ILLINOIS POLLUTION CONTROL BOARD

BYRON SANDBERG, Petitioner, vs. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN & COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C. Respondents.	)	PCB 04-33 (Third Party Pollution Control Facility Siting Appeal)
WASTE MANAGEMENT OF ILLINOIS) INC., Petitioner, vs. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN & COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 04-34 (Third Party Pollution Control Facility Siting Appeal)
COUNTY OF KANKAKEE, ILLINOIS, and EDWARD D. SMITH, KANKAKEE COUNTY STATE'S ATTORNEY, Petitioners, vs. THE CITY OF KANKAKEE, ILLINOIS CITY COUNCIL, TOWN & COUNTRY UTILITIES, INC., and KANKAKEE REGIONAL LANDFILL, L.L.C., Respondents.	)	PCB 04-35 (Third Party Pollution Control Facility Siting Appeal) (Consolidated)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on November 14, 2003 there caused to be filed via U.S. Mail with the Illinois Pollution Control Board an original and 4 copies of the following document, a copy of which is attached hereto:

TOWN & COUNTRY UTILITIES, INC.'S RESPONSE TO WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION TO COMPEL

BY: George Mueller
Attorney at Law

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PROOF OF SERVICE

STATE OF ILLINOIS)
)SS.
COUNTY OF LASALLE)

The undersigned, being first duly sworn, state that I served a true and correct copy of the foregoing Notice, together with a copy of each document referred to therein, upon the person(s) indicated via their facsimile numbers as indicated in the Service List on the 14th Day of November, 2003.

Pat Wheeler

SUBSCRIBED and **SWORN TO** Before Me This 14th Day of November, 2003.

Genia Fox
Notary Public

OFFICIAL SEAL
GENIA FOX
NOTARY PUBLIC STATE
Commission Expires 01-03-2004

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THE ILLINOIS POLLUTION CONTROL BOARD

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TOWN & COUNTRY UTILITIES, INC.'S RESPONSE TO WASTE MANAGEMENT OF ILLINOIS, INC.'S MOTION TO COMPEL

Now come Town & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. by their attorney, George Mueller, (hereinafter "Town & Country") and in their Response to the Motion of Waste Management of Illinois, Inc.'s to compel answers to their previous Request To Admit and to one of their Interrogatories, state as follows:

BACKGROUND

Waste Management of Illinois previously served upon Town & Country 37 Requests To Admit Or Deny pursuant to Supreme Court Rule 216. Town & Country filed Answers admitting some Requests, denying others and objecting to a number of Requests. What remains at issue are Town & Country's Responses to Requests 2 through 5 where Town & Country objected to each Request, but did also provide a Response. These Responses are apparently insufficient for Waste Management. Also at issue is Town & Country's objection to Requests 19 to 36. Requests 2 through 5 deal with the service of notice to the owners of Parcel 13-16-23-400-001. Requests 19 through 36 address the question of whether or not the Town & County Siting Application is substantially the same as a previous Application filed by Town & Country with the Kankakee City Council.

DISCUSSION

With regard to Requests 2 and 3, Town & Country objected to the same as calling for a legal conclusion, but Town & Country also offered, by way of additional response, that the records of the Kankakee County Treasurer speak for themselves. Town & Country, at this time, withdraws the objection that these Requests call for a legal conclusion, but submits that the answer already provided is sufficient. However, by way of supplemental answer, Town & Country would state both in response to Requests 2 and 3 the following:

> "Respondent admits that the named individuals are listed as owners, but points out that the Request is incomplete and misleading in that the records also list Judith A. Skates as the designated representative to receive tax bills. The records also list the owners as "Bradshaw, James and Bradshaw, Ted, et al., Skates, Judith A." The records

> also list the owners as, "Skates, Judith A." The records also list the owners as, "Skates, Judith and Bradshaw."

