nine siting criteria were the same for both Applications. The updated information did not contradict or undermine any of the conclusions that these statutory criteria were met. In fact, the additional information supported these conclusions, which were the same as those presented in the 2002 siting record.

Thus, the additional information was not new evidence that rebutted or disproved the conclusions in the 2002 Application that the criteria were met. Indeed, there was no relevant or credible evidence presented in the 2003 siting record to refute or justify a denial of criteria (i), (iii) and (vi). The County Board does not deny those facts. A review of the siting records relating to both Applications establishes that they are the same in all material respects, and that the reason for the denial of the 2003 Application can only be found outside the record.

II. THE MULTITUDE OF THREATENING AND HARASSING IMPROPER CONTACTS RESULTED IN THE REVERSAL OF THE PRIOR APPROVAL

The law is clear. Reversal of a local siting decision is required where fundamental unfairness, *ex parte* contacts in this case, has tainted the outcome, either by actual or potential prejudice. *E & E Hauling, Inc. v. Pollution Control Board*, 116 Ill. App. 3d 586, 598, 606, 451

[2] References to the County Board's Brief are cited to herein as "(Resp. Br., p. __.)."

N.E.2d 555, 571 (2d Dist. 1983), *aff'd* 107 Ill. 2d 33, 41 N.E.2d 664 (1985). The County Board acknowledges that the contacts at issue constitute *ex parte* contacts. Thus, it argues that those *ex parte* contacts did not result in any prejudice according to its analysis of the factors identified in *E & E Hauling, Inc.*, namely (1) the gravity of the *ex parte* communications; (2) whether the contacts may have influenced the ultimate decision; (3) whether the party making the improper contacts benefited from the ultimate decision; (4) whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and (5) whether vacation of the decision and remand for new proceedings would serve a useful purpose. *Id.*, 116 Ill. App. 3d at 607, 451 N.E.2d at 571.

The County Board claims that the *ex parte* contacts made by Mr. Harrison and other Expansion opponents were simply "members of the public expressing their opinion" on "non-substantive matters," and therefore, not grave enough to satisfy the first of the *E & E Hauling* considerations. (Resp. Br., pp. 35-40.) Nothing could be further from the truth. Mr. Harrison engaged in serious and strategic *ex parte* advocacy that consisted of repeated attempts to secure or influence, including by means of threat and harassment, the vote of a decision maker to deny the pending 2003 Application. That many of the *ex parte* contacts at issue may have been for relatively short periods of time is not determinative of the gravity of the communications.

Rather, it is the content of the communication that should dominate this factor. Here, the content ranged from presenting County Board members with petitions that were expressly opposed to the Expansion -- to offering substantive information opposing the Expansion that directly related to the statutory criteria that were ultimately denied -- to making false claims that the State's Attorney, Edward Smith, authorized the *ex parte* contacts -- to actual threats against the re-election of County Board members who refused to vote against the Expansion. Lies and

misrepresentations were told without recourse. In addition to the content of the communication, the method of the contact was also significantly grave. County Board members were physically accosted in their places of work, their vehicles and their homes. They were called on their home telephones and received letters mailed to their home address.

Instead of addressing the content and method of the *ex parte* contacts, the County Board focuses on the fact that the contacts were unsolicited by the County Board members. WMII acknowledges that the County Board members did not invite or welcome the contacts. Nevertheless, the contacts were repeated and contained enough information to have influenced or prejudiced the County Board members on a pending adjudicative matter. While the County Board may have made every effort to guard against such impropriety and ensure the fundamental fairness of the process, Mr. Harrison circumvented and subverted these efforts by guile, deceit and threat.

The facts in this case are significantly dissimilar to those presented in *Fairview Area Citizens Taskforce v. Pollution Control Board*, 198 Ill App. 3d 541, 555 N.E.2d 1178 (3d Dist. 1990), *Waste Management of Illinois, Inc. v. Pollution Control Board*, 175 Ill. App. 3d 1023, 539 N.E.2d 682 (2d Dist. 1988), *Town of Ottawa v. Illinois Pollution Control Board*, 129 Ill. App. 3d 121, 472 N.E.2d 150 (3d Dist. 1985), *Land and Lakes Co. v. Randolph County Board of Commissioners*, PCB 99-69 (Sept. 21, 2000), and *Gallatin National Bank v. Fulton County*, PCB 91-256 (June 15, 1992). In those cases, the contacts between members of the public and the decision makers consisted of mere opinion and general complaints, not threats, lies and substantive argument on specific criteria as occurred here. Moreover, the contacts in the cases cited by the County Board were of a benign nature as opposed to the aggressive and menacing tactics Mr. Harrison employed. None of the cases cited by the County Board has facts analogous

to the facts in this case. Therefore, they are not instructive on the issue of whether WMII has demonstrated that the content and method of the contacts were sufficiently grave and should not determine how the Board should rule on this factor.

The County Board misstates the next factor. Rather than analyze whether the *ex parte* contacts "*may* have influenced" the ultimate decision, the County Board argues that, based on the members' testimony, the contacts did not influence their decision. (Resp. Br., p. 40.) Given the use of the words "may have influenced," it is clear that the *E & E Hauling* court intended the analysis to consider the possibility of influence rather than the fact of influence. This is important given that the applicant is prohibited from delving into the minds of the decision maker absent a strong showing of bad faith or improper motive. *Land and Lakes Co. v. Village of Romeoville*, PCB 92-25, slip op. at 3 (June 4, 1992); *but see City of Rockford v. Winnebago County*, PCB 87-92, slip op. at 9 (November 19, 1987) *citing Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814 (1971) (such inquiry is appropriate where there was no factual finding explaining the decision). Indeed, motions *in limine* were improperly granted in this case precluding WMII from discovering what factors did or did not influence the votes of the County Board members who were contacted by Mr. Harrison. (*See Point III infra*).

Nevertheless, there is indirect evidence that the *ex parte* contacts influenced the ultimate decision. Mr. Harrison presented the following arguments in support of the denial of the 2003 Application: (a) the County did not need a landfill for Chicago waste, (b) the Expansion would contaminate the environment and depress property values, and (c) the additional truck traffic bringing Chicago waste would create congestion and increase the risk of accidents. These substantive communications, which were not made during the 2002 siting process, directly correlate with the denial of criteria (i), (iii) and (vi) in the 2003 siting process. The County

Board's determination that criteria (i), (iii) and (vi) were not satisfied, particularly in the face of the uncontroverted evidence in the record supporting those criteria, is clearly indicative of the undue influence Mr. Harrison was able to exert over certain County Board members as a result of these *ex parte* contacts.

As a result of Mr. Harrison's undue influence, the County Board vote on the 2003 Application changed as follows: the vote on criterion (i) changed from 22-0 in favor, to 16-12 against; the vote on criterion (iii) changed from 21-0 in favor, to 18-10 against; and the vote on criterion (vi) changed from 19-0 in favor, to 16-12 against. Significantly, the change in votes directly correlated to the subject matter of the *ex parte* contacts. The vote changes in this case are distinguishable from the vote changes in *Moore v. Wayne County Board*, PCB 86-197 (June 2, 1988); *Land and Lakes*, PCB 92-25, and *DiMaggio v. Solid Waste Agency of North Cook County*, PCB 89-139 (Oct. 27, 1989). In this case, unlike in *Moore*, *Land and Lakes*, and *DiMaggio*, County Board members did not "simply" change their votes. County Board members were targeted and pressured extensively by *ex parte* communications from Expansion opponents to change their vote. The change in the votes on criteria (i), (iii) and (vi) is a reliable indicator that the prejudice to WMII from Mr. Harrison's *ex parte* advocacy was actual and undeniable.

There should be no question that the third factor, whether the party making the improper contacts benefited from the ultimate decision, weighs in WMII's favor. The County Board adopts a circular logic and argues that because the County Board members stated that the contacts did not influence them, the contacts could not have benefited anyone. (Resp. Br., p. 46.) The County Board also argues that the benefit to Mr. Harrison in defeating siting approval does not count because he was not a "party" to the proceedings, nor was he "affiliated" with a party. (Resp. Br., p. 47.) In making the latter argument, the County Board takes the incorrect view that

the benefited party has to be a party who has filed an appearance in the proceedings. The County Board cites no authority for such a narrow reading of the term "party." It cannot be disputed that Mr. Harrison was a participant in the 2003 siting proceedings. *See, Valessares v. County Board of Kane County*, PCB 87-36, slip op. at 6 (July 16, 1987) (mere attendance at a local hearing is sufficient to constitute participation). The Board has stated that an *ex parte* contact is one that takes place between a decision maker and any "party with interest" without notice to the other parties to the proceeding. *Peoria Disposal Co. v. Peoria County Board*, PCB 06-184, slip op. at 37 (June 21, 2007). The Board has also held that "it is well established that contact by nonparties, outside the public hearing, with a board member concerning a pollution control facility siting proceeding is an *ex parte* contact." *Land and Lakes Co.*, PCB 99-69, slip op. at 46-47. Clearly, improper *ex parte* contacts can be made by one who participates or has an interest in the proceeding, so it is illogical to limit the remedy only to those cases where the improper contact is made by a person or entity who has filed an appearance. The disapproval of the 2003 Application, which was Mr. Harrison's goal and the very purpose of all of the *ex parte* contacts, was a definite benefit to him, and he was definitely a participant and a party with an interest.

The fourth factor is whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond. WMII had no knowledge of Mr. Harrison's actions and communications at any time during the pendency of the 2003 Application before the County Board. WMII learned about these actions during discovery in this appeal. Although some of the contacts were through letters that were submitted as part of the public comment, not all communications were made a part of the record. To this day, WMII cannot be certain of all of the communications, in number or substance, by Mr. Harrison to the County

Board members. Consequently, WMII never had the chance to fully and adequately respond to the statements.

Lastly, because the County Board denied site location approval (despite the unrefuted testimony in support of the Expansion) based on improper considerations, the denial decision should be vacated and remanded. Wielding lies, threats and bombast in face-to-face unannounced contacts, Mr. Harrison attempted to secure the vote of a decision maker on a pending adjudicative matter. The sole purpose of the contacts was to obtain a "no" vote by any available means. And it worked.

The Board should vacate and remand, not just because WMII is entitled to a fair and impartial hearing on its application. Additionally, vacating the County Board's decision would serve the useful purpose of putting landfill opponents on notice that there is a limit to how far one can go with actions and communications intended to influence votes outside the siting proceeding. Before this case, there was no precedent for the extent of Mr. Harrison's reprehensible behavior. The Board should go on record disapproving of such behavior before it becomes more threatening, harassing and intrusive. If Mr. Harrison's conduct is sanctioned by an affirmance of the denial of site location approval, there is nothing to stop Mr. Harrison, or any other landfill opponent, from engaging in the same pattern of threats, harassment and influence peddling.

By any objective standard, the actions of Mr. Harrison were improper and prejudicial. At a minimum, they created an appearance of impropriety which subverted the siting process. They also had a direct effect on the decision denying the 2003 Application. These proceedings were fundamentally unfair, and as a result, the denial of site location approval should be reversed and remanded for a new hearing.

III. WMII SHOULD HAVE BEEN PERMITTED TO PROBE COUNTY BOARD MEMBERS ABOUT THE REASON FOR THEIR VOTES GIVEN THEIR DIRECT TESTIMONY THAT THEY WERE NOT INFLUENCED

The County Board improperly wants to use the presumption that decision makers are objective as a shield and a sword. County Board members were allowed to testify when questioned by their attorney that their decision in connection with the 2003 Application was not influenced by Mr. Harrison's actions and communications. However, WMII's attorney was precluded from similarly inquiring into their decision making and specifically the basis for the denial, even through an offer of proof.

The Hearing Officer's ruling precluding WMII from questioning County Board members about the reasons or bases for their votes was erroneous. *See City of Rockford,* PCB 87-92, slip op. at 9, *citing Volpe*, 410 U.S. at 420, 91 S. Ct. at 825-26. That ruling prevented a determination of whether the denial was properly and validly made, and thus whether the proceedings were fundamentally fair. *Sokaogan Chippewa Community v. Babbitt*, 961 F. Supp. 1276, 1279-81 (W.D. Wis. 1997). The record is completely devoid of any competent evidence supporting the basis for the denial, and particularly the change in votes on criteria (i), (iii) and (vi), the criteria that Mr. Harrison focused on in his *ex parte* communications. There was no competent or relevant evidence presented that supports the denial. Under the circumstances of this case, it is more than reasonable to conclude that the County Board's reversal of the 2002 Application by the denial of the 2003 Application was determined by the *ex parte* advocacy of Mr. Harrison and other objectors. In this situation, it is entirely proper to permit access into the thought processes of the decision maker. *Volpe*, 410 U.S. at 420, 91 S. Ct. at 825-26 (inquiry into the mental impressions of a decision maker is appropriate where there is no factual basis explaining the decision).

WMII had a legitimate basis to discover the reasons for the change in votes. Therefore, the ruling precluding it from doing so was erroneous.

IV. THE COUNTY BOARD'S ATTEMPT TO DISCREDIT THE TESTIMONY OF WMII'S EXPERTS ON CRITERIA I, III, AND VI DOES NOT CHANGE THE CLEAR, UNREBUTTED SHOWING THAT THOSE CRITERIA WERE MET

Despite the fact that WMII presented clear and unrebutted facts and expert opinion that criteria (i), (iii) and (vi) were satisfied, the County Board contends that its decision that these criteria were not met is not against the manifest weight of the evidence. It bases its contention on criticisms of WMII's evidence and witnesses that are immaterial and do not alter or negate the substantial evidence in support of criteria (i), (iii) and (vi).

A. Criterion (i)

The County Board makes a number of arguments in an attempt to discredit the unrebutted testimony presented by, Ms. Sheryl Smith, the expert witness who testified on the need for the Expansion. These arguments are based on misstatements of Ms. Smith's testimony and inaccurate statements of law.

The County Board argues that the evidence on need was not the same for the 2002 and 2003 Applications because Ms. Smith's findings in the 2003 Application showed a waste disposal capacity shortfall of 49 million tons versus the capacity shortfall of 59 million tons in the 2002 Application. (Resp. Br. at. 3-4.) In making this argument, the County Board ignores that in both Applications, Ms. Smith testified as to a ***range*** of capacity shortfall. (C2607, pp. 50-51; 2002C1252, p. 23.)[3] In the 2003 Application, the capacity shortfall ranged between 49 million to 132 million tons, and in the 2002 Application, the range was between 50 million to

[3] References to the hearing transcript in the 2003 siting proceedings are cited to herein as "(C____, p. __.)." References to the hearing transcript in the 2002 siting proceedings are cited to herein as "(2002C____, p. __.)."

155 million tons. (C2607, pp. 50-51, 54-55; 2002C1252, p. 23.) It is appropriate for an expert witness on need to state a range of waste disposal capacity shortfall. *See Rochelle Waste Disposal LLC v. City Council of the City of Rochelle*, PCB 03-218, slip op. at 114-15 (May 15, 2004) (acknowledging that the use of a range of waste disposal capacity is proper). The County Board does not dispute the validity of the upper limits of the capacity shortfall range. Given Ms. Smith's undisputed testimony on the upper limits of the range, the 10 million-ton difference in the lower limit of the range is not material.

The County Board also challenges Ms. Smith's calculations regarding when the need for the facility would arise by arguing that the recycling rates she used were substantially below the current recycling rates for certain communities. (Resp. Br., p. 4.) This argument has no merit because Ms. Smith testified that she obtained and relied on the recycling goals stated in the solid waste plans for each county in the service area. (C2607, p. 54-57; 2002C1252, p. 10-13, 54-55.) That there may be an increase in recycling does not invalidate a finding of need. *See Turlek v. Pollution Control Board*, 274 Ill. App. 3d 244, 653 N.E.2d 1288 (1st Dist. 1995) (determination that waste incineration facility was necessary was not improper even if there was an increase in recycling).

Moreover, while the County Board argues that there would be sufficient capacity in the service area until 2015 if all recycling goals are met (Resp. Br., pp. 21-23), that still does not prove the lack of need. The County Board cites to *Waste Management of Illinois, Inc. v. Pollution Control* Board, 122 Ill. App. 3d 639, 461 N.E.2d 542 (3d Dist. 1984), *Waste Management of Illinois, Inc. v. Pollution Control* Board, 123 Ill. App. 3d 1075, 463 N.E.2d 969 (2d Dist. 1984), and *Waste Management of Illinois, Inc. v. Pollution Control* Board, 175 Ill. App. 3d 1023, 520 N.E.2d 682 (2d Dist. 1988) in support of its argument that available capacity of ten

years or longer cannot satisfy criterion (i). (Resp. Br., pp. 21-23.) However, Illinois courts and this Board have held that need was shown when the remaining capacity was ten years or longer. *E & E Hauling*, 116 Ill. App. 3d 586, 451 N.E.2d 555; *American Bottom Conservancy v. City of Madison*, PCB 07-84 (December 6, 2007). Indeed, the Board recently upheld a finding of need based on evidence that there was seventeen years of remaining waste disposal capacity. *American Bottom Conservancy*, PCB 07-84, slip op. at 33-34. The Board refused to find that such evidence demonstrated "no urgent need" for the facility. *Id.*, slip op. at 34. Thus, the County Board's argument that ten years or more of remaining capacity is sufficient to refute need should be rejected.

The County Board criticizes Ms. Smith's needs assessment on the basis that it did not consider facilities that were "in the siting and/or permitting process." (Resp. Br., p. 4.) Illinois case law has made clear that it is not necessary to consider proposed facilities as part of a need analysis. *Tate v. Illinois Pollution Control Board*, 188 Ill. App. 3d 994, 1019-20, 544 N.E.2d 1176, 1193 (4th Dist. 1989); *Turlek v. Village of Summit*, PCB Nos. 94-19, 94-21, 94-22 (May 5, 1994), slip op. at 37-38. Thus, despite the County Board's criticism, it was not improper that Ms. Smith used data for currently permitted facilities as opposed to proposed facilities. Based on her analysis of currently permitted facilities, the volume of waste received each year, and the remaining disposal capacity and service area, Ms. Smith estimated the amount of available disposal capacity to be 56 million tons, and further estimated that this available disposal capacity will run out in 2009. (C2607, pp. 74-75.) This evidence was not contradicted.

The County Board's final argument against Ms. Smith's need assessment is that she failed to consider certain "other landfills that are currently permitted and available to receive waste from the service area, including Prairie View Landfill, Brickyard Landfill and Spoon Ridge

Landfill." (Resp. Br., pp. 4-5.) First, it is inaccurate to state that Ms. Smith did not consider these other facilities. Ms. Smith testified that she did consider these facilities but did not include them in her calculations for valid reasons. (C2607, pp. 79-85; 2002C1252, pp. 21-22, 39-43.) For example, Spoon Ridge Landfill can hardly be considered an "available" landfill given that it has been inactive since June 1998 with no certainty that it will reopen, and given that its identified service area is waste from outside of Illinois and does not include counties identified as the service area for the Expansion. (C2607, pp. 82-85.) Even if Ms. Smith had included Prairie View Landfill and Town & Country Landfill in her analysis, based on the undisputed range of disposal capacity shortfall, need was still established. (C2607, p. 84; 2002C1252, pp. 39-43.)

Ms. Smith's testimony on these issues did not change from her testimony in the 2002 siting proceedings. Notably, in connection with the appeal before the Board challenging the County Board's approval of the 2002 Application, the County Board asserted in its brief that Ms. Smith's testimony on criterion (i) was supported by the manifest weight of the evidence.[4]

Despite all of the County Board's criticisms of Ms. Smith's testimony, she was the only witness to prepare a report, present facts, evaluate the data and form an opinion regarding need. There is absolutely nothing in the record to justify the County Board's finding that the need criterion was not met, and such a finding, therefore, is against the manifest weight of the evidence. *Industrial Fuels & Resources of Illinois, Inc. v. Illinois Pollution Control Board*, 227 Ill. App. 3d 533, 544-45, 592 N.E.2d 148, 156 (4th Dist. 1992); *Rochelle Waste Disposal*, PCB 03-218, slip op. at 115-16.

[4] *See* Brief and Argument of Respondents County of Kankakee and County Board of Kankakee, at 40-42, PCB No. 03-125, 03-133, 03-134, 03-135 (consolidated).

B. Criterion (iii)

With regard to compatibility with the surrounding area, the first part of Criterion (iii), the County Board nitpicks limited aspects of Mr. J. Christopher Lannert's testimony in connection with the 2003 Application. The County Board initially contends that Mr. Lannert "was biased because he was paid $275 per hour to perform his study and further admitted that whenever he testifies for waste haulers, he always comes to the conclusion that the proposed facility is not located to minimize incompatibility." (Resp. Br., p. 28.) This Board has previously stated that generic attacks on an expert witness's credibility because of the fact that he was paid for services or that he has never prepared a report not finding for the applicant are not persuasive. *Rochelle*, PCB No. 03-218, slip op. at 114.

Aside from that unpersuasive claim of bias, the County Board's only complaints with Mr. Lannert's testimony is that he did not review the City of Kankakee's Comprehensive Plan, did not speak with banks, developers, businesses, or residents for their opinion on compatibility, and did not consider the proposed convention center and aquatic center in his analysis. A compatibility assessment need not consider the impact that the landfill would have on the potential development to be reliable. *Citizens Against Regional Landfill (C.A.R.L.) v. County Board of Whiteside County*, PCB 92-156, slip op. at 44-46 (Feb. 25, 1993). Additionally, as stated above, opinions from businesses and residents is not necessarily determinative of the analysis of the impact on the surrounding area. *American Bottom Conservancy v. Village of Fairmont City*, PCB No. 01-159, slip op. at 39, 62 (Oct. 18, 2001); *C.A.R.L.*, PCB No. 92-156, slip op. at 45-46. This is particularly the case where, as here, agricultural fields and/or open space within the study area account for approximately 94 percent of the land use and only 6 percent is an industrial, residential or commercial use. (2002C1248, p. 60.)

Mr. Lannert's methodology and analysis were no different from what he presented for the 2002 Application. (C2607, p. 10.) The County Board agreed with Mr. Lannert then, but now has to pick nits to defend a decision that was not based on the facts and evidence in this record.[5] (County Br., Kankakee I, pp. 51-53.)

The County Board also flyspecks the testimony of Ms. Patricia McGarr, the expert witness who testified on the second part of Criterion (iii), which relates to whether the Expansion is located so as to minimize any effect on the value of surrounding property. The County Board asserts that she "relied" on cursory conversations with homeowners to determine the values of properties, "relied" on the Poletti study, analyzed a small number of farm transactions, did not statistically compare Kane and Kankakee counties, and arbitrarily chose a mile radius as her target area. (Resp. Br., pp. 5-7, 25-27.)[6] These assertions are inaccurate.

Ms. McGarr did not "rely" on cursory conversations with homeowners or on the Poletti study to determine property values. Rather, the evidence in the record reflects that Ms. McGarr determined property values by performing a standard comparable property value analysis for properties surrounding the Kankakee Landfill and the Expansion. (C2605, pp. 31-33, 35-37, 41-42; 2002C1249, pp. 11-18.) For her analysis in the 2003 Application, she used the same data from the 2002 Application, in addition to considering two farmland sales and three residential sales that occurred after November 2002. (C2605, pp. 31-33, 35-37, 41-42.) She testified that

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[5] *See* Brief and Argument of Respondents County of Kankakee and County Board of Kankakee, at 51-53, PCB No. 03-125, 03-133, 03-134, 03-135 (consolidated), references to which are cited to herein as "(County Br., Kankakee I, p. __.)."

[6] The County Board initially attacks Ms. McGarr based on whether she received an associate's degree from Richard J. Daley College. (Resp. Br. at 5, 25.) However, the unrefuted evidence established that she took and passed the required courses to have earned the degree and that the degree was not required to obtain her real estate appraiser license or the MAI designation. (Pet. Ex. 26, 2002; 1/12/04 Tr. Vol. 2 at 43-44.)

the additional sales data further supported her opinion that the Expansion is located so as to minimize any effect on the value of surrounding property. (C2605, pp. 36, 41.) She further testified that in doing her analysis, she relied on sales data, and that if she had an opportunity to talk with a homeowner, she would, but that her report was not based on homeowner communication. (C2606, p. 72.) Opinions from residents are not required in the criterion (iii) analysis. *American Bottom Conservancy*, PCB 01-159, slip op. at 39, 62; *C.A.R.L.*, PCB 92-156, slip op. at 45-46.

The County Board's other challenges to Ms. McGarr's testimony also lack merit. Ms. McGarr performed three separate studies as part of her overall evaluation, namely a residential study for the Kankakee Landfill, a farmland study for the Kankakee Landfill, and a residential study for the Settler's Hill Landfill located in Kane County. (2002C1249, pp. 11-23.) The County Board's criticism of the number of farm transactions contained in her farmland study is unwarranted. Ms. McGarr evaluated farm sales in two five-year periods and analyzed all available transactions during those periods. (C2606, pp. 16-18.) The County Board has not cited any cases holding that a ten-year span is an insufficient time period upon which to base a property value analysis. The ten-year data indicated to Ms. McGarr that farmland properties surrounding the Kankakee Landfill experienced a greater increase in average property value than property in the Control Area. (C2605, p.p. 33, 35-36.) This finding was unrebutted.

The County Board's criticism of Ms. McGarr's target area is also unwarranted. The County Board asserts, incorrectly, that Ms. McGarr "arbitrarily" chose a mile as her target area. In her testimony, however, she stated that she chose the one-mile radius based upon her experience in studying other landfills that the impact analysis diminishes with a target area much

greater than a mile. (C2606, pp. 49, 56-57.) In any event, the County Board has cited no authority for the proposition that a one-mile radius is inadequate for a target area.

With regard to her study of the Settler's Hill Landfill in Kane County, Illinois, Ms. McGarr testified that she selected Settler's Hill because that facility and Kane County shared significant similarities to the Expansion and Kankakee County. (C2605, pp. 144-45; C2606, p. 60.) While Ms. McGarr acknowledged that the two counties have differences (as all counties do), she did not admit that those differences were significant. In fact, she testified that, in her opinion, there were no significant differences. (C2605, p. 145.)

As with Mr. Lannert, Ms. McGarr's methodology and analysis were the same as she presented for the 2002 Application. The County Board raised no concern or objection regarding her method or evaluation there. In fact, the County Board defended her analysis and conclusion that the facility was so located to minimize any effect on the value of surrounding property. (County Br., Kankakee I, pp. 51-53.) The County Board's attempt to discredit her now is unfounded and unavailing.

In summary, Mr. Lannert testified that the Expansion was so located as to minimize the incompatibility with the character of the surrounding area. He was the only witness to present data, prepare a report and testify regarding the first part of Criterion (iii). Ms. McGarr testified that the Expansion was so located as to minimize any effect on the value of surrounding property. She was the only witness to present data, prepare a report and testify regarding the second part of Criterion (iii). No data, facts or opinion were presented to rebut their conclusions. Thus, the County Board's decision that criterion (iii) was not satisfied is against the manifest weight of the evidence.

C. Criterion (vi)

The County Board makes several contentions concerning the evidence presented in support of criterion (vi), but none of them impact the conclusion that traffic patterns to or from the Expansion are designed to minimize the impact on existing traffic flows.

The County Board's contention that WMII failed to consider the impact on school bus operations is simply erroneous. Mr. Stephen Corcoran, in his testimony regarding Criterion (vi), specifically testified that the Expansion's peak traffic is expected to occur between 12:00 noon and 1:00 p.m., and that the Expansion's peak hours do not coincide with school bus usage on U.S. Route 45/52 between I-57 and 6000 South Road, which occurs from 7:00 - 8:00 a.m. and 3:00 – 3:45 p.m. (C2610, pp. 12, 23-25, 44-46.) There was no conflicting evidence regarding that fact. The County Board claims that it is concerned that trucks driving to and from the Expansion will crash into slowed or stopped school buses. This concern is not supported by the record given the undisputed that the Expansion peak hours do not coincide with school bus peak hours. Moreover, "concerns and speculation" that increased truck traffic will have very harmful effects, including traffic hazards, is not a legitimate basis upon which to find criterion (vi) not satisfied particularly when there is no evidence in the record to support that concern. *Waste Hauling, Inc. v. Macon County Board*, PCB 91-223, slip op. at 36-40 (May 7, 1992).

The County Board's other contentions are equally without merit. The County Board contends that WMII failed to consider future traffic, specifically traffic from future developments like the Town & Country landfill, the convention center and the aquatic center. The County Board argues that WMII should have analyzed future traffic that was expected to be generated in the area. (Resp. Br., p. 29.) This argument ignores the specific wording of criterion (vi), which limits the evaluation to existing traffic flows. 415 ILCS 5/39.2(a)(vi); *see also Tate*,

188 Ill. App. 3d at 1024, 544 N.E.2d at 1196 (analysis of existing traffic flow into an existing facility is the appropriate consideration for this criterion (vi)); *Waste Hauling, Inc.*, PCB 91-223, slip op. at 40 ("It is important to recognize that the statutory criterion only requires consideration of 'existing traffic flows.'").

The County Board also contends that WMII applied an inadequate stopping sight distance. The County Board argues that WMII should have used a sight distance of 1,000 to 1,100, despite the fact that WMII applied the 570 feet stopping sight distance pursuant to the guidelines published by the American Association of State Highway and Transportation Officials ("AASHTO"). Even if the County Board's sight distances had been applied, the undisputed evidence in the record (in fact, this evidence was on the testimony of Mr. Brent Coulter, who was Michael Watson's witness) is that the 2003 Application satisfied them. (C2613, p. 36.)

The County Board raises three additional arguments about the design dimensions of the intersection improvements at the Expansion access drive, namely, that the median between the southbound and northbound turn lanes is 12 feet and not 14 feet, the shoulder of Roadway Route 45/52 is inadequate, and the length of the southbound turn lane is 430 feet and not 530 feet. (Resp. Br., p. 30.) All three of these arguments must fail, however, because an intersection design study detailing each of the construction details of the proposed intersection, including dimensions, had been approved by IDOT. (C2610, p. 61.)

The County Board's last challenge to criterion (vi) is that WMII did not establish any mandatory procedure for cleaning mud and debris from the roadway. (Resp. Br., p. 31.) The Board has held that similar concerns of traffic-related dust do not pertain to a proposed facility's effect on traffic flow. *CDT Landfill Corp. v. City of Joliet*, PCB 98-60, slip op. at 50-51 (Mar. 5, 1998).

In analyzing criterion (vi), the question is not whether there will be no adverse impact, but whether the impact on traffic flow has been minimized. *Fairview Area Citizens Taskforce*, 198 Ill. App. 3d at 553-54, 555 N.E.2d at 1186. Simply put, none of the County Board's concerns about criterion (vi) relate to existing traffic flows. There was no evidence in rebuttal to WMII's testimony about traffic flows. There was no evidence as to what additional steps WMII could take that would be reasonable and necessary to further minimize impact on existing traffic flows. That WMII met the requirements of this criterion is clearly evident upon review of the undisputed evidence. The decision of the County Board on criterion (vi) is, therefore, against the manifest weight of the evidence.

CONCLUSION

The County Board decision reversing its prior determination that Criteria (i), (iii) and (vi) were met is not supported by any relevant or reliable evidence in the record. The County Board's reversal was the result of improper *ex parte* advocacy, not evidence. Accordingly, the County Board's denial of Criteria (i), (iii) and (vi) was against the manifest weight of the evidence, and should be reversed. In the alternative, this Board should reverse the County Board decision because the proceedings were fundamentally unfair, and remand this matter to the County Board for proper consideration and decision.

Respectfully Submitted,
WASTE MANAGEMENT OF ILLINOIS, INC.

By: */s/ Donald J. Moran*
One of Its Attorneys

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

CERTIFICATE OF SERVICE

I, Donald J. Moran, an attorney, on oath certify that I caused to be served the foregoing, **REPLY BRIEF OF PETITIONER WASTE MANAGEMENT OF ILLINOIS, INC.**, upon the following:

Mr. Charles Helsten
Hinshaw & Culbertson
P.O. Box 1389
Rockford, IL 61105-1389
chelsten@hinshawlaw.com
VIA ELECTRONIC MAIL

Mr. Jamie Boyd
Kankakee County State's Attorney
450 East Court Street
Kankakee, IL 60901
VIA REGULAR FIRST CLASS U.S. MAIL

Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601
VIA REGULAR FIRST CLASS U.S. MAIL

via electronic mail or by depositing a copy thereof, enclosed in an envelope at 161 N. Clark Street, Chicago, IL 60601 with proper postage pre-paid as addressed above before 5:00 p.m. on this 12th day of December 2007.

/s/ *Donald J. Moran*
Donald J. Moran