With regard to Request To Admit No. 4, Waste Management argues, "The word "individually" refers to whether the Notice was served on Mrs. Skates personally, as opposed to collectively or in a representative capacity, and thus relates to the method of service and the capacity in which she received notice." To the extent that Town & Country believes the foregoing sentence is incomprehensible, it tends to prove the point in the objection that the Request required Town & Country to legally interpret the meaning of the word "individually." The capacity in which Judith Skates received notice, either individually or as a representative of some other group, is clearly a question of law whereas whether and how notice was physically delivered to her is a question of fact.

Waste Management cites a number of cases on the issue of what constitutes a question of fact and what constitutes a question of law within the meaning of those terms in Requests To Admit. Huheny v. Chairse, (citation omitted), Robertson v. Sky Chefs,Inc. (citation omitted), and Szczeblewski v. Gossett, (citation omitted), all cited by Waste, are all auto accident cases where the contested admissions dealt with the manner and form of a party's driving a motor vehicle. These cases are all the progeny of our Supreme Court's decision in PRS International, Inc. v. Shred Pax Corp., 184 Ill.2d 224 (1998). In that case, the Court gave a useful example of when a Request To Admit calls for a fact and when it calls for a legal conclusion:

> "For example, a party's conduct pursuant to a contract, including what actions that party did or did not take, would be a factual question properly included in a Request To Admit. However, whether that conduct amounts to a material breach is a legal rather than a factual question, and thus is not appropriate for a Request To Admit. In subsequent filings, the other party may

> refer to that party's conduct under the contract and argue that it amounts to a breach, but the language of Rule 216 refers only to factual issues." (At 184 Ill.2d 236, 237).

The sum and substance of the facts regarding physical service of notice on Judith Skates is set forth in more detail in Town & Country's Supplemental Response to Request To Admit No. 4, as follows:

> "A certified mail notice was sent to "Judith A. Skates, 203 S. Locust, Onarga, IL 60955" as mailing number 70022410000628156442. Said notice was signed for by Judith Skates on February 12, 2003. A certified mail notice was sent to "Gary L. Bradshaw, James R. Bradshaw, J.D. Bradshaw, Ted A. Bradshaw, and Denise Fogel, c/o Judith Skates,203 S. Locust, Onarga, IL 60955 as mailing number 70022410000628156428. Said Notice was signed for by Judith Skates on February 12, 2003."

The foregoing arguments also all apply to Request To Admit No. 5. The phrase used by Waste Management in this Request, "on behalf of" again calls for Town & Country to render legal conclusions regarding legal status and capacity. As indicated on the face of the relevant certified mailing card, a copy of which was included with the siting Application, the Notice was sent to the individuals named in this Request "c/o Judith Skates." The term "c/o" is generally understood to mean "care of." The fact, then, is no longer is dispute. Whether the other individuals in the named Request are by reason of this fact deemed to be served constructively, in representative capacity, or not at all is a question for the Pollution Control Board to resolve. More precisely, it is a question that the Pollution Control Board already has resolved in its decision of January 9, 2003 in PCB 03-31 where the Board actually devoted a full page of its Opinion to what it referred to as the "Skates parcel." (Slip Opinion at 16, 17). The Board ultimately found in that case that "service

on Judith Skates only was consistent with the records of the Treasurer's Office. Town & Country has satisfied the requirements for service under Section 39.2(b) of the Act."

The other set of contested Requests present an entirely different issue altogether. Waste Management's Requests To Admit No.19 through 36 all address factual similarities or dissimilarities between the instant Application and a previous Application for siting approval filed by Town & Country Utilities. The issue in this instance is not whether the Requests call for a legal conclusion, but rather whether or not they are relevant and material.

In 2002, Town & Country filed a Request For Siting Approval with the City of Kankakee which was unanimously granted by the Kankakee City Council. The PCB reversed on January 9, 2003 in PCB Case No.03-31 finding that the City Council's decision that the proposed facility was so designed, located, and proposed to be operated as to protect the public health, safety, and welfare was against the manifest weight of the evidence. On March 7, 2003, Town & Country filed a second siting Application with the City of Kankakee seeking siting approval for the same property. At the outset of the siting hearing, Waste Management filed a Motion To Dismiss based upon the fact that the two Applications were substantially the same. Section 39.2(m) of the Act provides that, "An applicant may not file a request for local siting approval which is substantially the same as a request which was disapproved pursuant to a finding against the applicant under any of criteria 1 through 9 of subsection(a) of this section within the preceding two years." After hearing argument and authority from both sides, the Hearing Officer denied the Motion, and the siting hearing proceeded. Subsequently, the City of Kankakee granted siting approval and found both that the PCB's decision reversing the previous siting approval on the first Application was not "disapproval" within the meaning of that term in Section 39.2, and also

that the two Applications were not "substantially the same." The Kankakee City Council's findings on this issue and detailed factual findings with regard to differences in the two Applications are set forth on Page 4 of its final Findings Of Fact And Conclusions Of Law.

The way in which the Board is to consider this issue has been directly addressed in the past, both by the Board and the Appellate Court. When this was an issue of first impression, the Board in PCB 90-137 on November 29, 1990 found that two applications submitted to the Village of Roxanna by Laidlaw Waste Systems were substantially the same. Laidlaw appealed, and the Appellate Court reversed and remanded. Specifically, even though the Board had previously deemed the issue of substantial similarity a "jurisdictional issue," the Appellate Court found that the local siting authority is required to make findings of fact with respect to whether or not the two siting applications are substantially the same, and the Board's review is limited to a determination of whether those findings are against the manifest weight of the evidence. The Court specifically stated with regard to the determination of whether applications are substantially similar:

> "Laidlaw is correct with respect to the standard of review to be utilized by the Board in reviewing the decision of the Village of Roxanna. In administrative law, the determinations and conclusions of the fact finder, in this case the (local governing body) are generally deemed conclusive. The reviewing tribunal is not allowed to determine issues independently, to substitute its own judgment, or to re-weigh the evidence. In other words, the reviewing tribunal should not reverse the findings and conclusions initially reached simply because it would have weighed the evidence in a different manner." Laidlaw Waste Systems, Inc. v. Pollution Control Board, 230 Ill.App.3rd 132, 595 N.E.2d 600 (5th Dist. 1992).

On remand, the Pollution Control Board in its Opinion And Order of September 9, 1993 in PCB 90-137 applied the correct standard on review and found that the Village's decision that the two siting applications were not substantially the same was not against the manifest weight of the evidence.

In this context, whether or not the two Applications of Town & Country are substantially the same is not a fact which can be proven by Waste Management at the upcoming Board hearing, or disproven by Town & Country at that hearing. Our Supreme Court in the lead case cited by Waste Management in their Motion To Compel, PRS International, 184 Ill.2d 224, held that the purpose of the rule governing Requests To Admit is "to establish some of the material facts in a case without the necessity of formal proof at trial." (184 Ill.2d at 237). Accordingly, what Town & Country, or any other party, may think of the similarity or dissimilarity of the two siting Applications is factually irrelevant to the closed record since the law is well established that on this issue the PCB's only job is to review that record to determine whether or not the City Council's findings of fact are against the manifest weight of the evidence.

Lastly, Waste Management seeks to compel answer to their Interrogatory No. 5 which seeks Town & Country's basis for any and all of its denials in the Requests To Admit. This Interrogatory is clearly vague and over broad. If Requests To Admit truly are limited to facts, then a denial of a Request simply means that the responding party believes the fact not to be true. Consider, for example, Town & Country's denial of Waste Management's Request No. 37, a statement that prior to August 18, 2003 Town & Country received a copy of the final report of

Mr. Ralph Yarborough of Geo-Technical Associates, Inc. The statement is denied because it is not true. Town & Country never received the report prior to August 18, 2003. No other basis or explanation is required.

CONCLUSION

For the foregoing reasons, Town & Country prays that the Motion To Compel of Waste Management of Illinois be denied, subject only to the supplemental information and clarification provided by Town & Country herein.

Respectfully Submitted,
Town & Country Utilities, Inc. and
Kankakee Regional Landfill, LLC

BY: George Mueller
One of Their Attorneys

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FACSIMILE TRANSMITTAL COVER SHEET

DATE: 11/14/03 **PAGES SENT (Including This One):** 11

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RE: Town & Country's Response to Waste Management's Motion To Compel

MESSAGE: